70643-8

70643-8

No. 70643-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MANUEL JUAREZ-GARCIA,

Appellant.

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

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

The State alleged Manuel Juarez-Garcia raped his stepdaughter, E.L., four times over a four-month period, and that E.L. became pregnant as a result. At trial, Mr. Juarez-Garcia was convicted of a total of eleven charges for three separate acts of rape, one act of attempted rape, and one act of child molestation.

The State was required to prove each rape as a separate and distinct act. When the jury convicted Mr. Juarez-Garcia of three acts of rape, it found that each rape resulted in E.L. becoming pregnant. However, evidence of only one pregnancy was presented to the jury, and the State offered no evidence regarding which of the acts described at trial, if any, resulted in her pregnancy. Because there was insufficient evidence for the jury's finding that each rape resulted in pregnancy, Mr. Juarez-Garcia's due process rights were violated.

In addition, the jury convicted Mr. Juarez-Garcia of three counts of second degree rape of a child, and made a separate finding that the child raped was under 15 years of age. Because both the conviction and aggravating fact were based on E.L.'s status, the jury's finding violated double jeopardy.

The jury's special verdicts must be vacated and the case remanded for resentencing.

B. ASSIGNMENTS OF ERROR

1. The jury's special verdict finding the complaining witness became pregnant three separate times as a result of three acts of rape was not supported by sufficient evidence and violated Mr. Juarez-Garcia's constitutional right to due process.

2. The trial court erred in finding, contrary to the jury's verdict, that the charge in count IV alone resulted in the complaining witness's pregnancy.

3. The trial court erred when it failed to set forth the reasons for its decision to impose an exceptional sentence in written findings of fact and conclusions of law as required by RCW 9.94A.535.

4. The convictions for second degree rape of a child and the jury's finding that the complaining witness was under age 15 at the time of the rapes violated double jeopardy.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The due process provisions of the Fourteenth Amendment and of Article I, § 3 of the Washington Constitution require the State to prove beyond a reasonable doubt every essential element of the crime

charged. Under State v. Hickman,[1] elements added to the "to convict" instructions become the law of the case, which the State must prove beyond a reasonable doubt. As instructed, the jury was required to find each act of rape separate and distinct from all other allegations. Did the jury's finding that the complaining witness was impregnated by each separate act of rape, in the absence of evidence to establish this beyond a reasonable doubt, violate Mr. Juarez-Garcia's right to due process?

2. It is constitutionally prohibited to prosecute a person two times for the same offense. The jury found Mr. Juarez-Garcia guilty of rape of a child in the second degree, and separately found that he had raped a child under age 15. Did it violate double jeopardy to convict Mr. Juarez-Garcia for both rape of a child and an aggravating fact based on the child's age?

D. STATEMENT OF THE CASE

When Manuel Juarez-Garcia met and began dating Maria Lopez, she had a young daughter, E.L. 5/29/13 RP 35. Mr. Juarez-Garcia and Ms. Lopez never married, but they lived together and had four children, whom they raised together with E.L. 5/29/13 RP 34. On July 23, 2012, the family moved from California to Washington State,

[1] 135 Wn.2d 97, 99, 954 P.2d 900 (1998).

where both parents worked twelve-hour days as farm labor. 5/29/13 RP 36-37.

In November 2012, when E.L. was 13 years old, E.L. reported to her school's secretary that Mr. Juarez-Garcia had sexually abused her. 5/29/13 RP 60; 5/30/13 RP 28. The authorities were called, and E.L. was later informed by a doctor she was pregnant. 5/30/13 RP 29. E.L. terminated the pregnancy and DNA testing of the fetus showed Mr. Juarez-Garcia was the father. 5/30/13 RP 30; 5/31/13 RP 57.

At trial, E.L. described five separate acts allegedly committed by Mr. Juarez-Garcia, which occurred between July 23, 2012, when E.L. arrived in Washington, and November 27, 2012, when E.L. made the report to the school secretary. 5/29/13 RP 36; CP 5. According to E.L., the first incident took place at a farm's camp, where the family was living at the time. 5/29/13 RP 77. Mr. Juarez-Garcia climbed into E.L.'s bed while she was sleeping, partially removed both of their clothes, and began moving while lying on top of her. 5/29/13 RP 78-85. She testified he quickly jumped back into his own bed when he heard her siblings return home. 5/29/13 RP 85. Based on this testimony, the jury found Mr. Juarez-Garcia not guilty of rape of a

child in the second degree, and guilty of child molestation in the second degree. CP 61, 102-03.

E.L. described a second incident, in which Mr. Juarez-Garcia picked up E.L. and her younger brother from school to take them to a doctor's appointment. 5/29/12 RP 89-90. Before the appointment, Mr. Juarez-Garcia took the kids back to the camp where they had lived, which was deserted during the off-season. 5/29/13 RP 96-97. When E.L's little brother left to play in the camp's playground, she alleged Mr. Juarez-Garcia climbed into the back seat next to her, partially removed both of their clothes, pressed his body against hers and started moving, causing pain inside her vagina. 5/29/13 RP 94, 99-110. When she attempted to get away, he hit her on the head. 5/29/13 RP 105. The jury found Mr. Juarez-Garcia guilty of rape in the second degree (forcible compulsion), rape of a child in the second degree, and child molestation in the second degree. CP 62, 96-98. It also found that E.L. was under age 15 at the time of the offense, and that she became pregnant as a result. CP 108, 111-112.

E.L. testified that a third incident occurred when she was released early from school for parent-teacher conferences. 5/29/13 RP 111-12. E.L. alleged Mr. Juarez-Garcia drove them to the parking lot

of a Food Pavilion, came into the back of the vehicle where she was sitting, and attempted to remove her pants. 5/29/13 RP 113-14. When a car parked nearby, he stopped and drove them home. 5/29/13 RP 114-15. The jury found Mr. Juarez-Garcia guilty of attempted rape of a child in the second degree. CP 65, 107.

The fourth incident allegedly occurred when E.L. went with Mr. Juarez-Garcia and three of her siblings to wire money to a family member at Fred Meyer. 5/29/13 RP 117-18. After they attempted unsuccessfully to run the errand, E.L. jumped back in the vehicle and playfully locked her younger siblings out. 5/29/13 RP 120. E.L. testified Mr. Juarez-Garcia offered her siblings money and sent them back into the store. 5/29/13 RP 119-121. Once they were gone, she alleged Mr. Juarez-Garcia climbed in the back of the vehicle with her, removed some of their clothes, and moved his body against hers, causing pain to the inside and outside of her vagina. 5/29/13 RP 121-24. He told E.L. that he would hit or kill her mother if E.L. told her mother what happened. 5/29/13 RP 125. The jury found Mr. Juarez-Garcia guilty of rape in the second degree (forcible compulsion), rape of a child in the second degree, and child molestation in the second degree. CP 63, 99-101. It also found E.L. was under 15 years old at

the time of the offense, and that she became pregnant as a result. CP 109, 111-12.

The final incident allegedly occurred when E.L. and her brother accompanied Mr. Juarez-Garcia to meet with a man about possible employment. 5/29/13 RP 130. Mr. Juarez-Garcia told E.L.'s brother to wait for them in the car. 5/29/13 RP 131. E.L. walked with Mr. Juarez-Garcia in an area with no buildings or people around. 5/30/13 RP 19-20. She alleged that when they started to walk back to the car, he grabbed her hand and pulled off her pants. 5/30/13 RP 21. He partially undressed them both, and moved his body against hers while standing behind her, causing pain to the inside and outside of her vagina. 5/30/13 RP 23. He told E.L. he would hit or kill her mother if she told. 5/30/13 RP 24. The jury found Mr. Juarez-Garcia guilty of rape in the second degree (forcible compulsion), rape of a child in the second degree, and child molestation in the second degree. CP 64, 104-06. It also found E.L. was under 15 years old at the time, and that this rape caused her to become pregnant. CP 110-12.

At sentencing, the State conceded that three of the convictions of child molestation merged with the rape convictions and that the second degree rape of a child convictions constituted the same criminal

conduct as the second degree rape convictions. 7/17/13 RP 172-73. Mr. Juarez-Garcia was sentenced to 116 months for the remaining child molestation conviction and 210 months to life for the attempted rape of a child conviction, to run concurrently with 40 years to life in prison for the second degree rape convictions. 7/17/13 RP 180-81; CP 117. The court imposed an exceptional sentence of 40 years based on the jury's finding that E.L. was under age 15 at the time of the rapes and "that the charge in Count 4 resulted in her pregnancy." 7/17/13 RP 181.

Mr. Juarez-Garcia appeals.

E. ARGUMENT

1. **There was insufficient evidence for the jury's finding that E.L. became pregnant as a result of three separate acts of rape by Mr. Juarez-Garcia between July and November of 2012.**

   a. The State was required to prove, beyond a reasonable doubt, three separate and distinct acts of rape.

The State bears the burden of producing sufficient evidence to prove beyond a reasonable doubt every essential element of a crime charged. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Cantu, 156 Wn.2d 819, 825, 132 P.3d 725 (2006). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. Winship, 397

U.S. at 358; U.S. Const. amend. 14; Wash. Const. art. I, sec. 3; City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). When the sufficiency of the evidence is challenged, the Court must determine whether, after viewing the evidence most favorable to the State, any rational trier of fact could have found the element or aggravated fact beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980); State v. Yates, 161 Wn.2d 714, 752, 168 P.3d 359 (2007).

Here, the "to convict" jury instructions properly directed the jury it must find each act constituting second degree rape "separate and distinct" from any other act constituting second degree rape in order to convict Mr. Juarez-Garcia, and gave the identical instruction regarding each charge of second degree rape of a child and second degree child molestation. CP 75-85. Thus, the jury was correctly prohibited from using one act by Mr. Juarez-Garcia to convict him of more than one count of second degree rape, second degree rape of a child, or second degree child molestation.

Elements added to the "to convict" instructions become the "law of the case," and the State is required to prove these elements beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 99, 954 P.2d 900

(1998). Because this "separate and distinct" element was added to the "to-convict" instructions, the State was required to prove it beyond a reasonable doubt.

b. Based on the evidence presented by the State, no rational trier of fact could have found that the three acts of alleged rape each resulted in pregnancy or that any one act, separate and distinct from the other, resulted in pregnancy.

The jury was instructed to answer special verdict forms if it found Mr. Juarez-Garcia guilty of second degree rape or second degree rape of a child. CP 95. The special verdict forms asked the jury to fill in the counts of second degree rape and second degree rape of a child on which it convicted, and answer whether the "crime" resulted in pregnancy. CP 111-12. The jury responded to these forms by filling in three counts of second degree rape of a child (counts II, V, X) and three counts of second degree rape (counts I, IV, IX), and answering "yes" to the question "Did the crime result in the pregnancy of a child victim of rape?" Id.

Therefore, the jury found that during each of the three acts of rape, E.L. became pregnant. Put simply, this was the jury's verdict:

E.L. was raped at the deserted camp prior to her doctor appointment.	E.L. became pregnant as a result.
E.L. was raped at the Fred Meyer parking lot after her siblings returned to the store.	E.L. became pregnant as a result.
E.L. was raped outside when she accompanied Mr. Juarez-Garcia to a meeting regarding possible employment.	E.L. became pregnant as a result.

No rational trier of fact could find E.L. became pregnant as a result of each act of rape. These rapes were alleged to have taken place between July and November 2012. 5/29/13 RP 36; CP 36-41. The State provided evidence at trial that E.L. had terminated only one pregnancy, and there was no evidence of miscarriages. 5/30/13 RP 30. Thus, the evidence showed E.L. became pregnant only once, preventing any possibility that E.L. was pregnant as a result of three separate acts.

The trial court recognized this inconsistency when it found, sua sponte, "that the charge in Count 4 resulted in [E.L.]'s pregnancy." 7/17/13 RP 181. According to the State's division of the charges during its closing argument, count IV charged Mr. Juarez-Garcia with second degree rape for the alleged assault of E.L. in the parking lot of Fred Meyer after her younger siblings ran back into the store. CP 63.

Despite the court's finding, there was no evidence presented at trial that E.L. became pregnant as a result of this alleged rape, or any of the other alleged rapes. The trial court's finding had no basis in evidence and was contrary to the jury's verdict, which found that E.L. had become pregnant as a result of all three acts of rape. CP 111-12.

In fact, the State successfully excluded any evidence of when E.L. became pregnant. 5/30/13 RP 74. Outside the presence of the jury, the nurse practitioner who collected the fetus for testing testified she was informed the fetus was 25 weeks on December 20, 2012, the date of the abortion. 5/30/13 RP 69, 71. If true, E.L. was in her first week of pregnancy on July 5, 2012, more than two weeks before the family arrived in Washington. 5/29/13 RP 36. The State had no evidence E.L.'s pregnancy was a result of the rapes alleged to have occurred in Washington, and no such evidence was presented to the jury. No rational trier of fact could have found that E.L. became pregnant as a result of one of the acts alleged at trial, much less all three acts.

c. The jury's finding of the aggravated fact must be reversed, with the case remanded for a new sentencing hearing.

At sentencing, the trial court followed the State's recommendation and imposed an exceptional sentence of 40 years to

life. 7/17/13 RP 181; CP 117. It based this exceptional sentence, in part, on the jury's finding that E.L. became pregnant as a result of the three counts of second degree rape and three counts of second degree rape of a child. Id. However, recognizing the evidence at trial failed to show E.L. became pregnant three times, the trial court assigned the pregnancy aggravator to one particular act, stating, "I have imposed an exceptional sentence in this case based on the jury's finding... that the charge in Count 4 resulted in her pregnancy." Id. Contrary to the requirements of RCW 9.94A.535, it failed to set forth its reasoning in written findings of fact and conclusions of law.

There was no evidence supporting the assignment of this aggravator to count IV or any other charge. Because the State failed to prove, beyond a reasonable doubt, that E.L. became pregnant as a result of a specific act of rape alleged at trial, the jury's verdict as to this aggravating factor must be reversed, and the case remanded for resentencing. See Hickman, 135 Wn.2d at 99.

2. **Mr. Juarez-Garcia's convictions for second degree rape of a child and the aggravating factor that E.L. was under 15 years of age violate double jeopardy.**

a. Double jeopardy is violated where multiple convictions for rape involve a single incident against a single victim, and both crimes require proof of the victim's status.

The double jeopardy clauses of the state and federal constitutions protect against multiple prosecutions for the same conduct and multiple punishments for the same offense. U.S. Const. amend 5;[2] Wash. Const. art. I, § 9;[3] Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); United States v. Dixon, 509 U.S. 688, 696, 113 S.Ct. 2349, 125 L.Ed.2d 556 (1993). A conviction and sentence will violate the constitutional prohibition against double jeopardy if, under the "same evidence" test, the two crimes are the same in law and fact. State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998); State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995).

On appeal, a claim of double jeopardy is reviewed de novo. State v. Smith, 177 Wn.2d 533, 545, 303 P.3d 1047 (2013); State v. Hughes, 166 Wn.2d 675, 681, 212 P.3d 558 (2009).

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[2] The Fifth Amendment provides in relevant part, "No person shall... be subject for the same offence to be twice put in jeopardy of life or limb..."

[3] Article 1, § 9 provides in relevant part, "No person shall be compelled in any criminal case to... be twice put in jeopardy for the same offense."

Convictions for first degree rape and second degree rape of a child, which arise from a single incident, do not violate double jeopardy. Smith, 177 Wn.2d at 550. In Smith, the convictions arose from the same incident and were therefore the same in fact. Id. at 545. However, the court found that because first degree rape required proof of force, whereas second degree rape of a child required proof of the victim's status, the elements were dissimilar enough to satisfy the "same evidence" test. Id. at 548.

The court distinguished the facts in Smith to those presented in State v. Hughes, in which the defendant was convicted of both rape of a child in the second degree and rape in the second degree due to the victim's inability to consent by reason of physical helplessness or mental incapacity. 166 Wn.2d 675, 679, 212 P.3d 558 (2009). In Hughes, the court found that the "same evidence" test was not satisfied, because both convictions relied on the victim's status. Id. at 683-84. The two offenses were the same in fact, because they arose from a single act of intercourse with the same victim, and the same in law, because both crimes required proof of nonconsent due to the victim's status. Id. at 684. Convictions of both crimes violated double jeopardy

and the court remanded for vacation of one of the convictions. Id. at 686.

b. The conviction for second degree rape of a child, and the "special allegation" that E.L. was under 15 years of age both rely on proof of E.L.'s status and therefore violate double jeopardy.

The jury found Mr. Juarez-Garcia guilty of three counts of second degree rape of a child for three separate acts against the same alleged victim, E.L. CP 96, 99, 104. In order to convict Mr. Juarez-Garcia of rape of a child, the State had to prove: (1) he had sexual intercourse with E.L.; (2) E.L. was at least 12 years old, but less than 14 years old, at the time; (3) he was not married to E.L. and; (4) he was at least thirty-six months older than E.L. RCW 9A.44.076(1). For the same three acts against E.L., the jury convicted Mr. Juarez-Garcia of three counts of second degree rape, and answered the attached "special allegation" affirmatively, finding that E.L. was under 15 years of age at the time of the offense. See RCW 9.94A.837. Because both the conviction for second degree rape of a child and the aggravating fact that E.L. was under 15 years of age were based on E.L.'s status, finding

Mr. Juarez-Guilty of both violated his double jeopardy rights. See Hughes, 166 Wn.2d at 686.

In State v. Rice, the court distinguished between "sentencing enhancements" and "aggravating factors," finding that a "special allegation" is the former. 159 Wn. App. 545, 569, 246 P.3d 234 (2011). In Rice, the defendant argued his double jeopardy rights were violated when the jury found him guilty of first degree kidnapping, with a predicate charge of first degree molestation, and affirmatively answered the special allegation that the victim was under 15 years of age. Id. at 568-69. He argued that because the predicate felony involved a child less than 15 years old, he was punished twice for the same offense. Id. at 569. Division II disagreed, finding there was no violation of double jeopardy because the special allegation was a sentencing enhancement rather than an aggravating factor. Id. at 569-70. It based this finding on a determination that the special allegation raised the minimum standard sentence rather than allowing the trial court to impose an exceptional sentence outside the presumptive sentencing range. Id. at 569.

The Rice analysis was subsequently invalidated by Alleyne. Alleyne v. United States, __ U.S. ___, 133 S.Ct. 2151, 2162, 186

L.Ed.2d 314 (2013). In Alleyne, the Court eliminated the distinction between sentencing enhancements and aggravating factors, finding that a fact which increases the legally prescribed floor of the sentencing range necessarily aggravates the punishment. Id. at 2161. When a finding of fact alters the legally prescribed punishment so as to aggravate it, it must be submitted to the jury and found beyond a reasonable doubt. Id. at 2162-63. Thus, the aggravating fact that E.L. was under 15 years of age cannot be deemed to satisfy the requirements of double jeopardy simply by referring to it as a "sentencing enhancement" instead of an aggravating factor.

In addition, unlike the Rice court suggested, here the trial court specifically relied on the jury's finding that E.L. was under 15 to impose an exceptional sentence. 7/17/13 RP 1818. Without the aggravating factor, Mr. Juarez-Garcia's sentencing range would have been 210-280 months. CP 115-116. With the aggravating factor, the minimum possible sentence was increased to 25 years. RCW 9.94A.507(3)(c)(ii). The trial court imposed an exceptional sentence of

40 years to life, "based on the jury's finding that the child victim was under the age of 15 as to all three rape counts." 7/17/13 RP 181.

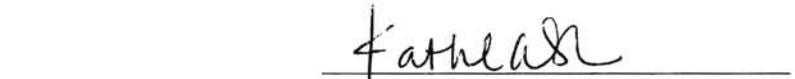
When the jury found Mr. Juarez-Garcia guilty of second degree rape of a child, it necessarily found he had raped someone under the age of 15. RCW 9A.44.076(1). By also finding the aggravating fact that he had committed second degree rape against a child under the age of 15, Mr. Juarez-Garcia's double jeopardy rights were violated. See Hughes, 166 Wn.2d at 686. The aggravating factor must be vacated and the case remanded for resentencing. Id.

F. CONCLUSION

For the reasons stated above, Mr. Juarez-Garcia respectfully asks this Court to vacate the jury's special verdicts and remand for resentencing.

DATED this 14th day of March, 2014.

Respectfully submitted,



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

STATE OF WASHINGTON, Respondent, v. MANUEL JUAREZ-GARCIA, Appellant.	)))))))))	NO. 70643-8-I

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