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SUPREME COURT NO. 95482-8
COURT OF APPEALS NO. 75127-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EDDY GONZALES,

Petitioner.

ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION

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A. IDENTITY OF RESPONDENT

The State of Washington is the Respondent in this case.

B. COURT OF APPEALS OPINION

The Court of Appeals decision at issue is State v. Gonzales, No. 75127-1-I, filed January 25, 2018 (published in part).

C. ISSUE PRESENTED FOR REVIEW

The State asks this Court to deny the petition for review. If this Court accepts review, the State seeks cross-review of the court of appeals' conclusion that the jury instructions, which did not inform the jury that an act of child molestation had to be separate and distinct from an act of child rape, created a potential double jeopardy violation.

D. INTRODUCTION AND STATEMENT OF THE CASE

Appellant Eddy Gonzales was convicted of one count of child rape (count one), one count of child molestation (count three), and witness tampering (count four). CP 78, 80, 113. The jury acquitted Gonzales of a second count of child rape (count two). CP 79. The relevant facts are set forth in the State's briefing before the court of appeals. Brief of Respondent at 3-4.

The court of appeals affirmed the convictions in a unanimous opinion, published with the exception of the court's resolution of

Gonzales's statement of additional grounds. State v. Gonzales,
No. 75127-1-I (Wash. Ct. App. Jan. 25, 2018).

E. ARGUMENT

For the reasons outlined below, this Court should reject Gonzales's petition for review. If the court accepts review, the State requests that the court also accept review of the court of appeals' erroneous conclusion that the jury instructions created the potential for a double jeopardy violation. RAP 13.4(d).

1. THE COURT SHOULD DENY THE PETITION FOR REVIEW.

RAP 13.4(b) governs consideration of a petition for review. It provides that 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 the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another 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.

The State's briefing in the court of appeals adequately addressed the substantive issues raised by Gonzales. Gonzales fails to meaningfully explain how the criteria of RAP 13.4(b) warrant a grant of review.

Because Gonzales has failed to establish that the court of appeals' decision conflicts with any decision of this Court, and has failed to establish any other reason warranting review, his petition should be denied. RAP 13.4(b).

2. THE JURY INSTRUCTIONS DID NOT CREATE A POTENTIAL DOUBLE JEOPARDY VIOLATION.

The provisions of RAP 13.4(b) are inapplicable because the State is not seeking review and believes that review by this Court is unnecessary. However, if the Court grants review, in the interests of justice and full consideration of the issues, the Court should also grant review of the lower court's conclusion that a "separate and distinct acts" instruction was required for the child-molestation and child-rape counts. Those crimes are not identical offenses, especially given the way the jury was instructed in this case. RAP 1.2(a); RAP 13.7(b). This argument is summarized below and is set forth more fully in the briefing in the court of appeals.

Gonzales presumes that child molestation and child rape are identical offenses for purposes of double jeopardy, although he cited no authority for that assertion in the court of appeals nor does he cite any in this petition. Although Gonzales has never referenced it, the State pointed out, and the court of appeals recognized, that the

State v. Land¹ decision held that when a charge of child rape is based on evidence of sexual intercourse in the form of oral-genital contact rather than penetration, then the molestation and rape are identical offenses for double jeopardy purposes. Gonzales, Slip Op. at 5. Based entirely on Land, the court of appeals here concluded that because the jury was not instructed that an act of molestation must be separate and distinct from an act of rape, there was the potential for a double jeopardy violation. Id. If review is accepted, the State seeks cross-review of that conclusion. RAP 13.4(d).

Land was incorrectly decided, and the court of appeals erred in relying on it. First, child molestation and child rape are not identical offenses for purposes of double jeopardy. Further, the jury instructions here were clear that the child molestation and child rape were based on separate acts. The lack of a specific "separate and distinct acts" instruction did not create the potential for double jeopardy in this case.

A defendant's conduct may violate more than one criminal statute, and double jeopardy is implicated only when the court exceeds its legislative authority by imposing multiple punishments where multiple punishments are not authorized. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). The question of whether

¹ 172 Wn. App. 593, 295 P.3d 782 (2013).

multiple punishments are authorized is ultimately a question of the legislature's intent. State v. Kelley, 168 Wn.2d 72, 77, 226 P.3d 773 (2010).

To determine legislative intent, courts consider the "same evidence" test, which asks whether the crimes are the same in both law and in fact. State v. Louis, 155 Wn.2d 563, 569, 120 P.3d 936 (2005). If each offense contains an element not included in the other, then the offenses are not the same in law and multiple convictions are permissible. Id. Only clear evidence of contrary legislative intent can override the results of the same evidence test. Calle, 125 Wn.2d at 780.

Child rape requires sexual intercourse, while child molestation requires sexual contact. State v. Jones, 71 Wn. App. 798, 824-26, 863 P.2d 85 (1993). Although sexual intercourse can be accomplished by oral/genital sexual contact, the definition of sexual contact that applies to child molestation does *not* apply to sexual intercourse as it is defined for child rape. State v. Gurrola, 69 Wn. App. 152, 157, 848 P.2d 199 (1993). Applying the statutory definition of "sexual contact" to child rape cases would eliminate any distinction between rape of a child and molestation of a child when the contact was oral/genital — a result clearly contrary to legislative intent. Id.; See also State v. Brown, 78 Wn. App. 891, 895-96, 899 P.2d 34

(1995) (due to the improbability of inadvertent oral/genital contact, legislature did not intend statutory definition of “sexual contact,” which includes sexual gratification requirement, to apply to rape cases).

In Land, the court of appeals did not mention either Gurrola and Brown, concluding instead that when a defendant is charged with both molestation and rape, the statutory definition of sexual contact applies to the statutory definition of sexual intercourse, thereby rendering the offenses “identical” for double jeopardy. Land, 172 Wn. App. at 600. But as correctly held in Gurrola and Brown, the statutory definition of sexual contact does not apply to the statutory definition of sexual intercourse; Land was wrongly decided.

Regardless, here the jury was specifically instructed that the definition of sexual contact applied *only* to the child molestation count — “For the purposes of Count Three, sexual contact means . . .” CP 103. And the prosecutor specifically told the jury during his closing argument that the instruction defining sexual contact did *not* apply to the child rape counts:

But now that we’re talking about child molestation, how is this different from counts I and II? This doesn’t require sexual intercourse or penetration or anything like that. It requires sexual contact, and the testimony that you have here, there is a number of things that you have to work with. And one count of child molestation is at issue here and is before the jury for consideration. But [J.G.] testified about a number of things that would constitute sexual contact.

So let's look at the definition of sexual contact. And, again, this only applies to Count III and this is important because the term sexual contact appears in the definition of sexual intercourse, but only as to Counts I and II. So you're to use this instruction as the Court says only as to Count III. Because we know that for Rape of a Child, a penis going in somebody's mouth or a tongue being on somebody's vagina, that is sexual contact.

But what about all the other stuff that [J.G.] described. What about the touching of the breasts. What about the reaching down the pants. What about the defendant placing his penis in her hand while she was sleeping out in the living room. Those are all instances of sexual contact because it's any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party or a third party. That's the definition of sexual contact.

RP 1668-69. The jury was instructed that the crimes had different elements, and no specific "separate and distinct acts" instruction was required.

In sum, child molestation and child rape have different elements and are not the same offenses for double jeopardy. The court of appeals here erred when it concluded that the trial court was required to provide a "separate and distinct acts" instruction as to the child rape counts and child molestation count in this case.


F. CONCLUSION

The State respectfully asks that the petition for review be denied. However, if review is granted, in the interests of justice the State seeks cross review of the issue in Section 2 above.

DATED this 8th day of February, 2018.

Respectfully submitted,

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