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SUPREME COURT NO. ________
COURT OF APPEALS NO. 75759-8-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JUAN JOSE RODRIGUEZ-MONTOYA,

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The Court of Appeals decision at issue is State v. Rodriguez-Montoya, No. 75759-8-I, filed March 5, 2018 (unpublished).

C. ISSUES 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 Rodriguez-Montoya was convicted of one count of first-degree child rape (count one) and two counts of first-degree child molestation (counts two and three). CP 46-48. The relevant facts are set forth in the State's briefing before the court of appeals. Brief of Respondent at 2-3.

The court of appeals affirmed the convictions in a unanimous unpublished opinion. State v. Rodriguez-Montoya, No. 75759-8-1 (Wash. Ct. App. Mar. 5, 2018).

E. ARGUMENT WHY REVIEW SHOULD BE DENIED

For the reasons outlined below, this Court should reject Rodriguez-Montoya's petition for review.

1. STANDARD FOR 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 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.

RAP 13.4(b).

2. THIS COURT SHOULD NOT CONSIDER ARGUMENT RAISED FOR THE FIRST TIME IN THE PETITION FOR REVIEW.

In his petition for review, Rodriguez-Montoya argues for the first time that a split of authority exists between the decision of division one of the court of appeals in State v. Florczak, 76 Wn. App. 55, 882 P.2d 199 (1994), and that of division three in State v. Carol M.D., 89 Wn. App. 77, 948 P.2d 837 (1997). Rodriguez-Montoya asserts that this Court should reject the Florczak standard for admissibility of out-of-court statements made by young children for the purpose of medical

treatment, and instead require a child hearsay hearing pursuant to RCW 9A.44.120.

This new argument contradicts the argument he made below. Rodriguez-Montoya never argued to the court of appeals that a child hearsay hearing pursuant to RCW 9A.44.120 was required prior to admitting R.A.L.'s statements under ER 803(a)(4). As such, the lower court had no occasion to consider the argument, so naturally the opinion does not address it.

Instead, Rodriguez-Montoya argued to the court of appeals that reversal was required because the facts of his case failed to meet the Florczak standard. He did not cite to any other standard or argue that a different standard should apply instead. Yet now, for the first time in his petition for review, Rodriguez-Montoya asserts that division one should have followed the approach "believed to be better" by division three in Carol M.D.,[1] and he asks this Court to conclude that a child hearsay hearing pursuant to RCW 9A.44.120 is required prior to admitting young children's out-of-court statements to medical providers.

This Court should decline to grant review of this new claim because it was not raised in the Court of Appeals. "An issue not

[1] Rodriguez-Montoya never cited to Carol M.D. in his opening brief below; he cited it once in his reply brief solely for proposition that the State bore the burden of proof to meet the foundational requirements of the medical treatment hearsay exception. Reply Brf. of Appellant at 5.

raised or briefed in the Court of Appeals will not be considered by this court." State v. Halstien, 122 Wn.2d 109, 130, 857 P.2d 270 (1993); see also Plein v. Lacky, 149 Wn.2d 214, 222, 67 P.2d 1061 (2003) (generally, parties cannot raise a new issue in a petition for review); Fisher v. Allstate Ins. Co, 136 Wn.2d 240, 252, 961 P.2d 350 (1998) ("This court does not generally consider issues raised for the first time in a petition for review."). Rodriguez-Montoya has not acknowledged or explained why he made a different argument before the court of appeals. This Court should deny the petition and reject Rodriguez-Montoya's attempt to raise a new argument for the first time in his petition for review.

3. THE DECISION BELOW IS NOT IN CONFLICT WITH A DECISION OF THIS COURT.

a. The Court Of Appeals Did Not Conclude That The Sole Corroboration For R.A.L.'s Out-Of-Court Statements Was Her Inconclusive Medical Examination.

Rodriguez-Montoya argues that the opinion of the court of appeals contradicts this Court's decision in In re Dependency of A.E.P., 135 Wn.2d 208, 956 P.2d 297 (1998), which considered the admission of child hearsay statements pursuant to RCW 9A.44.120. However, as noted in the previous section, Rodriguez-Montoya's argument that the child hearsay statute should govern the admissibility

of young children's out-of-court statements made for the purpose of medical treatment was not raised below, and cannot be raised for the first time in his petition for review.

Nevertheless, the court of appeals' decision here does not conflict with A.E.P. A.E.P. addressed out-of-court statements admitted pursuant to RCW 9A.44.120, which the court found were insufficiently corroborated on the specific facts before it.[2] Here however, although R.A.L. may not have understood that her statements would aid in her medical treatment, it is unlikely that a four-year-old child would have fabricated abuse to a pediatrician. See State v. Butler, 53 Wn. App. 214, 223, 766 P.2d 505 (1989) (concern about trustworthiness of out-of-court statement of two-and-a-half-year-old child ameliorated by fact that child of such age would have no reason to fabricate cause of injury). See also State v. Ashcraft, 71 Wn. App. 444, 457, 859 P.2d 60 (1993) (because of young age, child victim had no reason to fabricate nature of injury).

Here, based on the totality of circumstances, there was sufficient corroborating evidence in the record for the court to conclude that R.A.L.'s statements were reliable: R.A.L. was unhappy being cared for at Rodriguez-Montoya's home, and she did not want to stay

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[2] RCW 9A.44.120 explicitly requires corroboration if the child does not testify at trial.

there. RP 1044. She spontaneously disclosed the abuse to her mother in the evening after she had been at daycare at Rodriguez-Montoya's home. RP 229, 1045. Further, when the child interviewer later attempted to speak to R.A.L., R.A.L. cried and was too upset to complete the interview. RP 796, 801. Finally, in addition to redness observed during the examination, the specificity of R.A.L.'s statements themselves provides corroboration. R.A.L. did not make a vague allegation of inappropriate touching; rather, as quoted in the court of appeals' opinion, she provided specific details. Slip Op. at 12. The specificity and spontaneity of R.A.L.'s statements as well as her lack of motive to fabricate provided independent corroboration of their reliability.

Thus, the facts of this case are fundamentally different from those in A.E.P., where an inconclusive medical examination could not alone provide sufficient corroboration, given evidence that previous suggestive questioning had potentially rendered the child's statements unreliable and that there was an alternate explanation for the child's precocious sexual knowledge. 135 Wn.2d at 231-34. The court of appeals opinion here does not conflict with a decision of this Court.

b. The Court Of Appeals Properly Evaluated The Record To Conclude Double Jeopardy Was Not Violated.

Rodriguez-Montoya asserts that the court of appeals applied the wrong legal standard when deciding whether his convictions for first-degree rape of a child (count one) and first-degree child molestation (count two) violated double jeopardy. The State's briefing in the court of appeals adequately addressed Rodriguez-Montoya's substantive argument on this issue. Rodriguez-Montoya fails to meaningfully explain how the criteria of RAP 13.4(b) warrant a grant of review. Because Rodriguez-Montoya 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).

F. IF THIS COURT ACCEPTS REVIEW, IT SHOULD ALSO CONSIDER WHETHER THE JURY INSTRUCTIONS CREATED 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 unwarranted. 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 (counts one and two). RAP 1.2(a); RAP 13.7(b). Those crimes are not identical offenses. This argument is summarized below and is set forth more fully in the State's briefing in the court of appeals.

The court of appeals recognized that State v. Land[3] held that a "separate and distinct acts" instruction was required in some cases when a defendant is charged with both child rape and child molestation, alleged to have occurred during the same charging period. Slip Op. at 5. Specifically, Land determined 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 molestation and rape are identical offenses for double jeopardy purposes. 172 Wn. App. at 600-01.

Based entirely on Land, the court of appeals here concluded that a potential for a double jeopardy violation was created because the jury was not instructed that the act of rape in count one had to be separate and distinct from the act of molestation in count two. Slip Op. at 5-7. If this Court accepts review in this case, it should also review that conclusion. RAP 13.4(d). Land was incorrectly decided, and the court of appeals erred in relying on it. Child molestation and child rape are not identical offenses for purposes of double jeopardy.

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

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 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 the legislature clearly did not intend. Id.; see also State v. Brown, 78 Wn. App. 891, 895-96, 899 P.2d 34 (1995) (due to 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 or 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.

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 count and child molestation counts in this case.

G. 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 F above.

DATED this 18th day of April, 2018.

Respectfully submitted,

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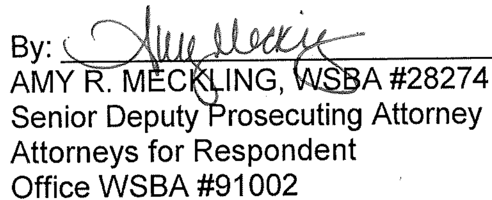
By: 
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Filing Petition for Review

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