70643-8

70643-8

NO. 70643-8-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

MANUEL JUAREZ-GARCIA,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Susan K. Cook, Judge

RESPONDENT'S BRIEF

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I. SUMMARY OF ARGUMENT

Manuel Juarez-Garcia repeatedly raped his thirteen year old step-daughter, E.L., over a period of two and a half months. As a result, she became pregnant. Where the defendant's rapes are what caused the pregnancy of the victim during the charged time period, the State is not required to prove which specific act of rape caused the impregnation of the child. However, even if the State were required to so prove, the evidence is sufficient here to affirm the finding of the aggravating factor.

The jury found that, as to the forcible rape charges, E.L. was under fifteen years of age. The jury did not enter any such finding as to the Rape of a Child charges. The "under fifteen" enhancement, when predicated on a forcible rape charge, does not violate double jeopardy with respect to a child rape charge.

II. ISSUES

1. Where multiple rapes of a child victim occur over a period of time, is the State required to prove which rape led to the impregnation of the child?

2. Where multiple rapes of a child victim occur over a period of time, where the child becomes pregnant as a result, and where it is proved beyond a reasonable doubt that only the defendant committed the rapes and impregnated the child, then is the evidence sufficient to sustain a finding of the aggravating factor of pregnancy of a child victim of rape?
3. Where the sentence enhancement based on the child's age enhances only the forcible rape charge, and not the rape charge based on the child's age, is double jeopardy implicated?
4. Where did the trial court imposed an exceptional sentence of forty years based on the aggravating factor of child pregnancy, and where the oral and hearing record are sufficient, should the matter be remanded for sentencing and/or to enter writing findings?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

The appellant, Manuel Juarez-Garcia was charged on November 30, 2012, with four counts of Rape of a Child in the

Second Degree. CP 1-3. An amended information was filed on February 14, 2013, charging him with Counts I, IV, and IX, Rape in the Second Degree with an enhancement that the victim was under the age of fifteen at the time of the offense, Counts II, V, VII, and X, Rape of a Child in the Second Degree, Counts III, VI, VIII, and XI Child Molestation in the Second Degree, and Count XII, Attempted Rape of a Child in the Second Degree. The amended information also provided notice of the aggravating factor that the offenses resulted in the pregnancy of a child victim of rape, pursuant to RCW 9.94A.535(i). CP 8–13. Juarez-Garcia was convicted after a jury trial of Counts I-VI and VIII-XII. CP 96-101, 103-107. The jury acquitted him of Count VII. CP 102. The jury also entered findings that, as to Counts I, IV, and IX, the victim of the rape was under fifteen at the time of the commission of the crime. CP 108-110. Finally, the jury entered findings that, as to Counts I, II, IV, V, IX, and X, the crime resulted in the pregnancy of a child victim of rape. CP 111-112.

On July 17, 2013, Juarez Garcia was sentenced to an exceptional sentence of 40 years on Counts I, IV, and IX[1], and standard range sentences of 116 months on Count VIII and 210

[1] His mandatory minimum sentence was twenty-five years based on the "under fifteen" enhancement found by the jury.

months on Count XII. CP 116-117; Supp. CP ___ (sub 92, Agreed Order Correcting Judgment and Sentence).

Juarez-Garcia filed timely notice of appeal on July 17, 2013. CP 130.

2. Statement of Facts

M.L. and Juarez-Garcia had lived together as married for a period of time. 5/29 RP 35[2]. M.L. had five children, the oldest of whom was the victim, E.L. 5/29 RP 33 – 34. Juarez-Garcia was the father of all but E.L. 5/29 RP 34-35. E.L. was born May 14, 1999, and had just turned 14 at the time of trial. 5/29 RP 60.

Juarez-Garcia, M.L., and the children moved from California to Washington on July 23, 2012. 5/29 RP 36, 42. Upon arrival, the family briefly lived with Juarez-Garcia's cousin and then, about five to seven days later, they moved to a company cabin at Sakuma Camp Two where M.L. and Juarez-Garcia could work in the fields. 5/29 RP 36-37, 42, 68; 5/30 RP 34. That fall E.L. commenced the seventh grade at Allen Elementary School. 5/29 RP 63-64, 68. School started on September 5, 2012. 5/31 RP 26. The family left Sakuma Camp

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[2] The State will refer to the verbatim report of proceedings by using the date of hearing followed by "RP" and the page number. The report of proceedings in this case are as follows:
5/29 RP ___, 5/30 RP ___, 5/31RP ___, 7/17 RP ___.

Two on October 15, 2012, and moved to an apartment in Sedro Woolley. 5/30 RP 34-35, 37, 43.

E.L. described five discrete instances of rape, molestation, and attempted rape. The first instance happened at the Sakuma cabin prior to September 5, 2012. 5/29 RP 76. E.L. had been sleeping in bed when she was awakened by the feel of Juarez-Garcia getting on top of her. 5/29 RP 78-80. Juarez-Garcia removed E.L.'s blanket and covered her mouth. Juarez-Garcia removed his own clothes (shorts and underwear) and then E.L.'s clothes (to her knees). 5/29 RP 80, 81. When Juarez-Garcia was on top of her, E.L. felt something "like soft and . . . hard." 5/29 RP 82-83. She felt this on the part of the body where she goes to the bathroom. 5/29 RP 83-84. She testified on cross that she did not remember whether Juarez-Garcia was inside or outside her vagina. 5/30 RP 48. Juarez-Garcia was moving up and down while he was on top of her. 5/29 RP 84, 107. He told E.L. to not tell her mother or he would hit her (the mother)[3]. 5/29 RP 84. At some point, Juarez-Garcia and E.L. heard E.L.'s siblings coming and Juarez-Garcia quickly got off her, pulled up his shorts, and went back to his own bed (all beds for the seven people in the family were in the one-room cabin). 5/29 RP 85.

[3] E.L. believed that he would hit her mother because she was aware of a prior instance in California where Juarez-Garcia had hit her mother. 5/29 RP 84-85.

E.L. described another instance where she and her siblings went with Juarez-Garcia to the Fred Meyer store to send money to her step-uncle. 5/29 RP 117-119. They all went into the store and then returned to the car but then the siblings went back into the store leaving E.L. with Juarez-Garcia in the car. 5/29 RP 119-120. Juarez-Garcia took off one of E.L.'s pant legs and her underwear. E.L. was lying down in the back. Juarez-Garcia took off his pants and underwear. 5/29 RP 122. Juarez-Garcia put one of E.L.'s legs on one side of him and the other leg on the other side. Juarez-Garcia was facing E.L. 5/29 RP 123. Then Juarez-Garcia came closer to E.L. and his body started moving. 5/29 RP 124. E.L.'s body hurt on the inside and the outside of the part where she goes to the bathroom. 5/29 RP 105-106, 124. Where Juarez-Garcia was touching her it felt spiky and hard. 5/29 RP 124-125. Juarez-Garcia told her to not tell her mom or he will hit or kill her (mom). 5/29 RP 125. After Juarez-Garcia was finished, he pulled up his pants and went to the store. 5/29 RP 126. E.L. pulled up her pants and cleaned her face because she was crying. 5/29 RP 126-127. As E.L. was pulling up her pants and when she got home, she noticed wet, white stuff on the inside of her underwear. 5/29 RP 127, 128.

E.L. described another time where Juarez-Garcia had said he needed E.L. to come with him to interpret as Juarez-Garcia was looking for a job. 5/29 RP 130. They, along with one of E.L.'s brothers, drove to a location which was basically a field. 5/29 RP 130-131. Juarez-Garcia and E.L. got out of the car and walked for a while. 5/29 RP 131, 132-133, 5/30 RP 20. After a while they turned around and started to walk back toward the car when Juarez-Garcia grabbed E.L.'s arm. 5/29 RP 133, 5/30 RP 21, 22. While he was standing behind her, he partially removed her pants and underwear. Juarez-Garcia removed his own pants and underwear. 5/30 RP 22-23. He stood behind her, grabbed her waist and moved back and forth, causing her body to hurt on the inside and the outside. 5/30 RP 23, 25-26. It felt "spiky" where he was hurting her. 5/30 RP 25. She couldn't see him, but could feel him moving behind her. He told her to be quiet because she was crying. 5/30 RP 24. He told her not to tell her mother or he would hit her or kill her (mom). 5/30 RP 24. When Juarez-Garcia was finished, he told E.L. to pull her pants up. 5/30 RP 26. After they went home, E.L. noticed "still more white stuff" on her clothes. 5/30 RP 27.

E.L. described another instance that happened when E.L. had a medical appointment. 5/29 RP 89. Juarez-Garcia picked up E.L.

and her brother from school. 5/29 RP 90. A school sign out sheet showed that Juarez-Garcia signed out E.L. and her brother early from school for a medical appointment on November 7, 2012. 5/29 RP 18; Supp. CP ___ (sub 57, copy of trial exhibit 31 reflected in filed copy of State's powerpoint presentation for closing argument). Juarez-Garcia drove E.L. and her brother to Sakuma Camp Two which was deserted for the season. 5/29 RP 94, 96-97. The brother got out of the car to play at the playground. 5/29 RP 94. Juarez-Garcia drove E.L. to another location at the camp, near the bathroom. 5/29 RP 96. After parking the car, Juarez-Garcia crawled from the front seat to the back seat where E.L. was. 5/29 RP 97, 99. Juarez-Garcia grabbed E.L.'s hand and pulled off her pants and underwear and then his own pants and underwear. 5/29 RP 100-101. As E.L. lay on the seat, Juarez-Garcia was kneeling on the seat at her legs. 5/29 RP 102, 104. Juarez-Garcia hit E.L. in the head and put her legs on top of his shoulder. 5/29 RP 105. E.L. then felt "the hard stuff" on the part of her body where she goes to the bathroom and said that it hurt. 5/29 RP 105-106. E.L. said that she felt some "spiky stuff" on the part that was hurting. 5/29 RP 107. She said that it hurt on the inside of her body. 5/29 RP 110. Juarez-Garcia's body was moving back and forth as E.L. was feeling that pain. 5/29 RP 107. E.L. noticed that Juarez-

Garcia's face was turning red as this was happening. 5/29 RP 107-108. After Juarez-Garcia was finished, the brother came back to the car and then they went to E.L.'s medical appointment. 5/29 RP 108-109. At some point after Juarez-Garcia was finished but before they left the camp, E.L. went to the camp bathroom and noticed wet, white stuff on her underwear. 5/29 RP 109-110. She didn't know what it was. 5/29 RP 110.

E.L. described another time when there had been a school conference attended during the day by herself and Juarez-Garcia. 5/29 RP 112. This would have been sometime between November 15 and November 21. 5/29 RP 55; 5/31 RP 25. After the conference was over, Juarez-Garcia was driving himself and E.L. home when he stopped off at the Food Pavilion in Sedro Woolley. 5/29 RP 113. Juarez-Garcia parked the car in the parking lot and then came to the back of the car where E.L. was sitting. 5/29 RP 114. He locked the door. E.L. was trying to get out but she couldn't. 5/29 RP 117. He started to try to take her pants off when another car drove in and parked next to them. 5/29 RP 114. Juarez-Garcia stopped what he was doing, returned to the driver's seat, and drove them home. 5/29 RP 115.

Other than the times that E.L. described at trial, there were no other times when Juarez-Garcia did these things to her. 5/30 RP 28. Nobody else had ever touched her in this way. All of the events described occurred in Washington and none occurred in California. 5/30 RP 30. E.L. had had her period before and after moving to Washington. 5/30 RP 65.

On November 27, 2012, E.L. told the school secretary, Gari Lillis, that she didn't feel well, complaining of a heachache. 5/30 RP 28, 56; 5/31 RP 19. At that time she was also concerned that she had not had her period and so might be pregnant. 5/30 RP 61. E.L. did not know how one got pregnant. 5/30 RP 57. She had learned from her school in California that not having her period might mean she was pregnant but she did not have the information and did not know how one actually got pregnant. 5/30 RP 61-62.

When E.L. went to Lillis, she realized that if the school decided to send her home, they may call Juarez-Garcia to come get her. 5/30 RP 28. She was scared that this may happen so she revealed to Lillis some part of what had been going on with Juarez-Garcia. 5/30 RP 28; 5/31 RP 23. Lillis told the school counselor who talked to E.L. and then called the police. 5/30 RP 28-29, 40, 90; 5/31 RP 23. Juarez-

Garcia was arrested that day. 5/29 RP 39, 40. The next day, E.L. was interviewed at the Child Advocacy Center. 5/30 RP 92, 130.

A few days after disclosing the abuse, E.L. was taken to the doctor where she was informed she was pregnant. 5/30 RP 29, 57. E.L. had an abortion a few days before Christmas. 5/30 RP 30, 57. With DNA obtained from the aborted fetus, E.L. and Juarez-Garcia, the Washington State Patrol Crime Lab determined that Juarez-Garcia was the father within a probability estimate of 99.99991 per cent. 5/30 RP 14, 78, 83-84, 134; 5/31 RP 53, 57.

Verdict, Judgment and Sentence

The jury entered the following verdicts:

Count I, Rape in the Second Degree:
Guilty as Charged
Count II, Rape of a Child in the Second Degree:
Guilty as Charged
Count III, Child Molestation in the Second Degree:
Guilty as Charged

Count IV, Rape in the Second Degree:
Guilty as Charged
Count V, Rape of a Child in the Second Degree:
Guilty as Charged
Count VI, Child Molestation in the Second Degree:
Guilty as Charged

Count VII, Rape of a Child in the Second Degree:
Not Guilty
Count VIII, Child Molestation in the Second Degree:
Guilty as Charged

Count IX, Rape in the Second Degree:
Guilty as Charged
Count X, Rape of a Child in the Second Degree:
Guilty as Charged
Count XI, Child Molestation in the Second Degree:
Guilty as Charged

Count XII, Attempted Rape of a Child in the Second Degree:
Guilty as Charged

CP 96-107.

The jury found that, as to Counts I, IV, and IX, the victim was under the age of 15 at the time of the commission of each of those crimes. CP 108-110.

The jury found that, in committing the crimes of Rape of a Child against E.L., Juarez-Garcia's commission of that crime resulted in the pregnancy of E.L. CP 111.

The jury found that, in committing the crimes of Rape in the Second Degree against E.L., Juarez-Garcia's commission of that crime resulted in the pregnancy of E.L. CP 112.

Pursuant to the jury verdict, the court entered a finding that the victim was under 15 years of age at the time of each of the forcible rapes in Counts I, IV, and IX. The court imposed standard range sentences on Counts VIII and XII. The court imposed exceptional sentences of 40 years on each of the forcible rape charges based on

the jury's finding that the child victim was made pregnant by the rape. The court merged the molestation charges and thus did not impose sentences on them. The court found the child rape charges to be the same criminal conduct as the forcible rape charges and therefore did not impose sentence on them. 7/17 RP 179-180; CP 116-117; Supp. CP ___ (sub 92, Agreed Order Correcting Judgment and Sentence).

IV. ARGUMENT

1. There is sufficient evidence to sustain the jury's finding of the aggravating factor of pregnancy of child victim of rape.

Juarez-Garcia argues on appeal that there is insufficient evidence to support the jury's finding of the aggravating factor of pregnancy of child victim of rape. He argues insufficiency based on the fact that (1) it is factually impossible for all three acts of sexual intercourse to have jointly caused one pregnancy or alternatively that (2) the State was required to prove, but failed to prove, specifically which act of intercourse caused the conception. Br. App. 10-12.

The State concedes factual impossibility for three separate acts of rape that occurred on different days to jointly cause pregnancy.

As to the argument that the State was required to prove, but failed to prove, which specific act of intercourse caused the pregnancy, the State responds that (1) where multiple rapes of a child victim occur over a period of time, the State is not required to prove which specific rape led to the impregnation of the child and (2) under the circumstances in the present case, there is sufficient evidence to sustain the finding as to all three rapes that Juarez-Garcia's rape of E.L. caused her to be pregnant.

A. Where multiple rapes of a child victim occur over a period of time, the State is not required to prove which specific rape led to the impregnation of the child.

There is no support for the appellant's argument that in cases of multiple acts of rape within a short time frame the State is required to prove which specific act of rape caused the pregnancy of the child victim.

RCW 9.94A.535(i) provides for the possibility of a sentence outside the standard range where a jury finds beyond a reasonable doubt that "[t]he offense resulted in the pregnancy of a child victim of rape."

The State has found no cases regarding this aggravator.

The Legislature added pregnancy of a child victim of rape as a statutory aggravating circumstance in 1997. *Former* RCW 9.94A.390; SHB 1383. SHB 1383 established a statutory basis to seek restitution for pregnant victims of Rape of a Child in addition to adding the aggravating factor of pregnancy of child victim of rape.

> "In construing a statute, the court's paramount duty is to ascertain and give expression to the intent of the Legislature." "To determine the intent of the Legislature, the court 'must look first to the language of the statute.'" "'Where statutory language is plain and unambiguous, a statute's meaning must be derived from the wording of the statute itself.'"

State ex rel. Royal v. Bd. of Yakima County Comm'rs, 123 Wn.2d 451, 457-458, 869 P.2d 56 (1994) (quoting *Service Employees Int'l Union, Local 6 v. Superintendent of Pub. Instruction*, 104 Wn.2d 344, 348, 705 P.2d 776 (1985)); *Condit v. Lewis Refrigeration Co.*, 101 Wn.2d 106, 110, 676 P.2d 466 (1984); *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wn.2d 441, 445, 536 P.2d 157 (1975); *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010).

However, if a statute is subject to more than one reasonable interpretation, then it will be construed according to legislative purpose and intent. *State ex rel. Royal v. Bd. Of Yakima county Comm'rs*, 123 Wn.2d at 459; *State v. Jacobs*, 154 Wn.2d 596, 600-601, 115 P.3d 281 (2005). Furthermore, if a literal reading of the

statute "would produce an absurd and unjust result and would clearly be inconsistent with the purposes and policies of the act," then the Court should depart from that literal reading and engage in statutory construction." *State v. McDougal*, 120 Wn.2d 334, 351, 841 P.2d 1232 (1992) (citing 2A N. Singer, *Statutory Construction* § 45.12 (4th ed. 1984)). "[I]n construing a statute, 'a reading that results in absurd results must be avoided because it will not be presumed that the legislature intended absurd results.'" *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (quoting *State v. Delgado*, 148 Wn.2d 723, 733 (2003) (Madsen, J., dissenting)); *see also McDougal*, 120 Wn.2d at 350 ("Unlikely, absurd or strained consequences resulting from literal reading should be avoided.").

Whenever there is a case of ongoing sexual abuse of a child, where the offenses occur in relative temporal proximity to each other, the State would never be able to prove which specific act led to the pregnancy. To construe this statute to require the State to prove which specific act out of many caused impregnation would lead to the absurd result that in cases with multiple rapes the court would be unable to impose an exceptional sentence for pregnancy whereas in a case with a single rape that led to pregnancy, the court would be able to do so. It would create a situation where the single offense

rapist is worse off than the multiple offense rapist. This cannot have been the Legislature's intention.

Here, E.L. testified that she had had no sexual relations with anyone other than Juarez-Garcia, she testified to every act of sexual intercourse that occurred with Juarez-Garcia, she testified that all of those acts occurred in the State of Washington, the State charged every act of sexual intercourse, and the jury rendered verdicts on all acts. Juarez-Garcia asserts in his briefing that "The State had no evidence that E.L.'s pregnancy was a result of the rapes alleged to have occurred in Washington, and no such evidence was presented to the jury." Br. App. at 12. This is clearly incorrect. E.L.'s testimony plus DNA evidence established that pregnancy could only have occurred in Washington, and only due to the charged rapes perpetrated by Juarez-Garcia.

Juarez-Garcia points out in his briefing that the jury was instructed to unanimously find, separately and distinctly, that each act of rape occurred. Juarez-Garcia then points out that the jury was instructed to determine whether "the crime" of second degree rape resulted in the pregnancy of the child victim and whether "the crime" of second degree rape of a child resulted in the pregnancy of the child victim. The jury answered "yes" to both questions. From here,

Juarez-Garcia concludes that "[t]herefore, the jury found that during each of the three acts of rape, E.L. became pregnant." However, this conclusion is not warranted. In comparing the special verdict forms for the enhancement of child under fifteen with the special verdict forms for the aggravator of pregnancy, one can see that with the "under fifteen" enhancement the jury did make that finding specific to each individual rape. However, in looking at the "pregnancy" aggravator, the jury concluded that the defendant impregnated his child victim of rape, without making that same specificity as to a particular count, or act, of rape. What the jury was instructed, and what they found, was that (A) Juarez-Garcia committed the act of rape against E.L. three times and (b) Juarez-Garcia made E.L. pregnant by raping her.

Juarez-Garcia provides no authority for his position that the State is required to prove which specific act of rape impregnated the child victim other than argument that the jury instructions somehow compel this result. The instructions, however, instruct the jury to find whether rape occurred on four separate occasions. Once the determination is made that rape occurred, regardless of how many times it occurred, then the jury was instructed to determine whether pregnancy resulted from Juarez-Garcia's rape of E.L.

Where, as here, there is no possibility that there was any other act of sexual intercourse, other than those alleged and proved by the State and found beyond a reasonable doubt by the jury that could have caused the pregnancy, then the aggravator has been proved.

B. Where multiple rapes of a child victim occur over a period of time, where the child becomes pregnant as a result, and where it is proved beyond a reasonable doubt that only the defendant committed the rapes and impregnated the child, then the evidence is sufficient to sustain a finding of the aggravating factor of pregnancy of a child victim of rape.

The "jury's special verdict finding the existence of an aggravating circumstance [is reviewed] under the sufficiency of the evidence standard." *State v. Chanthabouly*, 164 Wn. App. 104, 142, 262 P.3d 144 (2011), *rev. denied*, 173 Wn.2d 1018 (2012).

> Under this standard, we review the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the presence of the aggravating circumstance beyond a reasonable doubt.

Chanthabouly, 164 Wn. App. at 143 (citing *State v. Stubbs*, 170 Wn.2d 117, 123, 240 P.3d 143 (2010) and *State v. Yates*, 161 Wn.2d 714, 752, 168 P.3d 359 (2007)).

RCW 9.94A.535(i) provides for the possibility of a sentence outside the standard range where a jury finds beyond a reasonable

doubt that "[t]he offense resulted in the pregnancy of a child victim of rape."

Here, the State proved beyond a reasonable doubt that E.L. was not pregnant when she was first present in the State of Washington. E.L. had had her period in California and had also had her period in the State of Washington before she became pregnant. E.L. testified that only Juarez-Garcia had had sex with her and the first time that that happened was in the State of Washington. The State proved that the only possible sexual encounter that could lead to pregnancy occurred with Juarez-Garcia in the State of Washington. E.L. testified to every sexual act that occurred between her and Juarez-Garcia. The State charged all of those acts and the jury found those acts to be proved beyond a reasonable doubt.

The jury found that three acts of sexual intercourse occurred between E.L. and Juarez-Garcia. Certainly, one of those acts led to E.L.'s pregnancy.

The question on review, if this Court determines that the State is required to tie the pregnancy to a particular act, is whether, as to each of the three acts, or any one of the three acts, there is sufficient evidence for any rational juror to have found that that act caused the pregnancy. Where the only possibility is that Juarez-Garcia

impregnated the child victim during any one of the three acts of rape, then as to each of the three acts any rational juror could have found that to be the act that caused the pregnancy.

C. The trial court did not err in imposing an exceptional sentence of forty years on the three forcible rape convictions based on the aggravating factor of pregnancy of child victim and remand is not required to enter written findings and conclusions.

Although the trial court did not enter written findings and conclusions, and although the trial court misspoke in conflating the jury finding on the sentence enhancement (victim under fifteen) with the jury finding on the aggravating circumstance (pregnancy), the record is clear that the trial court intended to impose an exceptional sentence on the forcible rape charges based on the pregnancy of the child victim.

"[W]here 'the trial court's oral opinion and the hearing record are sufficiently comprehensive and clear that written facts would be a mere formality,' the trial court's failure to enter mandatory written findings and conclusions is harmless." *State v. Bluehorse*, 159 Wn. App. 410, 422-423, 248 P.3d 537 (2011) (emphasis added, citations omitted).

Here, the prosecutor filed a written sentencing brief. Supp. CP ___ (sub 80, State's Sentencing Brief). In the brief, the State noted that "[e]ach of the second degree rapes have a minimum sentence of 300 months or 25 years, per RCW 9.94A.507(3)(c)(ii). . . A single count of rape in the second degree by forcible compulsion, with a victim under fifteen results in a minimum of 25 years." Supp. CP ___ (Sub 80, State's Sentencing Brief at p. 7). The State then requested a sentence of 40 years based on the victim's pregnancy. Supp. CP ___ (Sub 80, State's Sentencing Brief at p. 8). At the sentencing hearing, the prosecutor misspoke and referred to the enhanced sentence as being an exceptional sentence, although he cited to the correct enhancement statute (RCW 9.94A.507). The prosecutor correctly advised the court that pursuant to RCW 9.94A.507, the minimum sentence would be twenty five years. The prosecutor went on to recommend an exceptional sentence of forty years, whether by means of one forty-year sentence on one of the forcible rapes, or by running standard range sentences consecutively on the forcible rapes. 7/17 RP 173.

The trial court adopted the State's recommendation to impose a forty year exceptional sentence. The court referred to the appellant's having taken advantage of a 13 year old child, using force

on that child, "and to top it off, you made her pregnant." The court imposed forty years on each of the forcible rape convictions. 7/17 RP 180. The trial court then stated:

> I have imposed an exceptional sentence in this case based on the jury's finding that the child victim was under the age of 15 as to all three rape counts and that the charge in Count 4 resulted in her pregnancy.

7/17 RP 181.

The written Judgment and Sentence indicates that the exceptional sentence is based on the aggravating factors as found by the jury. CP 116.

Taken as a whole, the trial court clearly intended to impose an exceptional sentence on all three forcible rape charges based on the aggravating factor of pregnancy of child victim of rape. The failure to enter written findings and conclusions is harmless and remand is not required.

2. Double jeopardy is not violated where the defendant is convicted of forcible rape with an age-based sentence enhancement and also of rape of a child.

A. Where the sentence enhancement based on the child's age enhances only the forcible rape charge, and not the rape charge based on the child's age, double jeopardy is not implicated.

For three of the instances of sexual misconduct with E.L., Juarez-Garcia was convicted of three counts of Rape of a Child and three counts of Rape in the Second Degree. The second degree rapes were enhanced by the jury's finding that E.L. was under fifteen years of age. The "under fifteen" enhancement was not charged with respect to the rape of a child counts and the jury made no such finding. Juarez-Garcia was not sentenced at all on the child rape counts. Juarez-Garcia now argues that the "under fifteen" enhancement should be vacated as to the forcible rape counts because its imposition constitutes double jeopardy as the child rape counts.

> An offender who is not a persistent offender shall be sentenced under this section if the offender . . . [i]s convicted of . . . rape in the second degree . . . .Upon a finding that the offender is subject to sentencing under this section, the court shall impose a sentence to a maximum term and a minimum term. . . If the offense that caused the offender to be sentenced under this section was . . . rape in the second degree . . . and there has been a finding that the victim was under the age of fifteen at the time of the offense under RCW 9.94A.837, the minimum term shall be either the maximum of the standard sentence range for the offense or twenty-five years, whoever is greater.

RCW 9.94A.507(1), (3)(a), (3)(c)(ii).

"[D]ouble jeopardy provisions bar multiple punishments for the same offense." *State v. Kelley*, 168 Wn.2d 72, 77, 226 P.3d 773 (2010). However, "[i]f the legislature intends to impose multiple punishments, their imposition does not violate the double jeopardy clause." *Id.*

Washington courts have long held that sentence enhancements do not implicate double jeopardy concerns because they are not separate sentences or separate substantive crimes. *State v. Eaton*, 143 Wn. App. 155, 160, 177 P.3d 157 (2008), *aff'd*, 168 Wn.2d 476, 229 P.3d 704 (2010). "[B]ecause sentencing enhancements are not 'offenses,' double jeopardy is not implicated." *State v. Simms*, 151 Wn. App. 677, 690, 214 P.3d 919 (2009), *aff'd*, 171 Wn.2d 244, 250 P.3d 919 (2011) (citing *State v. Claborn*, 95 Wn.2d 629, 628 P.2d 467 (1981)); *State v. Gaworski*, 138 Wn. App. 141, 147, 156 P.3d 288 (2007) ("Enhancement statutes increase the punishment for the underlying crime, but they do not elevate the degree of a crime or create a separate criminal offense.").

The Supreme Court in *Kelley, supra,* and *State v. Aguirre*, 168 Wn.2d 350, 229 P.3d 669 (2010), addressed the issue of whether the

Apprendi[4] and *Blakely*[5] decisions changed this analysis, and held that they did not.

> A legislature can enact statutes imposing, in a single proceeding, cumulative punishments for the same conduct. "With respect to cumulative sentences imposed in a single trial, the *Double Jeopardy Clause* does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended."

Kelley, 168 Wn.2d at 77 (*citing Missouri v. Hunter*, 459 U.S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983)).

The Court in *State v. Rice*, 159 Wn. App. 545, 569, 246 P.3d 234 (2011), specifically held that the "under fifteen" enhancement did not violate double jeopardy as a second punishment for the same offense. In so holding, the court recognized that there may have been a Sixth Amendment issue had the defendant not waived her right to a jury trial and stipulated to the enhancement. *Rice*, 159 Wn. App. at 570 FN 16.

The United States Supreme Court in *Alleyne v. United States*, ___ U.S. ___, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), addressed the issue of whether an enhancement that increased the mandatory minimum of a sentence implicated Sixth Amendment concerns and required a jury finding in line with *Apprendi, supra,* and *Blakely,*

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[4] *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).
[5] *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

supra. The Court overruled its prior decision in *Harris v. United States*, 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002), in answering that question affirmatively. The Court held that *Harris* was inconsistent with *Apprendi* "and with the original meaning of the Sixth Amendment. Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Alleyne*, 133 S.Ct. at 2155. What *Alleyne* did not address was whether a sentencing enhancement which constituted an "element" of a "crime" for purposes of the Sixth Amendment also constituted an "element" of a "crime" for purposes of the Fifth Amendment's double jeopardy clause.

Where a defendant is convicted of forcible rape, the legislature clearly intended to impose additional punishment when the victim of the forcible rape is under fifteen. The statute itself specifies that the enhancement "shall" be filed in cases of Rape in the Second Degree.[6] No doubt recognizing this fact, Juarez-Garcia seeks to argue that the enhancement is double jeopardy not as to the

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[6] "In a prosecution for . . . rape in the second degree . . . the prosecuting attorney shall file a special allegation that the victim of the offense was under fifteen years of age at the time of the offense," when there is sufficient evidence to do so and it is unlikely to interfere with the ability to obtain a conviction. RCW 9.94A.837. *See State v. Rice*, 159 Wn. App. 545, 562, 246 P.3d 234 (2011) ("Despite the use of the words 'shall' and 'when'/'whenever,' under these three statutes, a prosecutor retains discretion to file or not file the special allegations.")

predicate offense, but as to another offense. The fallacy in this argument is that the enhancement is not an "offense" by itself.

Assuming *arguendo* that the same analysis applies in a Fifth Amendment context regarding whether an enhancement constitutes an "element" of a "crime," Juarez-Garcia nonetheless is not entitled to the relief that he seeks. Juarez-Garcia seeks to remove the enhancement from the mooring of its predicate offense and treat it as though it were a separate offense. However, it is clear from *Alleyne*, that the enhancement is not a crime in and of itself, but is to be treated as an element of the predicate crime to which it is attached. *See Alleyne*, 133 S.Ct. at 2157 ("any fact that increased the prescribed statutory maximum sentence must be an 'element' of the offense to be found by the jury") and *Alleyne*, 133 S.Ct. at 2158 ("*Apprendi*'s definition of 'elements' necessarily includes not only facts that increase the ceiling, but also those that increase the floor").

The question then becomes whether Rape in the Second Degree, with the added element of "under 15", creates a double jeopardy problem with respect to the Rape of a Child in the Second Degree conviction.

Convictions for the offenses of Rape in the Second Degree and Rape of a Child in the Second Degree arising out of the same

conduct do not violate double jeopardy. *State v. Smith*, 177 Wn.2d 533, 303 P.3d 1047 (2013). Even if the "under 15" enhancement constituted an additional element of the crime of Rape in the Second Degree for double jeopardy purposes, that additional element does not transform the second degree rape charge into the "same offense" as the child rape charge. The additional element would not change the nature of the rape charge into a "status" offense; force would still need to be proved.

The "under fifteen" enhancement is not an offense or a substantive crime and therefore does not implicate double jeopardy concerns with respect to a charged crime that is not its predicate offense. And, even if it is an "element" of Rape in the Second Degree for purposes of the Fifth Amendment, it does not transform the Rape in the Second Degree into a status offense and therefore does no implicate double jeopardy concerns with respect to the Rape of a Child. The "under fifteen" enhancement does not constitute "multiple punishments" for the Rape of a Child convictions.

V. CONCLUSION

For the reasons stated above, this Court should affirm the jury's special verdicts and the trial court's sentence.

DATED this 10 day of June, 2014.

SKAGIT COUNTY PROSECUTING ATTORNEY

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DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [X]United States Postal Service; [ ]ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Kathleen A. Shea, addressed as Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101 . I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 10th day of June, 2014.

Karen R Wallace
KAREN R. WALLACE, DECLARANT