NO. 100667-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARK BRIAN WARNER,

Petitioner.

ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION I
Court of Appeals No. 83332-4-I
Kitsap County Superior Court No. 19-1-01710-18

ANSWER TO PETITION FOR REVIEW

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SERVICE	Suzanne Lee Elliott, WSBA#12634 705 2nd Avenue, Suite 1300 Seattle, Wa 98104-1797 Email: suzanne-elliott@msn.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED March 14, 2022, Port Orchard, WA **Original e-filed at the Supreme Court; Copy to counsel listed at left.** **Office ID #91103 kcpa@co.kitsap.wa.us**

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I. IDENTITY OF RESPONDENT

The respondent is the State of Washington. The answer is filed by Kitsap County Deputy Prosecuting Attorney JOHN L. CROSS.

II. COURT OF APPEALS DECISION

The State respectfully requests that this Court deny review of the unpublished decision of the Court of Appeals in *State v. Warner*, No. 83332-4-I, filed January 24, 2022, a copy of which is attached to the petition for review.

III. COUNTERSTATEMENT OF THE ISSUES

The Court of Appeals, in conformity with well-established principles held that substantial evidence supported the trial court's bench-trial finding that Warner committed first degree rape of a child. None of the criteria set forth in RAP 13.4(b) are met, because:

1. The Court of Appeals decision does not conflict with any decision of this Court or a published decision of the Court of Appeals;

2. The decision fails to present a significant question of law under the Constitution of the State of Washington and of the United States; and

3. The petition fails to present any issue of substantial public interest that should be determined by this Court?

IV. STATEMENT OF THE CASE

A. PROCEDURE

After two charging amendments, the matter proceeded to trial under a second amended information which charged first degree child rape (count I), first degree child molestation (count II), sexual exploitation of minor (count III), and four counts of first degree possession of depictions of minor engaged in sexually explicit conduct (counts IV-VIII). CP 37-44.

Warner waived his right to a jury trial. CP 23; RP, 2/21/20, 6-7 (trial court's colloquy with Warner). During a hearing on February 21, 2020, the trial court advised the parties that "Assuming that we have a judge available for Monday, I understand you might be going out but I don't know that for a fact." RP, 2/21/20, 7-8.

On February 24, 2020, the presiding judge called the case for trial and the parties answered ready. 1RP 5. The presiding judge did not know to which judge the trial would be assigned. 1RP 6. On Tuesday, February 25, 2020, the parties appeared before the Honorable Michelle Adams for trial. 1RP 1-2.

The trial court found Warner guilty on all counts. Findings of Fact and Conclusions of Law for Hearing on Bench Trial, CP 58-71. Id. The trial court also found beyond a reasonable doubt the existence of the aggravating circumstances of abusing a position of trust and particular

vulnerability, as alleged in counts I and III. Id.

After verdict, Warner moved to arrest judgment as to count I, alleging insufficient evidence of the required element of penetration. CP 46. Warner's motion was denied. RP, 4/17/20, 8. The issue is covered in trial court's conclusion of law III. CP 61.

At sentencing, on defense motion, the trial court decided that the convictions for child rape and child molestation violated double jeopardy and the child molestation count was dismissed. RP, 4/17/20, 18; CP 72-73.

The trial court found that substantial and compelling grounds existed to depart from the standard range and sentenced Warner to 462 months. CP 74-75; Findings of Fact and Conclusions of Law for Exceptional Sentence, CP 86-88.

B. FACTS

The trial court as trier of fact found that three photos, state's exhibits 34, 35, and 36, show a man's hand holding open the vagina of a young girl aged between two and eight or nine years. CP 58. And, similarly, another three photos, state's exhibits 63, 64, and 65 show "the vagina" being spread open by hands belonging to a young girl. Id.

The trial court found that the male thumbs shown in state's

exhibits 34, 35, and 36 were "against the internal part of the labia majora, past the outside of the labia majora." CP 59. The trial court found that the male hands in the photos belonged to Warner. CP 61.

The trial court found that a dress can be seen in the background of state's exhibits 63, 64, and 65 and that the fabric is the same as that of a dress belonging to the victim, OJM. CP 59. A photo of the victim in that dress was found on Warner's computer along with the six exhibits referenced above. Id.

The trial court found that Warner had ample opportunity to be alone with OJM: OJM stayed with Warner and his wife overnight at their home and OJM and family had lived with the Warner's for three months. CP 60. Warner's wife was often away from the house working when OJM was there. Id.

The present appeal focusses on the testimony of Katherine Espy, RN. 2RP 189. Ms. Espy practices as a sexual assault nurse examiner or SANE nurse. Id. SANE nurses meet sexual assault victims, offering needed care and a full range of forensic examination. 1RP 189-90.

Ms. Espy reviewed photos in the present case. 1RP 191. She was asked what conclusions she might draw from looking at a picture of a vagina without a face attached. Id. She responded "Let me be specific. When I'm looking at a picture of genitalia, I'm not looking at the vagina

unless a speculum is used." 2RP 191. Further, from a picture "I'm just looking at external genitalia, which is anything on the outside of the vagina. . ." 2RP 192. Such a picture allows Ms. Espy to determine gender and pre- or postpubertal, "meaning estrogen or non-estrogenized." Id.

Ms. Espy perused state's exhibits 34, 35, and 36 and testified that they showed "the labia majora is being separated." 2RP 196-97. She said

> It's not easy to see how far out the labia is being pulled, but on the left side it's flattened, and we can almost see a line at the top where the labia is kind of being pulled over. That part would normally be closed, and it's being opened this way with a finger.

2RP 197. Ms. Espy added

> Q. [by the prosecutor] Those are adult fingers. Does it appear or can you tell whether they are inside or outside of the labia majora?
>
> A. Well, the thumb, again, is pulling over that left side of the labia majora. If that was let loose, that would go back over. So from this picture, it appears, at least the side where the thumb is, is being pulled out, and that would have been against the internal genitalia. So it would be past the outside of the labia majora.
>
> Q. So the thumb would be past the outside?
>
> A. Yes.

2RP 198-99.

V. ARGUMENT

THIS COURT SHOULD DENY REVIEW OF THE COURT OF APPEALS DECISION BECAUSE THE PETITION FAILS TO RAISE AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST AND HAS NO SUBSTANTIVE MERIT.

RAP 13.4(b) sets forth the considerations governing this Court's acceptance of 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 a published 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.

Here, Warner claims only that RAP 13.4(b)(4) warrants review. He asserts that the meaning of a term in the child rape statute raises an issue of "substantial public interest." But the term is well and clearly defined by correct precedent and Warner provides no authority contrary to that precedent. The petition lacks merit, raises no issue of substantial public interest and should be denied.

1. Warner admits that his thumb was inside the victim, touching her vagina, and he fails to provide legal authority or prove factual error that establishes that this behavior is not "penetration" and therefore "sexual intercourse" as that term is defined by statute and precedent.

Warner claims that review is warranted because substantial evidence does not support the trial court's finding of fact which finding in turn fails to support the trial court's conclusion of law that he committed child rape because the trial court and the Court of Appeals wrongly construed the meaning of the required element of penetration of the vagina

as a matter of law. The Court of Appeals applied the correct standard of review to the trial court's findings and conclusions and correctly followed precedent in affirming the conviction.

First, it is not contested that "[F]ollowing a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law." *Slip op.* at 5, *quoting State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). Nor is issue taken with "We examine the findings to decide whether, when viewing them in the light most favorable to the State, any rational fact finder could have found that the State proved each element of the offense beyond a reasonable doubt." Id. Further, conclusions of law are reviewed de novo. Id. The Court of Appeals applied the proper standards of review.

Warner's focus is on the de novo review component. Neither here nor below does he challenge the trial court's findings of fact. And here the Court of Appels was also correct in noting that "Unchallenged findings of fact are verities on appeal." Id. Thus Warner's de novo challenge admits that the trial court's findings of fact are true and correct. Warner's thumb "was against the internal part of [O.M.'s] labia majora, past the outside of the labia majora." *Slip op.* at 7. His thumb was "on a "shiny area," which "indicates a moist area, and moisture would be on a part of

the vagina that is inside the vagina."" Id. The trial court's findings are clearly supported by substantial evidence when the expert witness upon whose testimony Warner relies for a definition of vagina says that his thumb "inside the vagina."

In this factual context, Warner argues that based on the testimony of a registered nurse the definition of the statutory term "vagina" should be broken into anatomically distinct pieces the penetration of some of which is not sexual intercourse. But the Court of Appeals found that Washington courts have rejected this reduction argument for over 80 years. *Slip op.* at 6, *citing State v. Snyder*, 199 Wash. 298, 301, 91 P.2d 570 (1939) ("[i]t is not necessary that the penetration should be perfect, . . . nor need there be an entering of the vagina . . . the entering of the vulva or labia is sufficient"). An offender does not avoid a penetration finding by claiming the he penetrated only a piece or part of the female genitalia, all of which is described by the statutory term "vagina."

Further, such a fine distinction nullifies the statute's applicability to penetrating behavior "however slight." RCW 9A.44.073(1)(a) and (b). And, Warner does not explain why fingering a child inside her labia is not within the "ordinary meaning" of "sexual intercourse" such that "any penetration, however slight" suffices for conviction under subsection (1)(a). *See State v. Weaville*, 162 Wn. App. 801, 256 P.3d 426 (2011)

review denied 173 Wn.2d 1004 (2011)(penetration need not be perfect, "the slightest penetration of the body of the female by the sexual organ of the male is sufficient; there is also no need for an entering of the vagina or rupturing of the hymen, as the entering of the vulva or labia is sufficient.").

The Court of Appeals properly relied on more recent judicial consideration of the meaning of the term. *State v. Montgomery*, 95 Wn. App. 192, 200, 974 P.2d 904 (1999), *review denied* 139 Wn.2d 1006 (19999). The Court of Appeals properly rejected Warner's unspoken assertion that Katherine Espy, RN is an authority on the law. Warner has no case that holds contrary to *Snyder, Montogomery, Delgado*, or *Weaville. Slip op.* at 6. His argument assumes, contrary to well-established authority, that Ms. Espy can provide legal conclusions or ""offer opinions of law in the guise of expert testimony.'" Id., *quoting State v. Olmedo*, 112 Wn. App. 525, 532, 49 P.3d 960 (2002) "(quoting *Stenger v. State*, 104 Wn. App. 393, 407, 16 P.3d 655 (2001)."

Montgomery argued, as Warner does,

> that it was reversible error for the trial court to prevent him from differentiating the vagina from the remainder of the female sexual organ, and arguing that the evidence only established penetration of the labia. He prefers a narrow definition of vagina which would require penetration into the vaginal canal in order to meet the definition of sexual intercourse.

Montgomery, 95 Wn. App. at 200. The *Montgomery* Court construed the

term according to its "evident intent and purpose." Id. The Court understood the term in its "ordinary and popular sense." Id. The Court read the two sub-definitions of "sexual intercourse" *in pari materia,* easily deciding that Montgomery's proposed narrow definition did not meet the language or purpose of the statute. 95 Wn. App. at 200-01. The *Montgomery* court's analysis is consistent and cogent and not in error.

Warner has only Ms. Espy's seriatim anatomical descriptions as ammunition in his attempt to challenge long-standing precedent. He ignores that Ms. Espy directly said that his thumb was "inside the vagina." Warner's petition has neither factual nor legal support and should be denied.

VI. CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court deny Warner's petition for review.

VII. CERTIFICATION

This document contains 2249 words as counted pursuant to RAP 18.17

DATED March 14, 2022.

Respectfully submitted,

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