67558-3

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No. 67558-3-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

OLIVER WEAVER,

Appellant.

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

APPELLANT'S REPLY BRIEF AND RESPONSE TO STATE'S CROSS-APPEAL

NANCY P. COLLINS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ISSUE PRESENTED IN STATE'S CROSS-APPEAL

The prosecution concedes, as it must, that Weaver's two convictions for rape rested on a single, identical instance of intercourse. It insists that these two convictions do not run afoul of the prohibition against double jeopardy based on a recent case in which the Supreme Court has granted review,[1] and in disregard of precedent. Did the trial court correctly rule that Weaver's two convictions of rape, one for second degree rape and one for second degree rape of a child, based on one act, violated double jeopardy?

B. ARGUMENT.

1. **The court correctly ruled that Weaver's two convictions for the same act violate double jeopardy.**

In State v. Hughes, 166 Wn.2d 675, 686, 212 P.3d 558 (2009), the Supreme Court ruled that rape in the second degree and rape of a child in the second degree based on the same incident violate double jeopardy and one conviction must be vacated. This holding is consistent with a long line of cases, but the prosecution asks this Court to ignore those cases. See e.g., State

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[1] State v. Smith, 165 Wn.App. 296, 266 P.3d 296 (2011), rev. granted, 173 Wn.2d 1034 (2012).

v. Birgen, 33 Wn.App. 1, 651 P.2d 240 (1982) (collecting cases). Although the prosecution cross-appeals for the express purpose of proclaiming that these two offenses may be punished separately, it also admits it cannot escape the statutorily-based same criminal conduct doctrine, and therefore it does not actually ask the court to impose separate punishment for the two identical convictions.

Just as in Hughes, these alternative rape offenses "are the same in fact because they arose out of one act of sexual intercourse." Id. at 684. There are some facial differences in the language of the statues, as rape of a child involved the age of the child, and, under the prong of rape in the second degree at issue in Hughes, it required evidence of the victim's mental incapacity or physical helplessness, as the child victim in Hughes had cerebral palsy. Id. at 679, 684. The Hughes Court cautioned that the purpose of the statutes should not be construed too narrowly. Id. at 684.

Instead, the court focused on whether the legislature intended to preclude multiple punishments. Id. at 684-85. The offenses of rape and rape of a child are listed in the same portion of the criminal code, which is a crucial consideration in discerning the intent to punish the same act separately. Id. at 685. The

Hughes Court emphasized that in other cases, courts have "specifically recognized that the legislature did not intend one act of sexual intercourse" to require multiple punishments. Id. at 685-86 (citing Birgen, 33 Wn.App. at 6-7 (finding double jeopardy violation in rape and statutory rape convictions for same conduct); State v. Calle, 125 Wn.2d 769, 888 P.2d 155 (1995) (finding no double jeopardy violation in rape and incest convictions based on different placements in criminal code but citing Birgen favorably for offenses at issue in that case). Both offenses have the same seriousness level and subject Weaver to the identical sentencing range. CP 75; RCW 9.94A.515.

The prosecution insists that this Court should follow a Division Two decision issued after Hughes, which addressed double jeopardy in the context of the forcible compulsion prong of first degree rape and second degree rape of a child, Smith, 165 Wn.App. at 320-23. Resp. Brf. at 10-12. The Supreme Court has granted review in Smith and thereby undercut the Division Two opinion's precedential value. More importantly, Smith is contrary to long-established precedent.

In Birgen, and the Supreme Court cases on which it is based, the court specifically considered the relationship between

forcible rape and status-based rape. Birgen, 33 Wn.App. at 6-10 (holding rape in the third degree based on expressed non-consent and threatened harm same offense as statutory rape and citing: State v. Elswood, 15 Wash. 453, 454, 46 P. 727 (1896) (information alleging defendant "did make an assault . . . and feloniously did ravish, carnally know, and abuse" and also alleging age based rape charged a single crime); State v. Roller, 30 Wash. 692, 696-697, 71 P. 718 (1903) (when rape involves a child, force is presumed; rape by force and statutory rape are the same charge); State v. Adams, 41 Wash. 552, 83 P. 1108 (1906) (same as Roller); State v. Dye, 81 Wash. 388, 389-390, 142 P. 873 (1914) (acquittal on child rape precluded subsequent prosecution for forcible rape against child based on same act); State v. Allen, 128 Wash. 217, 219, 222 P. 502 (1924) (allegation of forcible rape against 13-year-old charges a single crime); State v. Powers, 152 Wash. 155, 160, 277 P. 377 (1929) (even after Legislature defined forcible rape and statutory rape in separate statutory sections, a single act in violation of both is one crime)). This collection of cases shows that the legislature has not intended to separately punish a person for committing a forcible rape and a statutory rape. On the contrary, forcible compulsion is considered to have occurred when

the rape is based only on the age of the child, because the premise of statutory rape is that the age difference alone constitutes impermissible forcible compulsion.

Birgen, Calle, and Hughes dictate the resolution of Weaver's double jeopardy violation. No case has ever upheld - under double jeopardy principles - convictions for rape and child rape based on a single act of intercourse. As the court ruled in Hughes**Error! Bookmark not defined.**, and as the trial court agreed in the case at bar, the legislature intended a single penalty for Weaver's two convictions based on offenses contained in the same portion of the criminal code and which rested on a single act of sexual intercourse against one person. The double jeopardy violation requires the vacation of Weaver's conviction for rape of a child in the second degree.

2. **The prosecution correctly explains that a double jeopardy error requires vacation of the offending conviction**.

The State appropriately concedes that the remedy for a double jeopardy violation is vacating the offending conviction. Resp. Brf. at 12. Either inadvertently, or because the prosecution encouraged the court to commit this error, RP 17, the trial court failed to vacate one conviction, even though it ruled that multiple

convictions violated double jeopardy, and that remedy should be ordered on remand.

3. **The failure to offer reliable evidence of prior convictions undermines the prosecution's assertions of Weaver's criminal history**.

The prosecution offers a limited explanation of its sparse attempt to prove Weaver had intervening misdemeanor convictions. It tries to shift blame to Weaver, implying that Weaver did not object to the sufficiency of computer worksheets the State used in lieu of a judgment and sentence, but Weaver made his objection plain. See RP 13. Furthermore, the State should have been fully aware of its burden of proof, given the mandate from the Supreme Court that required this resentencing hearing. State v. Weaver, 171 Wn.2d 256, 259-60, 251 P.3d 876 (2011).

The prosecution claims that In re Adolph, 170 Wn.2d 556, 243 P.3d 540 (2010), undermines prior cases discussing the adequacy of proof based on documents other than a judgment and sentence. Adolph may discuss this issue, but it does not alter the basic framework as set forth in State v. Ford, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999). See Adolph, 170 Wn.2d at 564.

In Adolph, the prosecution presented two different types of "official government records, based on information obtained directly

from the courts," both of which showed Adolph was convicted of a "DUI on December 30, 1991 in Lincoln County." Id. at 570.

Unlike Adolph, the prosecution presented a single computer printout of a worksheet for each alleged prior conviction. Exs. 6-9. The printouts were muddled by shorthand. Id. They use abbreviations and no one testified about what those abbreviations mean. Even in its Response Brief, the State only mentions one prior conviction that had any clarity to what underlying conviction it pertained, implicitly conceding that the remaining alleged convictions are far from transparent in their meaning. The court made no findings about what convictions the worksheets show.

Weaver's case was remanded from the Supreme Court under the express mandate that the prosecution must present reliable evidence of Weaver's criminal history as opposed to allegations from the prosecution. Weaver, 171 Wn.2d at 258. The prosecution's lackluster efforts to comply with this Supreme Court mandate show its disregard for the Court ruling, or its inability to meet its burden, as it offers little more than its own explanation of Weaver's intervening misdemeanor offenses. The computer worksheets may be certified, but they are not self-explanatory and do not demonstrate that Weaver was convicted of something other

than a traffic offense. Especially when the Supreme Court remands a case for the prosecution to present reliable evidence of misdemeanor offense, the prosecution should not shirk that responsibility by failing to present reliable evidence of specific criminal convictions entered against the accused. The prosecution failed to offer adequate proof of Weaver's criminal history and his offender score should be appropriately reduced and his case remanded for a lesser sentence.

4. **The jury's verdict for the aggravating factors did not support an exceptional sentence.**

Weaver's direct appeal has been pending since 2005. His case was stayed for a long time and remanded from the Supreme Court two times, and this resentencing hearing is a continuation of that direct appeal. The legal framework for exceptional sentences and aggravating factors based on jury verdict has changed in that time, and those changes apply to Weaver. See State v. Robinson, 171 Wn.2d 292, 303, 253 P.3d 84 (2011).

One change is that the Supreme Court overturned State v. Bashaw, 169 Wn.2d 133, 146, 234 P.3d 195 (2010), in State v. Nunez, _ Wn.2d _, _ P.3d _, 2012 WL 2044377 (2012), accordingly, the arguments Weaver offered in his opening brief

regarding the apparent flaw in the unanimity instruction are no longer endorsed by the Supreme Court. However, the special verdict forms remain confusing as the jury was not asked to explain which offense the aggravating factor applied, and as to rape of a child in the second degree, the aggravating factor of the victim as a child remains duplicative.

Weaver's original opening brief was filed in 2006, before State v. Pillatos, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007), was issued and before the enactment of the version of RCW 9.94A.537 which permitted a court to seek a jury finding of aggravating factors for a case that had been tried before its enactment. Laws 2007, ch. 205.

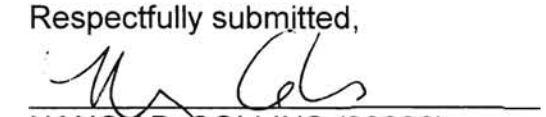
The changes wrought in the law in the course of Weaver's still-direct appeal should be applied to Weaver, both in the interest of justice and as the law requires. Flaws that appear in the jury's special verdict form when taking the double jeopardy violation into account undermine the court's exercise of authority to impose an exceptional minimum term.

C. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Weaver respectfully requests this Court remand his case for further proceedings.

DATED this 25th day of June 2012.

Respectfully submitted,



NANCY P. COLLINS (28806)
Washington Appellate Project (91052)
Attorneys for Appellant

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	)	
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Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 25TH DAY OF JUNE, 2012, I CAUSED THE ORIGINAL **REPLY AND CROSS-RESPONSE BRIEF** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] OLIVER WEAVER 268865 AIRWAY HEIGHTS CORRECTIONS CENTER PO BOX 2049 AIRWAY HEIGHTS, WA 99001	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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STATE OF WASHINGTON
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SIGNED IN SEATTLE, WASHINGTON THIS 25TH DAY OF JUNE, 2012.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710