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Division I
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Supreme Court No. _______
COA No. 75759-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JUAN JOSE RODRIGUEZ-MONTOYA,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Juan Jose Rodriguez-Montoya requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Rodriguez-Montoya, No. 75759-8-I, filed March 5, 2018. A copy of the Court of Appeals' opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Divisions of the Court of Appeals disagree about what standard applies when the State seeks to admit a young child's out-of-court statements made to a medical provider, when the child is too young to testify and too young to understand the purpose for making the statement. Here, Division One held such statements are admissible if corroborated by other evidence. But according to Division Three, the "preferable approach" is to hold a child hearsay hearing pursuant to RCW 9A.44.120. This Court has never definitively addressed this issue. Should this Court accept review and resolve this important question? RAP 13.4(b)(2), (4).

2. When applying the corroboration requirement under the child hearsay statute, this Court has held that the results of a physical exam are not alone sufficient to corroborate a child's out-of-court statement if

the results of the exam are inconclusive. Here, the Court of Appeals held that the results of a physical exam were alone sufficient to corroborate a child's out-of-court statement admitted under the hearsay exception for statements made to medical providers. But the court also acknowledged that the results of the exam were inconclusive. Does the Court of Appeals' opinion conflict with this Court's case law, warranting review? RAP 13.4(b)(1), (4).

3. When an appellant alleges a double jeopardy violation, this Court's decisions require the reviewing court to take a "hard look" at how the case was presented to the jury. If the evidence and jury instructions allowed the jury to enter multiple convictions for the same offense, the verdict is ambiguous and must be resolved in favor of the defendant. Here, the State presented evidence of multiple acts that could support either charge. The trial court did not instruct the jury they must find "separate and distinct" acts for each count. The Court of Appeals concluded the record was sufficient to ensure a double jeopardy violation did not occur. Does the Court of Appeals' opinion conflict with this Court's controlling case law, warranting review? RAP 13.4(b)(1), (3), (4).

C. STATEMENT OF THE CASE

1. Charges involving F.M-G.

Rodriguez-Montoya was charged with one count of first degree rape of a child and one count of first degree child molestation involving F.M-G. CP 42, 46-47, 71-82. The charging periods for the two counts were identical. CP 42, 61, 65.

The State presented evidence that could form the basis of either charge. F.M-G. told his mother that Rodriguez-Montoya "took him into the kitchen" and "told him to touch his parts." RP 810. He also "pulled [F.M-G's] pants down" and "would start touching his parts." RP 811. F.M-G. told his mother this "happened many times." RP 810.

F.M-G. testified that Rodriguez-Montoya touched his "butt" and "put his privacy in my butt." RP 994-95. He also said Rodriguez-Montoya "put his privacy in my mouth," which happened "like five times." RP 997-98. He also said Rodriguez-Montoya touched F.M-G.'s "private spot" and "got [F.M-G.'s] hand" and had him touch Rodriguez-Montoya's "private spot." RP 992-93.

During a forensic interview, F.M-G. told the interviewer that Rodriguez-Montoya "took my pants down" and "put his pee in my butt." RP 905. He also said, "and we are on the bed and he put . . . my

hand on his pee." RP 905. F.M-G. continued, "[a]nd I ate his pee, . . . I licked his pee." RP 905. Then, "[h]e get my pee," and "[h]e feeled it like this . . . [a]nd he squeeze." RP 922. F.M-G. told the interviewer these things happened "again and again." RP 916.

The to-convict instructions for both charges informed the jury they must find the acts occurred sometime "between January 8, 2013 and February 4, 2014." CP 61, 65. The jury was separately instructed they must unanimously agree as to which act of child molestation or child rape was proved beyond a reasonable doubt. CP 63, 66. And, the jury was instructed:

> A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

CP 59. But the jury instructions did not state the jury must find separate and distinct acts for each count.

None of the jury instructions informed the jury they could not rely upon the same evidence to find Rodriguez-Montoya guilty of both child rape and child molestation.

In closing argument, the deputy prosecutor stated the rape of a child count was for the "anal and oral rape of [F.M-G.]" and the child molestation count was "for his inappropriate and gratuitous touching of

[F.M-G.]." RP 1221. But the prosecutor did not inform the jury they could *not* rely on the allegations of sexual contact between Rodriguez-Montoya's penis and F.M-G.'s mouth or anus for the child molestation count. The prosecutor did not tell the jury they must rely on separate and distinct acts for each count.

The jury entered general verdicts for both count I and count II. CP 46-48. The jury did not specify which act or acts they relied upon.

2. Charge involving R.A.L.

Rodriguez-Montoya was charged with one count of first degree child molestation involving R.A.L. CP 43, 48, 71-82. The only evidence produced to prove the elements of the charge were the child's out-of-court statements.

Maria Llamas, R.A.L.'s mother, testified that R.A.L. told her that she had been "abused" at daycare. RP 1045. No further details of what R.A.L. told her mother were admitted at trial.

As a result of R.A.L.'s disclosure, Llamas decided to take her to her regular pediatrician "to be checked." RP 1045. The purpose of the appointment was not to obtain medical treatment, but "[t]o know for sure what had happened to the little girl." RP 1045. The appointment took place five days after the child's disclosure. RP 1047, 1076.

Over objection, the court admitted R.A.L.'s statement to her pediatrician under ER 803(a)(4), the hearsay exception for "[s]tatements made for purposes of medical diagnosis or treatment." RP 65-66, 1094-95, 1105. The pediatrician, Margarita Guerra, testified R.A.L. made the following statement:

> Ruby tells me in Spanish that Diego asked her to touch his cola. She said no, and he unzipped his pants and put her hands in – in quotations – she points to the genital area. Then he pulled her pants down and Diego touched her – she points to her vaginal area – with his hands. Diego told Ruby that if she did not tell anybody, he was going to buy her candy. I asked Ruby if it hurt when he touch [sic] her, and Ruby responded no.

RP 1105.

Dr. Guerra also conducted a physical exam of R.A.L. RP 1106. She saw no injury or bruising but noted R.A.L.'s vaginal area was red. RP 1107. Dr. Guerra explained there were many reasons why R.A.L.'s vaginal area could be red, which had nothing to do with abuse. RP 1111, 1114. She could not say that the alleged event caused the redness. RP 1111. Dr. Guerra also noted R.A.L. was not crying or upset and was not fussy. RP 1112.

R.A.L.'s parents did not allow her to testify. The State conceded, and the trial court found, that R.A.L. was likely incompetent

to testify due to her young age. RP 866. The State presented no other evidence to support the child molestation count involving R.A.L.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. This Court should grant review to clarify the standards that must be met when a party seeks to admit a very young child's hearsay statements made to a medical provider.

This Court has never definitively decided whether and under what circumstances a young child's out-of-court statements to a medical provider are admissible at trial, where the child is too young to understand the purpose for making the statements. Division One has held that such statements are admissible if there is evidence to corroborate the statements. See State v. Florczak, 76 Wn. App. 55, 882 P.2d 199 (1994). Division Three, on the other hand, disapproves of this standard and believes the better approach is to hold a child hearsay hearing pursuant to RCW 9A.44.120. State v. Carol. M.D., 89 Wn. App. 77, 88, 948 P.2d 837 (1997). This Court should grant review to clarify whether and under what circumstances a child's out-of-court statement is admissible if the child is too young to understand the purpose for making the statement. RAP 13.4(b)(2), (4)

By its express terms, the hearsay exception for statements to medical providers applies only if the statements are "reasonably

pertinent to diagnosis or treatment." ER 803(a)(4). Generally, to establish reasonable pertinence (1) the declarant's motive in making the statement must be to promote treatment, and (2) the medical professional must have reasonably relied upon the statement for purposes of diagnosis or treatment. State v. Butler, 53 Wn. App. 214, 220, 766 P.2d 505 (1989).

The rationale for the rule is that a patient has a strong motivation to be truthful with a physician or therapist, in order to secure proper treatment. This rationale may not apply if the declarant is a young child:

> Logically, then, one might expect that if the child is too young to understand that he or she should be truthful in order to secure proper treatment, the child's statements should not be admissible under the instant hearsay exception. In other words, when the *reason* for the hearsay exception does not fit the facts presented, the hearsay exception should not be applied.

Karl. B. Tegland, 5C Washington Practice: Evidence Law and Practice § 803.24 (6th ed. 2017).

The Court of Appeals has recognized that young children may not understand that their statements to a physician are necessary for medical diagnosis or treatment, undermining the justification for the hearsay exception. Thus, Division One has held that courts may admit

a young child's statements under ER 803(a)(4) "only if corroborating evidence supports the child's statements." Florczak, 76 Wn. App. at 65. Division Three, on the other hand, believes the trial court should hold a child hearsay hearing before admitting such statements. Carol M.D., 89 Wn. App. at 88.

This Court has never definitively addressed this issue. In In re Pers. Restraint of Grasso, in a plurality opinion of only three justices, this Court stated that the hearsay statement of a very young child to her medical provider was admissible, even without evidence that the child understood the purpose of her statement, if corroborating evidence supported the statement and it appeared unlikely that the child would have fabricated the cause of the injury. 151 Wn.2d 1, 20, 84 P.3d 859 (2004) (citing Florczak, 76 Wn. App. at 64-65). But because this was only a plurality opinion, it holds no precedential value and provides no guidance to the lower courts.

This Court should grant review in order to decide this important question. The Court should also hold the child's statements were improperly admitted. R.A.L. was four years old when she made the statements to her pediatrician. She was probably too young to understand the purpose for making the statements. The trial court made

no finding about what R.A.L. understood and the record contains no evidence about it. The record contains almost no information at all about R.A.L. She did not testify at the trial. Her hearsay statements should not have been admitted.

2. Review is warranted because the Court of Appeals' conclusion that the State presented sufficient evidence to corroborate the child's hearsay statement conflicts with this Court's decision in In re Dependency of A.E.P.

The Court of Appeals' conclusion that the evidence was sufficient to corroborate R.A.L.'s hearsay statement to her pediatrician is erroneous. It conflicts with this Court's decision in In re Dependency of A.E.P., 135 Wn.2d 208, 956 P.2d 297 (1998), which held that an inconclusive physical exam is insufficient alone to corroborate a child's hearsay statements under the child hearsay statute, RCW 9A.44.120. That same standard should apply when deciding the admissibility of a child's hearsay statements under ER 803(a)(4). This Court should grant review and reverse. RAP 13.4(b)(1), (4).

The Court of Appeals illogically concluded that the physical evidence corroborated R.A.L.'s hearsay statements to her pediatrician. Slip Op. at 11-12. The only physical evidence was that R.A.L.'s vagina and labia were red during the examination. Slip Op. at 11-12. Both the

Court of Appeals and the doctor acknowledged that this symptom was inconclusive. Id. The examination took place five days after R.A.L. made the disclosure to her mother. RP 1047, 1076. The doctor testified she could not determine the cause of the redness. Slip Op. at 11-12. It could have been caused by abuse but also by many other things, including poor hygiene, a yeast infection, and contact dermatitis, all of which are common. Id. Even if the alleged abuse had occurred and actually caused any redness, it seems unlikely that the redness would have persisted for so many days.

The Court of Appeals' conclusion that an inconclusive physical exam is sufficient to corroborate a child's hearsay statement conflicts with this Court's decision in A.E.P., 135 Wn.2d 208. In that case, the Court addressed the corroboration necessary to support admission of a child's hearsay statements under RCW 9A.44.120.[1] The Court concluded that "[w]hile an inconclusive exam does not rule out the possibility of abuse, neither does it corroborate the hearsay statements." A.E.P., 135 Wn.2d at 232.

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[1] The child hearsay statute requires a child's hearsay statement to be corroborated if the child does not testify at trial. RCW 9A.44.120.

The same reasoning applies here. Although R.A.L.'s physical exam did not rule out abuse, it did not corroborate it either.

The evidence of corroboration here was significantly less than in other Court of Appeals cases. In Florzcak, for instance, the child became very fearful and upset when talking about the alleged abuser; she ran around the room and hid under a table while discussing the incidents of abuse. Florzcak, 76 Wn. App. at 66-67. In State v. Ashcraft, 71 Wn. App. 444, 458, 859 P.2d 60 (1993), the child had bruises and the physician testified they were more than three days old, contradicting the defendant's statement that she had bathed the child two days earlier and had noticed no bruises on her body. In Butler, the child likewise had physical injuries which the physician said "had an appearance of inflicted injury" that could not be the result of an accident as the defendant claimed. Butler, 53 Wn. App. at 223.

The Court of Appeals also reasoned that R.A.L.'s statement to her pediatrician was reliable because she "likely knew she was seeing Guerra for a medical appointment and had no reason to invent her statement." Slip Op. at 12-13. This reasoning is illogical and does not comport with the evidence. First, the child's mother explicitly testified that she did not bring the child to the doctor for the purpose of medical

treatment or diagnosis but rather to "know for sure what had happened to the little girl." RP 1045. Courts in other states have held that a child's hearsay statement is not admissible under the medical hearsay exception if the *purpose* for seeing the medical provider is not to obtain medical treatment but rather to determine whether the child is telling the truth. See, e.g., Prater v. Cabinet for Human Resources, Com. of Ky, 954 S.W.2d 954 (Ky 1997) (statement not admissible where statements were not reasonably pertinent to child's need for treatment); State v. Whipple, 304 Mont. 118, 19 P.3d 228 (2001) (statement not admissible where there was no showing that children believed they needed to tell doctor the truth in order to receive effective treatment or diagnosis); State v. Wade, 136 NH 750, 622 A.2d 832 (1993) (statement not admissible where there was no showing that child understood purpose of exam and need to provide accurate, truthful information); State v. Woods, 130 NH 721, 724, 546 A.2d 1073 (1988) (statement not admissible where mother brought child to family practitioner in order to see "if there was anything she could do to determine whether her daughter was telling the truth").

More important, the court misapplied the corroboration requirement. "Corroboration of the criminal act described by an

unavailable child declarant's hearsay statement may not be used to 'bootstrap' the statement for purposes of determining its reliability." State v. C.J., 148 Wn.2d 672, 687, 63 P.3d 765 (2003). In other words, "[t]he finding of corroborative evidence that supports the hearsay statement is independent of the statement's reliability." Id.

Thus, the Court of Appeals erred in concluding that R.A.L.'s statement was sufficiently corroborated because it fell under the exception for hearsay statements made to medical providers. The corroboration must be independent of the requirements of the particular hearsay exception applied. Id.

This Court should grant review and hold the evidence was not sufficient to corroborate the child's statement.

3. The Court of Appeals' opinion conflicts with this Court's case law requiring the court to take a "hard look" at how the case was presented to the jury in order to ensure a double jeopardy violation did not occur.

The Court of Appeals failed to recognize that the jury verdicts involving F.M-G. were ambiguous and must be resolved in Rodriguez-Montoya's favor. The jury entered general verdicts and did not specify which act or acts they relied upon. The jury instructions and the evidence allowed the jury to find Rodriguez-Montoya guilty of both

child rape and child molestation based on the same act. The Court of Appeals' opinion conflicts with this Court's double jeopardy jurisprudence, warranting review. RAP 13.4(b)(1), (4).

The right to be free from double jeopardy is the constitutional guarantee protecting a defendant against multiple punishments for the "same offense." State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417 (2007); U.S. Const. amend V; Const. art. I, § 9. The Double Jeopardy Clause precludes the State from prosecuting a person in a manner that results in multiple convictions for the same criminal act. State v. Mutch, 171 Wn.2d 646, 663, 254 P.3d 803 (2011).

The Court of Appeals recognized that it had earlier decided, in State v. Land, that when an act of sexual intercourse involves oral-genital contact alone, if done for sexual gratification, the same evidence can prove both rape and molestation. Because they are the same in fact and in law, in this circumstance, the two crimes are not separately punishable based on a single act. Slip Op. at 5 (citing State v. Land, 172 Wn. App. 593, 600, 295 P.3d 782, review denied, 177 Wn.2d 1016, 304 P.3d 114 (2013)).

The Court of Appeals also recognized that when the State presents evidence that could support a charge of either child rape or

child molestation, the jury should be instructed that their verdict on each count must be based on separate and distinct acts. Slip Op. at 5. Here, the jury did not receive such an instruction.

The Court of Appeals nonetheless concluded that no double jeopardy violation occurred because the evidence, the prosecutor's closing argument, and the jury instructions made it "manifestly apparent" to the jury that the State based each count on a separate act and was not seeking to impose multiple punishments for the same offense. Slip Op. at 5, 8.

The Court of Appeals' conclusion is erroneous. The court applied the wrong legal standard. Under the proper standard, when the evidence and the jury instructions *allow* the jury to enter multiple verdicts for the same criminal act, the verdict is ambiguous and must be resolved in favor of the defendant. State v. Kier, 164 Wn.2d 798, 811-14, 194 P.3d 212 (2008). The prosecutor's closing argument may not be considered in isolation and cannot alone prevent a double jeopardy violation. Id.

To determine whether a double jeopardy violation occurred, the reviewing court must take a "hard look" at how the case was presented to the jury. Id. at 808. While the court may look to the entire trial

record, its review is "rigorous" and "among the strictest." Mutch, 171 Wn.2d at 665. "Considering the evidence, arguments, and instructions, if it is not clear that it was *manifestly apparent* to the jury that the State was not seeking to impose multiple punishments for the same offense and that each count was based on a separate act, there is a double jeopardy violation." Id. (internal quotation marks, alteration and citation omitted).

Here, the evidence allowed the jury to find Rodriguez-Montoya guilty of both child molestation and child rape of F.M-G. based on the same act. The charging periods for the two counts were identical. CP 42-43. Both to-convict jury instructions contained the same identical charging periods. CP 61, 65.

The State presented evidence of multiple acts during the charging period that could support either charge. The child rape charge required the jury to find Rodriguez-Montoya engaged in "sexual intercourse" with F.M-G. CP 61. "Sexual intercourse" was defined to include "any act of sexual contact between one persons involving the sex organs of one person and the mouth or anus of another whether such person are of the same or opposite sex." CP 62.

The child molestation charge required the jury to find Rodriguez-Montoya had "sexual contact" with F.M-G. CP 65. "Sexual contact" was defined as "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." CP 68.

The State presented evidence of multiple acts of sexual contact between Rodriguez-Montoya's penis and F.M-G.'s mouth or anus that could support either charge. RP 905, 994-98.

The jury instructions also allowed the jury to rely upon the same evidence for both charges. The jury was not instructed to find "separate and distinct" acts for the separate charges. Although the jury received a unanimity instruction, as well as an instruction informing them they "must decide each count separately," these instructions are not sufficient to cure the double jeopardy problem. CP 59, 63, 66; Borsheim, 140 Wn. App. at 366; Mutch, 171 Wn.2d at 662-63.

The Court of Appeals nonsensically concluded the jury instructions were sufficient because the to-convict instructions contained separate legal elements. Slip Op. at 7-8. Presumably this would always be the case where a person argues he was convicted of both child rape and child molestation based on the same criminal act.

The jury must be instructed they cannot rely on the same act to satisfy both sets of elements.

Finally, the prosecutor's closing argument was not sufficient to overcome the risk of double jeopardy created by the evidence and the jury instructions. Kier, 164 Wn.2d at 811-14. The jury was instructed that the "lawyers' statements are not evidence." CP 52. They were also instructed that it is the duty of the court—not the lawyers—to inform the jury of the law. CP 52. The jury was given express permission to disregard the lawyers' statements that are not supported by the evidence or the law as provided in the instructions. CP 52.

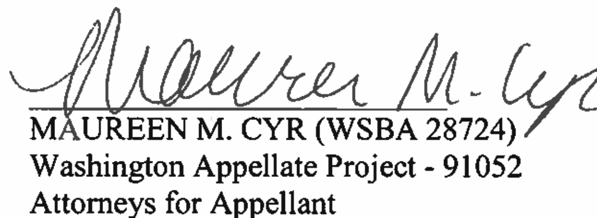
The prosecutor stated briefly in closing argument that the child molestation occurred when Rodriguez-Montoya grabbed F.M-G.'s penis and "squeezed it," and when he took F.M-G's hand and placed it on his own penis. RP 1231. But the prosecutor did not state that the jury *could not* rely upon the allegations of sexual contact involving Rodriguez-Montoya's penis and F.M-G.'s mouth or anus for the child molestation count. And, the prosecutor did not tell the jury that they must rely on separate and distinct acts to find Rodriguez-Montoya guilty of both rape and molestation of F.M-G.

The jury instructions expressly gave the jury permission to rely upon the evidence of sexual contact involving Rodriguez-Montoya's penis and F.M-G.'s mouth or anus for the child molestation count, regardless of what the prosecutor said during closing argument. The jury could have decided that the testimony of touching that the prosecutor suggested they rely upon for the molestation count was simply too vague or otherwise unconvincing. Nothing prevented the jury from relying upon the same act of sexual contact to find Rodriguez-Montoya guilty of child rape and child molestation.

E. CONCLUSION

For the reasons provided, this Court should grant review.

Respectfully submitted this 4th day of April, 2018.



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APPENDIX

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JUAN JOSE RODRIGUEZ-MONTOYA, Appellant.	No. 75759-8-I DIVISION ONE UNPUBLISHED OPINION FILED: March 5, 2018

LEACH, J. — Juan Jose Rodriguez-Montoya appeals his convictions for rape of a child in the first degree and two counts of child molestation in the first degree for the rape and molestation of F.M-G. and the molestation of R.A.L. He relies on his constitutional guaranty against double jeopardy to challenge the convictions for rape and molestation of F.M-G. under instructions that did not require that the jury base its decisions on separate and distinct acts. He also claims that the court should not have admitted R.A.L.'s out-of-court statement to her pediatrician because R.A.L. did not make her statement about the abuse and her abuser's identity for purposes of medical diagnosis or treatment.

The record shows that it was manifestly apparent to the jury that the State based the rape and molestation charges involving F.M-G. on separate and distinct acts. Second, evidence about an abuser's identity is reasonably necessary to a child's treatment and the totality of the circumstances corroborates R.A.L.'s statement, making it admissible under ER 803(a)(4). We affirm.

BACKGROUND

From the age of six, F.M-G. attended day care at "Patty's," a neighbor's apartment. Patty's husband, Rodriguez-Montoya, also lived at the apartment. In February 2014, seven-year-old F.M-G. told his mother that he did not want to return to Patty's because Rodriguez-Montoya had made him touch Rodriguez-Montoya's "parts." F.M-G. disclosed to a child interview specialist that Rodriguez-Montoya had put his penis into F.M-G.'s bottom, touched F.M-G.'s penis, made F.M-G. touch his own penis, and made F.M-G perform oral sex.

Four-year-old R.A.L. also attended Patty's day care. In November 2014, R.A.L. told her mother that Rodriguez-Montoya had touched her inappropriately. R.A.L.'s mother took her to see her pediatrician, Dr. Margarita Guerra. R.A.L. disclosed that Rodriguez-Montoya had touched her private parts and made her touch his. Guerra testified about R.A.L.'s statement at trial.

A jury convicted Rodriguez-Montoya of rape of a child in the first degree and two counts of child molestation in the first degree for the rape and molestation of F.M-G. and the molestation of R.A.L. The charging periods for the counts involving F.M-G. were identical. Rodriguez-Montoya appeals his convictions.

ANALYSIS

Double Jeopardy

Rodriguez-Montoya asserts that the trial court's instructions allowed the jury to rely on the same act to find him guilty of both rape and molestation of F.M-G. in violation of his protection against double jeopardy. An appellant may raise a

double jeopardy claim for the first time on appeal because it implicates a constitutional right.[1] This court reviews double jeopardy claims de novo.[2]

The Fifth Amendment to the United States Constitution and article I, section 9 of the Washington Constitution protect defendants against multiple punishments for the same offense.[3] Beyond these constitutional limitations, the legislature has the power to define and designate punishment for criminal conduct.[4] We must determine whether the legislature intended to allow multiple punishments for criminal conduct that violates both the rape of a child in the first degree statute and the child molestation in the first degree statute.[5]

First, we evaluate the language of the relevant statutes to determine if they expressly authorize multiple punishments for conduct that violates more than one statute.[6] An individual is guilty of child rape in the first degree "when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim."[7] "Sexual intercourse" means both any penetration of the vagina

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[1] State v. Mutch, 171 Wn.2d 646, 661, 254 P.3d 803 (2011); RAP 2.5(a)(3).

[2] Mutch, 171 Wn.2d at 661-62.

[3] U.S. CONST. amend. V (no "person [shall] be subject for the same offense to be twice put in jeopardy of life or limb"); WASH. CONST. art. I, § 9 ("[n]o person shall be . . . twice put in jeopardy for the same offense"); Mutch, 171 Wn.2d at 663.

[4] State v. Louis, 155 Wn.2d 563, 568, 120 P.3d 936 (2005).

[5] See State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995) (explaining that whether the legislature authorized multiple punishments is a question of legislative intent); see also State v. Wilkins, 200 Wn. App. 794, 806, 403 P.3d 890 (2017) (holding that the legislature authorized multiple punishments for criminal conduct that constitutes first degree child rape and first degree child molestation), petition for review filed, No. 95250-7 (Wash. Nov. 25, 2017).

[6] Louis, 155 Wn.2d at 569.

[7] RCW 9A.44.073(1).

or anus of one person by another and "any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex."[8]

An individual is guilty of child molestation in the first degree "when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim."[9] "'Sexual contact' means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party."[10]

Neither statute expressly authorizes or prohibits multiple punishments for offenses arising out of a single act.[11] Where, as here, the statutes are silent, we apply a rule of statutory construction known as the "same evidence test."[12] The same evidence test provides that a defendant's convictions for two offenses that are identical both in fact and in law violate his protection against double jeopardy.[13] Thus, if the facts are not identical or "[i]f each offense requires proof of an element not required in the other, where proof of one does not necessarily prove the other, the offenses are not the same [in fact or in law] and multiple convictions are permitted."[14]

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[8] RCW 9A.44.010(1).
[9] RCW 9A.44.083(1).
[10] RCW 9A.44.010(2).
[11] Wilkins, 200 Wn. App. at 807.
[12] Louis, 155 Wn.2d at 569.
[13] Louis, 155 Wn.2d at 569 (quoting Calle, 125 Wn.2d at 777).
[14] Louis, 155 Wn.2d at 569.

When an act of sexual intercourse involves penetration, rape of a child in the first degree and child molestation in the first degree are legally distinct; rape requires proof of penetration while molestation does not, and molestation requires proof of sexual gratification while rape does not.[15] In State v. Land,[16] however, this court recognized that when an act of sexual intercourse involves oral-genital contact alone, if done for sexual gratification, the same evidence can prove both rape and molestation. Because they are the same in fact and in law, in this circumstance the two crimes are not separately punishable based on a single act.[17] Thus, when both are charged, the trial court should instruct the jury that it must find the State based each count on separate and distinct acts to avoid a potential double jeopardy violation.[18] But a violation does not occur if the evidence, arguments, and instructions make it "'manifestly apparent'" to the jury that the State based each count on a separate act and "'[was] not seeking to impose multiple punishments for the same offense.'"[19]

Rodriguez-Montoya asserts that the jury could have relied on a single act to convict him of both rape and molestation of F.M-G. He notes that the State presented evidence of multiple acts of sexual contact between his penis and F.M-G.'s mouth during the same charging period. He contends that because the trial court did not instruct the jury that it must rely on separate and distinct acts to

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[15] State v. Jones, 71 Wn. App. 798, 825, 863 P.2d 85 (1993).
[16] 172 Wn. App. 593, 600, 295 P.3d 782 (2013).
[17] Land, 172 Wn. App. at 600.
[18] Land, 172 Wn. App. at 600-01.
[19] Mutch, 171 Wn.2d at 664 (alteration in original) (quoting State v. Berg, 147 Wn. App. 923, 931, 198 P.3d 529 (2008)).

convict him on each count, the two convictions violate his guaranty against double jeopardy. We disagree.

In Land, a jury convicted Land of one count of child rape and one count of child molestation, both involving the same child and the same charging period.[20] We held that although the trial court should have submitted an instruction informing the jury that the State must have based each count on a separate and distinct act, the absence of an instruction did not violate Land's right to be free from double jeopardy.[21] We explained that the victim's testimony, the State's arguments, and the to-convict instructions and information delineating the two counts made it manifestly apparent that the State was not seeking to impose multiple punishments for the same offense.[22]

We see this case as similar to Land. F.M-G.'s mother testified that F.M-G. told her that Rodriguez-Montoya would take him into "the room where the washing machines are," pull down F.M-G.'s pants, and have them touch each other's "parts." F.M-G. also told a child interview specialist that Rodriguez-Montoya had taken F.M-G.'s hand and placed it on Rodriguez-Montoya's "pee" or his "privacy" and that Rodriguez-Montoya had touched F.M-G.'s "privacy." F.M-G. also testified to at least two incidents of sexual intercourse. He stated that more than once Rodriguez-Montoya "put his privacy in my butt" and explained that Rodriguez-Montoya used the part of his body that he "pee[s]" from to do so. In addition, F.M-G. stated that Rodriguez-Montoya put his "privacy in my mouth" on five separate

[20] Land, 172 Wn. App. at 597.
[21] Land, 172 Wn. App. at 603.
[22] Land, 172 Wn. App. at 602-03.

occasions. F.M-G. therefore implicitly distinguished the acts that constituted rape from those that constituted molestation.

The State explicitly did so in its closing argument. It told the jury that it had charged Rodriguez-Montoya with "[r]ape of a child in the first degree for his anal and oral rape of [F.M-G. and] child molestation in the first degree for his inappropriate and gratuitous touching of [F.M-G.]." The State explained the unanimity instruction to the jury in relation to the rape charge and said, "[I]f you can agree that at least on one occasion [F.M-G.] was anally raped within that charging period and you're unanimous, that's enough. If you can unanimously agree that within that charging period he was orally raped, that's enough." In reference to the molestation charge, the State explained, "Now with regard to Count II having to do with [F.M-G.], that same [unanimity] instruction applies that I just described. That's because [F.M-G.] has described multiple types of sexual contact. His hand on the defendant's penis, the defendant's hand on [F.M-G.'s] penis, and the fact that it happened multiple times." The State therefore defined the acts involving sexual intercourse as rape and the acts involving touching as molestation.

Finally, the to-convict instructions, like the information, clearly differentiated between the two counts. Instruction 9 stated that to convict Rodriguez-Montoya of rape of a child in the first degree involving F.M-G., the jury had to find that he had "sexual intercourse" with F.M-G. during the charging period. Instruction 13 stated that to convict Rodriguez-Montoya of child molestation in the first degree involving F.M-G., the jury had to find that he had "sexual contact" with F.M-G. during the

charging period. Instructions 10 and 16 provided the statutory definitions of sexual intercourse and sexual contact, respectively.

Similar to Land, we conclude that F.M-G.'s testimony, the State's arguments in closing, and the to-convict instructions and information distinguishing the rape and molestation charges made it manifestly apparent to the jury that the State was not seeking to impose multiple punishments for a single act. The trial court did not violate Rodriguez-Montoya's guaranty against double jeopardy by failing to instruct the jury that it needed to rely on separate and distinct acts for the bases of each conviction. Thus, no constitutional error occurred.

ER 803(a)(4)

Rodriguez-Montoya also challenges the trial court's admission of R.A.L.'s hearsay statement to her pediatrician on the ground that she did not make it for purposes of diagnosis or treatment. We review a trial court's rulings on the admissibility of evidence for an abuse of discretion.[23]

"Hearsay" is an out-of-court statement offered to prove the truth of the matter asserted.[24] Generally, a hearsay statement is not admissible at trial unless it satisfies an exception to the rule.[25] ER 803(a)(4) provides that the hearsay rule does not exclude "[s]tatements made for purposes of medical diagnosis or treatment." The exception applies only to hearsay statements that were

[23] State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).
[24] ER 801(c).
[25] ER 802.

"'reasonably pertinent to diagnosis or treatment.'"[26] "Generally, to establish reasonable pertinence (1) the declarant's motive in making the statement must be to promote treatment, and (2) the medical professional must have reasonably relied on the statement for purposes of treatment."[27]

As a preliminary matter, the State asserts that Rodriguez-Montoya did not preserve this claim for appellate review. Generally, an appellant may not challenge a trial court's decision to admit evidence unless "a timely objection or motion to strike [was] made, stating the specific ground of objection, if the specific ground was not apparent from the context."[28] We will not reverse the trial court's decision to admit evidence where the defendant seeks reversal "based on an evidentiary rule not raised at trial."[29] For example, in State v. Powell,[30] defense counsel objected at trial to a witness's testimony on the ground that it was not credible. On appeal however, Powell challenged the admissibility of evidence based on ER 403.[31] Our Supreme Court held defense counsel's failure to object to the witness's testimony at trial based on ER 403 meant that Powell did not preserve the issue for appellate review.[32]

Here, Rodriguez-Montoya claims that the trial court abused its discretion in admitting R.A.L.'s statement because of her young age and because it identified

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[26] ER 803(a)(4); In re Pers. Restraint of Grasso, 151 Wn.2d 1, 19-20, 84 P.3d 859 (2004) (quoting State v. Woods, 143 Wn.2d 561, 602, 23 P.3d 1046 (2001)).

[27] Grasso, 151 Wn.2d at 20.

[28] ER 103(a)(1).

[29] State v. Powell, 166 Wn.2d 73, 82, 206 P.3d 321 (2009).

[30] 166 Wn.2d 73, 83, 206 P.3d 321 (2009).

[31] Powell, 166 Wn.2d at 84.

[32] Powell, 166 Wn.2d at 84.

him as her abuser. The State claims that he did not object below to the admissibility of R.A.L.'s statement based on these grounds. Rather, in the trial court he objected on the ground that R.A.L. did not make her statement for purposes of medical diagnosis or treatment. He thus asserted that her statement did not meet the requirements of ER 803(a)(4). On appeal, he claims error based on the same evidentiary rule but now asserts more specific grounds to explain why R.A.L. did not make her statement for purposes of medical diagnosis or treatment. Because he seeks review of the same issue he raised at trial, he preserved it for review.

First, Rodriguez-Montoya contends that at four years old, R.A.L.'s age makes it unlikely that she understood the purpose for making her statement to Guerra. This required that the trial court identify evidence in the record corroborating her statement. Washington courts admit child hearsay statements under ER 803(a)(4) even if the child does not understand that she made the statements for purposes of medical diagnosis or treatment.[33] But a trial court may admit child hearsay "only if corroborating evidence supports the child's statements and it appears unlikely that the child would have fabricated the cause of injury."[34] This corroborating evidence must be part of the totality of the circumstances in which the child makes the statements.[35] "[T]o facilitate appellate review, the trial court should identify on the record the specific evidence—drawn from the totality

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[33] State v. Florczak, 76 Wn. App. 55, 65, 882 P.2d 199 (1994).
[34] Florczak, 76 Wn. App. at 65.
[35] Florczak, 76 Wn. App. at 65-66.

of the circumstances—on which it relies to determine whether or not the statements were reliable, and therefore admissible."[36]

Rodriguez-Montoya contends that the court's failure to identify corroborating evidence and the absence of evidence in the record supporting R.A.L.'s statement show that the court abused its discretion. He notes that R.A.L. had no physical injuries and claims that because she was "not crying, upset or fussy" when she spoke with Guerra, her reported behavior did not support her statement.

Consistent with Rodriguez-Montoya's argument, the trial court did not identify on the record what it considered to establish the reliability of R.A.L.'s out-of-court statement to Guerra. The record, however, documents the circumstances surrounding her statement to Guerra.[37] The totality of these circumstances corroborate R.A.L.'s statement. First, Guerra testified that when she examined R.A.L., she observed R.A.L.'s vagina and labia were red. R.A.L.'s mother testified that Guerra examined R.A.L. three or four days after R.A.L. told her that Rodriguez-Montoya had molested her. Because Guerra did not examine R.A.L. immediately after the incident, she testified that she could not determine whether the abuse caused the redness. Guerra stated that a number of issues could have caused the redness, including poor hygiene, a yeast infection, and contact

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[36] Florczak, 76 Wn. App. at 66.

[37] See Florczak, 76 Wn. App. at 66-67 (holding that although the trial court did not consider the reliability of KT's out-of-court statements, the record sufficiently documented corroborating evidence of those statements, including KT's emotional state and behavior during her counseling sessions).

dermatitis, all of which are common. She also stated, however, that touching could explain the redness.

Further, Guerra had been R.A.L.'s pediatrician since R.A.L. was 18 months old, which means R.A.L. likely knew she was seeing Guerra for a medical appointment and had no reason to invent her statement. R.A.L.'s mother testified that R.A.L. had seen Guerra for regular checkups over the last two-and-a-half years. Guerra explained that when a patient comes in for an appointment, the clinic follows the same procedures: the medical assistant takes the patient's vital signs, inquires about her chief complaint, does a short "review of systems," and then puts her in an examination room. Guerra stated that she begins by greeting the child, asks about her history, and then conducts a physical examination. On November 11, 2014, consistent with protocol, Guerra asked R.A.L. about why she had come to see her before performing a physical examination. Guerra documented her conversation with R.A.L. as follows:

> [R.A.L.] tells me in Spanish that Diego asked her to touch his cola. She said no, and he unzipped his pants and put her hands in—in quotations—she points to the genital area. Then he pulled her pants down and Diego touch[ed] her—she points to her vaginal area—with his hands.
>
> Diego told [R.A.L.] that if she did not tell anybody, he was going to buy her candy. I asked [R.A.L.] if it hurt when he touch[ed] her, and [R.A.L.] responded no.

Because R.A.L. had been seeing Guerra for "regular checkups" for over two years and each checkup involved similar procedures, R.A.L. likely knew she was seeing Guerra on November 11 for a medically related purpose and had no incentive to fabricate her statement. This, in addition to the redness around

R.A.L.'s vagina and labia, shows that the totality of the circumstances corroborates R.A.L.'s statement. Also, courts generally accept that a child's young age supports the conclusion that she did not fabricate the cause of her injury.[38] R.A.L. was only four years old when she made her statement to Guerra and therefore likely had no reason to fabricate the abuse. Thus, the trial court did not abuse its discretion in finding that R.A.L. made her statement for purposes of medical diagnosis or treatment and admitting it under ER 803(a)(4).

Rodriguez-Montoya also challenges the trial court's admission of R.A.L.'s statement identifying him as her abuser. Generally, statements attributing fault are not admissible under ER 803(a)(4).[39] But when the declarant is a child, "statements regarding the identity of the abuser are reasonably necessary to the child's medical treatment."[40] The medical provider must know who abused a child to avoid returning the child to the abusive relationship.[41] Rodriguez-Montoya's identity was therefore related to Guerra's diagnosis and treatment of R.A.L. The

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[38] Florczak, 76 Wn. App. at 66; accord State v. Ashcraft, 71 Wn. App. 444, 457-58, 859 P.2d 60 (1993) (holding that because of J.'s young age, she appeared to have no reason to fabricate the nature of her injuries); State v. Butler, 53 Wn. App. 214, 222-23, 766 P.2d 505 (1989) (explaining that a child of two and a half would normally have no reason to fabricate the cause of his injury).

[39] Butler, 53 Wn. App. at 217.

[40] State v. Hopkins, 134 Wn. App. 780, 788, 142 P.3d 1104 (2006) (holding an out-of-court statement by the thirteen-year-old victim to a nurse practitioner identifying her sister's friend as her abuser was admissible under ER 803(a)(4)); accord State v. Robinson, 44 Wn. App. 611, 613-16, 722 P.2d 1379 (1986) (holding an out-of-court statement by the three-year-old victim to a physician identifying her father's friend as her abuser was admissible under ER 803(a)(4)).

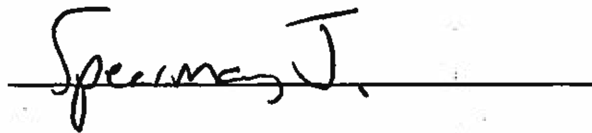
[41] Hopkins, 134 Wn. App. at 788.

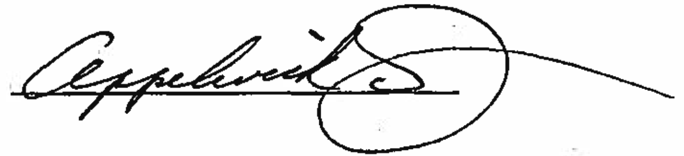
trial court did not abuse its discretion in admitting R.A.L.'s statement identifying Rodriguez-Montoya as her abuser.

CONCLUSION

Rodriguez-Montoya's convictions for rape and molestation of F.M-G. did not violate his protection against double jeopardy. The trial court did not abuse its discretion by admitting R.A.L.'s out-of-court statement to her pediatrician describing the abuse and identifying her abuser as Rodriguez-Montoya. We affirm.

WE CONCUR:





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