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Court of Appeals
Division I
State of Washington

SUPREME COURT NO. _____

NO. 74815-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ARTHUR BENSON,

Petitioner.

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

The Honorable Ellen J. Fair, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Arthur Benson asks this Court to grant review of the court of appeals' unpublished decision in State v. Benson, No. 74815-7-I, filed July 17, 2017 (attached as an appendix).

B. ISSUE PRESENTED FOR REVIEW

Should this Court grant review under RAP 13.4(b)(1), (b)(3) and (b)(4) to resolve the current conflict between this Court's decisions in State v. Kier, 164 Wn.2d 798, 194 P.3d 212 (2008); State v. Mutch, 171 Wn.2d 646, 254 P.3d 803 (2011), and State v. Peña Fuentes, 179 Wn.2d 808, 318 P.3d 257 (2014)?

C. STATEMENT OF THE CASE

Benson was charged with six counts of child rape and child molestation of sisters A.J.F. and A.L.F.[1] CP 93-94. This included two counts of first degree child molestation against A.J.F. (counts 1-2), one count of first degree child rape against A.L.F. (count 3), and three counts of first degree child molestation against A.L.F. (counts 4-6). CP 93-94. At issue in this case are the charges involving A.L.F.

A.L.F. testified to more incidents than charges. She testified that one night while she, her sister, and Benson were watching television, Benson

[1] In his opening brief, Benson used pseudonyms for the girls because their initials are so similar: referring to A.J.F. as Alice and A.L.F. as Andrea. See Br. of Appellant, 2 n.1. The court of appeals' decision, however, used the girls' initials, so this petition adopts the naming convention used by the court of appeals.

suggested a game of Truth or Dare. 1RP 89-90. A.L.F. said she dared Benson to show them his penis, and "first he was hesitant about it, but then he did it eventually." 1RP 89-90.

A.L.F. testified they played Truth or Dare again after that, which she said led to her "pok[ing]" Benson's penis with her finger and "gripping it" another time. 1RP 91-93. A.L.F. could not recall how many times this happened, but testified it was more than once. 1RP 93. A.L.F. also testified that one time during the game, Benson dared her to put his penis in her mouth and count to 100 in her head. 1RP 93. A.L.F. said that during this incident, Benson's penis was soft at first but then became erect. 1RP 103.

A.L.F. testified the next incident she remembered was undressing in her mother's room while Benson showered. 1RP 94. She said Benson then came in the room, laid a towel down on the bed while she got on all fours, and "had his penis and rubbed it against my vagina" from behind. 1RP 94. She claimed this was Benson's idea and that it happened "several times," but was not sure as to an exact number. 1RP 95-96.

A.L.F. also testified one time Benson laid on the bed with her on top of him, "and then he had held his penis in his hand and was rubbing it like more inside of my clit area." 1RP 96. Though A.L.F. emphasized this was "[m]ore inside," she said his penis did not go inside her body. 1RP 96. A.L.F. testified this happened only once. 1RP 97. The final incident A.L.F.

testified to was when she asked to join Benson in the shower. 1RP 132-33. She said he washed her breasts and she washed his penis. 1RP 97.

The jury found Benson guilty as charged. CP 57-62. The court of appeals affirmed Benson's convictions, but remanded for the trial court to strike an unlawful community custody condition. Opinion, at 10. The court of appeals' decision is discussed in more detail below.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

THIS COURT'S GUIDANCE IS NECESSARY AS TO WHETHER THE "RARE CIRCUMSTANCE" OF NO DOUBLE JEOPARDY VIOLATION IN MUTCH HAS NOW BECOME THE RULE RATHER THAN THE EXCEPTION.

1. Failing to instruct the jury that it must find separate and distinct acts of child rape and child molestation creates a potential double jeopardy violation.

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) (citing U.S. CONST. amend. V; CONST. art. I, § 9). A double jeopardy claim is reviewed de novo and may be raised for the first time on appeal. Mutch, 171 Wn.2d at 661-62.

Jury instructions "'must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror.'" Borsheim, 140 Wn. App. at 366 (quoting State v. Watkins, 136 Wn.

App. 240, 241, 148 P.3d 1112 (2006)). The reviewing court considers insufficient instructions "in light of the full record" to determine if they "actually effected a double jeopardy error." Mutch, 171 Wn.2d at 664. A double jeopardy violation occurs if it is not "manifestly apparent to the jury that each count represented a separate act." Id. at 665-66.

The Borsheim court held an instruction that the jury must find a "separate and distinct" act for each count is required when multiple counts of sexual abuse are alleged to have occurred within the same charging period. 140 Wn. App. at 367-68. Without this instruction, the accused is exposed to multiple punishments for the same offense, violating his right to be free from double jeopardy. Id. at 364, 366-67.

In Mutch, the State charged five counts of rape, all within the same charging period. 171 Wn.2d at 662. There was sufficient evidence of five separate acts of rape, but the jury was not instructed that each count must arise from a separate and distinct act in order to convict. Id. at 662-63. The possibility that the jury convicted Mutch on all five counts based on a single criminal act created a potential double jeopardy problem. Id. at 663.

However, this Court held the case "presented a rare circumstance where, despite deficient jury instructions," it was nevertheless manifestly apparent the jury based each conviction on a separate and distinct act. Id. at 665 (emphasis added). Specifically: (1) the victim, J.L., testified to precisely

the same number of rape episodes (five) as there were counts charged and to convict instructions; (2) the defense was consent rather than denial; (3) Mutch admitted to a detective that he engaged in multiple sex acts with J.L.; and (4) during closing, the prosecutor discussed each of the five alleged acts individually and defense counsel did not challenge the number of episodes, but merely argued consent. Id. The court concluded, "[i]n light of all of this, we find it was manifestly apparent to the jury that each count represented a separate act," and so a double jeopardy violation did not follow from the deficient jury instructions. Id. at 665-66.

In State v. Land, the court of appeals considered whether it violated double jeopardy where the jury was not instructed it must find separate and distinct acts of child rape and child molestation. 172 Wn. App. 593, 598-603, 295 P.3d 782 (2013). Land was convicted of one count of child rape and one count of child molestation, both involving the same child and the same charging period. Id. at 597-98. Land argued these convictions violated double jeopardy because they might have been based on the same act of oral-genital intercourse. Id. at 598-99. The State countered that the jury did not have to find separate and distinct acts because child molestation is not the "same offense" as child rape for double jeopardy purposes. Id. at 599.

Two offenses are not the same when "'there is an element in each offense which is not included in the other, and proof of one offense would

not necessarily also prove the other.'" Id. (quoting State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983)). Child rape and child molestation do not have identical elements. Id. Child molestation requires proof of "sexual contact," which means "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.089(1); RCW 9A.44.010(2). Child rape requires proof of "sexual intercourse," which includes "any penetration, however slight," as well as "any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another." RCW 9A.44.079(1); RCW 9A.44.010(1)(a), .010(1)(c) (emphasis added).

The Land court explained that where the evidence of sexual intercourse supporting a count of child rape is evidence of penetration, "rape is not the same offense as child molestation." 172 Wn. App. at 600. The touching of sexual parts for sexual gratification constitutes molestation until the point of actual penetration. Id. At that point, the act of penetration alone supports a separately punishable conviction for child rape. Id.

However, where the evidence of sexual intercourse is evidence of oral-genital contact, "that single act of sexual intercourse, if done for sexual gratification, is both the offense of molestation and the offense of rape." Id. In such a circumstance, the two offenses "are the same in fact and in law because all the elements of the rape as proved are included in molestation,

and the evidence required to support the conviction for molestation also necessarily proves the rape." Id. Because of this potential double jeopardy problem, the court considered Land's claim that the jury instructions exposed him to multiple punishments for the same offense. Id.

Land's jury was not instructed that the two counts involving the same child, S.H., required proof of separate and distinct acts. Id. at 601. However, S.H. did not testify Land's mouth came in contact with her sex organs. Id. The only evidence of rape was S.H.'s testimony that Land penetrated her vagina with his finger. Id. at 602. Consistent with this testimony, the prosecutor argued in closing that S.H.'s testimony about penetration was the "crucial element proving rape." Id. The prosecutor also emphasized S.H.'s testimony about sexual contact proved molestation and her testimony about penetration proved rape. Id. Given all these factors, the Land court concluded the lack of a separate and distinct instruction did not violate Land's right to be free from double jeopardy. Id. at 603.

2. It is not manifestly apparent from the record that the jury based the child rape and child molestation convictions on separate and distinct acts, violating Benson's right to be free from double jeopardy.

This case presents the same issue as Land: Benson was convicted of one count of child rape and three counts of child molestation as to A.L.F. within the same charging period. Like Land, Benson's jury was not

instructed that the child rape and child molestation counts must be based on separate and distinct acts. CP 74-77. Unlike Land, however, A.L.F. testified to oral-genital contact. Specifically, she said she put Benson's penis in her mouth and counted to 100 during Truth or Dare. 1RP 93. Because oral-genital contact constitutes both rape and molestation, this creates a potential double jeopardy problem.

Benson's jury was instructed it must find separate and distinct acts of child molestation as to A.L.F. CP 75-77. For instance, count 4 specified the jury must find Benson had sexual contact with A.L.F. "in an act separate and distinct from Counts V and VI." CP 75. But the jury was not instructed the act of child rape needed to be separate and distinct from the acts of child molestation. CP 74 (child rape to-convict instruction stating only that the jury must find "the defendant had sexual intercourse with [A.L.F.]").

Given this omission, the logical conclusion would be that the jury did not have to find separate and distinct acts of rape and molestation. This is similar to the canon of statutory construction that "to express one thing in a statute implies the exclusion of the other. Omissions are deemed to be exclusions." In re Det. of Williams, 147 Wn.2d 476, 491, 55 P.3d 597 (2002) (citation omitted).

The jury received the complete statutory definition of sexual contact. CP 78. The jury did not, however, receive the complete statutory definition

of sexual intercourse. Instead the instruction omitted penetration, specifying only that sexual intercourse "means 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 of opposite sex." CP 79; RCW 9A.44.010(1)(c). The alleged oral-genital contact met the definition, as given, of both sexual intercourse and sexual contact, and the evidence required to support molestation also necessarily proved rape.

Benson's case is distinguishable from Mutch. For instance, Benson's defense was denial, not consent. Benson denied ever having sexual contact or sexual intercourse with A.L.F. and A.J.F. See 2RP 233-63 (defense closing argument). Also unlike Mutch, A.L.F. did not testify to the same number of incidents as were charged. She testified to one incident of oral-genital contact, which the State argued in closing corresponded to the rape charge. 2RP 227-28. However, A.L.F. testified to more than three instances of sexual contact: more than once touching Benson's penis with her hand during Truth or Dare; several times where she was on all fours and Benson rubbed his penis against her vagina from behind; once where A.L.F. was on top of Benson and he rubbed his penis against her clitoral area; and once when they showered together. 1RP 91-97. In Mutch, there were five alleged incidents, five charges, and five convictions. 171 Wn.2d at 651-52. Not so in Benson's case.

Furthermore, the State used a Petrich[2] instruction instead of electing specific acts of child molestation. CP 80. The State pointed to three types of alleged conduct that would support child molestation. 2RP 229-31. But the State did not elect specific acts, instead arguing, "But you have how many? Seven, 8, maybe 12 [acts], to choose from, and that's where that [Petrich] instruction comes into play." RP 231. The State acknowledged "there's a lot more than three child molestations that happened involving [A.L.F.]" RP 231. The Petrich instruction allowed the State to simply point to all the acts of child molestation, without specifying which three the jury should rely on to convict. 2RP 229-31.

Furthermore, the jury did not specify which acts it relied on to convict for molestation. See State v. Kier, 164 Wn.2d 798, 814, 194 P.3d 212 (2008) (holding a verdict is ambiguous are multiple acts were alleged but the jury does not specify which act it relied on to convict). This Court has no way of knowing or guaranteeing that the jury did not rely on the same act of oral-genital contact to convict for both rape and molestation. This case is not the "rare circumstance" where the jury plainly based each conviction on a separate and distinct act. Mutch, 171 Wn.2d at 665.

[2] State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984), overruled in part by State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988).

The prosecutor's closing argument also did not protect against double jeopardy. The prosecutor emphasized the "mouth on penis" incident "is rape of a child in the first degree," based on the given definition of sexual intercourse. 2RP 228. The prosecutor then went on to discuss the multiple acts of sexual contact that could support child molestation convictions. 2RP 229-31. With regard to the incident where A.L.F. was on top of Benson on the bed, the prosecutor argued, "it's not rape because there was no penetration," reiterating, "that's sexual contact, but it's short of penetration, so that would be child molestation." 2RP 230-31. However, as discussed, the jury was never instructed on penetration. CP 78-79. The distinction between penetration and contact, then, did nothing to clarify the kind of proof necessary for child rape versus child molestation.

Moreover, it is the judge's "province alone to instruct the jury on relevant legal standards." State v. Clausing, 147 Wn.2d 620, 628, 56 P.3d 550 (2002). Benson's jury was accordingly instructed to "disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." CP 65. The prosecutor's argument about penetration was not supported by the law in the jury instructions. Courts presume the jury follows the court's instructions. State v. Ervin, 158 Wn.2d 746, 756, 147 P.3d 567 (2006). This Court must therefore presume the jury disregarded the prosecutor's distinction between penetration and contact.

Kier, 164 Wn.2d at 813 (holding prosecutor's election of a specific act in closing was insufficient to cure double jeopardy violation because jurors are told to rely on evidence and instructions rather than counsel's arguments).

The record also suggests there was an instance of penetration the State pointed to as sufficient for molestation. RP 230. A.L.F. testified when she was on top of Benson on the bed, he rubbed his penis "inside of my clit area." 1RP 96. Though she said his penis did not go inside her body, she said the rubbing was "[m]ore inside." 1RP 96. Washington case law is clear that "penetration" of the female includes penetration of the labia or vulva. State v. Delgado, 109 Wn. App. 61, 65-66, 33 P.3d 753 (2001), rev'd on other grounds, 148 Wn.2d 723, 63 P.3d 792 (2003). The bottom line is the jury would be rightfully confused by the prosecutor's closing argument and could have easily relied on the same acts to convict for rape and molestation.

Finally, Benson's 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 68. The Borsheim court held this instruction is insufficient to guard against double jeopardy because it fails to adequately inform the jury that each crime requires proof of a different act. 140 Wn. App. at 367, 369-70; see also Mutch, 171 Wn.2d at 663 (agreeing with Borsheim).

This Court can presume the jury found three separate and distinct acts of child molestation because the jury was so instructed. But the jury was not instructed that these acts must also be separate and distinct from the child rape. Given the record as a whole, it is not manifestly apparent that each count as to A.L.F. was based on a separate act, exposing Benson to multiple punishments for a single offense and violating his right to be free from double jeopardy.

3. The court of appeals' decision demonstrates the current conflict between this Court's decisions in *Kier*, *Mutch*, and *Peña Fuentes*.

This Court held in Kier that a prosecutor's election of a specific act in closing, without more, does not cure a double jeopardy violation. 164 Wn.2d at 813-14. There, the State argued Kier's second degree assault and first degree robbery convictions did not merge because they were committed against two different victims—Hudson and Ellison. Id. at 808. Noting the case before it was "somewhat analogous to a multiple acts case," this Court indicated it was at best unclear whether the jury believed Kier committed the crimes against the same or different victims. Id. at 811. Because the evidence and instructions allowed the jury to consider a single person as the victim of both the robbery and assault, the verdict was ambiguous. Id. at 814. The rule of lenity therefore required the assault conviction to merge into the robbery conviction. Id.

The State asserted in Kier that the possibility the jury could have considered Ellison to be the victim of the robbery "was eliminated because the prosecutor made a 'clear election' of which act supported each charge, as is allowed in a multiple acts case." Id. at 813. Specifically, in closing, the prosecutor identified Hudson as the victim of the robbery and Ellison as the victim of the assault. Id.

But the Kier court refused to consider the State's closing argument in isolation. Id. The evidence suggested both men were victims of the robbery. Id. The jury instructions did not specify Hudson alone was to be considered the robbery victim. Id. Further, "[w]hile the prosecutor at the close of the trial attempted to require this finding, the jury was properly instructed to base its verdict on the evidence and instructions and not on the arguments of counsel." Id. This Court therefore concluded the evidence and instructions allowed the jury to consider either man to be a victim of the robbery and assault, "notwithstanding the State's closing argument." Id. at 814.

As discussed, in Mutch, this Court found no double jeopardy violation despite deficient jury instructions. 171 Wn.2d at 665. This Court emphasized Mutch presented a "rare circumstance" where it was manifestly apparent the jury based each conviction on a separate and distinct act of child rape. Id.

Despite recognizing Mutch was a rare circumstance, this Court again held deficient jury instructions did not actually effect a double jeopardy violation in Peña Fuentes, 179 Wn.2d at 825. There, Peña Fuentes was convicted of one count of first degree child rape and two counts of first degree child molestation. Id. at 824. The jury was not instructed that child rape and child molestation must be based on separate and distinct acts, presenting a potential double jeopardy problem.[3] Id.

The Peña Fuentes court nevertheless held it was "manifestly apparent that the convictions were based on separate acts because the prosecution made a point to clearly distinguish between the acts that would constitute rape of a child and those that would constitute child molestation," seemingly in conflict with the Kier holding. Id. at 825. Specifically, the prosecutor "divided Peña Fuentes's behaviors into two categories—the acts involving penetration, which constituted rape, and the other inappropriate acts, which constituted molestation." Id. The court further noted Peña Fuentes "did not challenge the number of incidents or whether they overlapped, but rather he chose the strategy of attacking [the alleged victim's] credibility." Id.

[3] Though this Court did not explicitly apply or agree with the Land holding, it recognized the two elements of sexual contact for both offenses "are substantially identical." Peña Fuentes, 179 Wn.2d at 824 n.3.

In rejecting Benson's double jeopardy challenge, the court of appeals relied primarily on Peña Fuentes, reasoning "the State here clearly identified the single incident of oral-genital contact during the Truth or Dare game as the incident supporting the single count of rape of a child." Opinion, at 7. The court believed "[t]he State drew a clear distinction between the alleged counts of rape of a child and child molestation, similar to the prosecutor's closing remarks in Peña Fuentes." Opinion, at 7. The court of appeals did not acknowledge, though, that the prosecutor pointed to penetration as the distinction between rape and molestation, which, in this case, was not accurate because the jury was not instructed on penetration. 2RP 230-31.

The court further claimed "the State clearly elected the acts on which it relied for each count." Opinion, at 9. But, again, this conclusion was belied by the record, where the prosecutor simply pointed to certain types of conduct that could constitute molestation and declined to elect any specific acts: "You do have to decide which ones you're saying you're convinced of beyond a reasonable doubt." RP 231.

Finally, the court of appeals reasoned no double jeopardy violation occurred because the "jury received separate to-convict instructions, the evidence presented at trial did not confuse or blur the single incident of sexual intercourse by oral-genital contact with other acts of sexual contact,

and Benson focused on credibility of the victim rather than challenge the number of acts or whether the acts overlapped." Opinion, at 8.

The holdings of Peña Fuentes, Benson, and several other unpublished court of appeals decisions, call into question whether Mutch truly presented a "rare circumstance" where deficient jury instructions do not effect a double jeopardy violation. See, e.g., State v. Nguyen, No. 74358-9-I, 2017 WL 3017516, at *5 (July 17, 2017) (unpublished) (decided the same day as Benson, finding no double jeopardy violation under similar circumstances); State v. Duenas, No. 48119-7-II, 2017 WL 2561589, at *15 (June 13, 2017) (unpublished) (finding no double jeopardy violation where the prosecutor conflated child rape and child molestation in closing, but "the evidence and jury instructions made it manifestly apparent to the jury that each count involved distinct acts of sexual assault, even if the acts were part of the same incident"); State v. Miller, noted at 198 Wn. App. 1008, No. 33252-7-III, 2017 WL 959539, at *5 (March 7, 2017) (unpublished) (finding no double jeopardy violation because "the prosecutor repeatedly distinguished between the acts the State alleged as a basis for the rape charge and the acts the State alleged as a basis for the molestation charge").

These cases suggest the exception in Mutch has now become the rule. They further suggest courts are not faithfully applying the holding of Kier. This Court should grant review to determine the continued vitality of

Kier and Mutch, whether Mutch truly presented a rare circumstance, and whether a record like in Benson's case actually makes it manifestly apparent the convictions were based on separate and distinct acts.

E. CONCLUSION

For the aforementioned reasons, Benson respectfully asks this Court to grant review under RAP 13.4(b)(1), (b)(3), and (b)(4).

DATED this 16th day of August, 2017.

Respectfully submitted,

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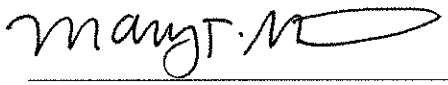

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Appendix

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. ARTHUR E. BENSON, Appellant.	)	No. 74815-7-I UNPUBLISHED OPINION FILED: July 17, 2017

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VERELLEN, C.J. — Arthur Benson was charged with one count of first degree rape of a child based on an act of intercourse consisting of oral-genital contact and three counts of first degree child molestation based on numerous other incidents not involving oral-genital contact. The jury was not instructed that it must find Benson committed the rape of a child count as separate and distinct from the child molestation counts. But because it was manifestly apparent to the jury that the State was not seeking multiple punishments against Benson for the same act, there was no double jeopardy violation.

The trial court imposed a community custody condition that Benson cannot frequent areas where minors are known to congregate as defined by the community corrections officer. We agree with the parties that the condition is not sufficiently definite to apprise Benson of prohibited conduct and allows for arbitrary enforcement by his community corrections officer.

Therefore, we affirm and remand with instructions to strike the unconstitutionally vague community custody condition.

FACTS

In 2001, when A.L.F. was seven years old, she moved with her mother and sister to Lynnwood, Washington.[1] While A.L.F.'s mother worked at a nearby restaurant, Arthur Benson, her mother's live-in boyfriend, supervised A.L.F. and her sister.

Benson began a game of "Truth or Dare" with A.L.F. and her sister. He showed them his penis. By the time A.L.F. was eight years old, Benson had asked her to touch his penis with her hand, which she did several times.

At one point, Benson put his penis in A.L.F.'s mouth. Benson engaged in other sexual activity with A.L.F. in her mother's bedroom. Benson had A.L.F. go to her mother's room, where she got on all fours on a towel, and he placed his penis against her genitals. This happened approximately seven different times. One time, Benson and A.L.F. lay in bed face-to-face and Benson put his penis on her genitals. A.L.F. testified none of these incidents involved penetration.[2]

The State charged Benson with one count of first degree rape of a child and three counts of first degree child molestation involving A.L.F.

In colloquy regarding jury instructions, the court, prosecutor, and defense counsel discussed instructions regarding the number of counts alleged:

> COURT: Right. And it only deals with the child molestation counts, because I would say as I heard the testimony, and please correct me if I'm wrong, as I heard the testimony I only heard one act of child rape.
>
> STATE: Right. Rape of a child, yes.

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[1] Because the victim was a minor, she will be referred to by her initials.

[2] A.L.F. testified that on one occasion, Benson put his penis "more inside," but then clarified that there was no penetration. Report of Proceedings (RP) (Dec. 14, 2015) at 96.

COURT: Rape of a child.

DEFENSE: I'm assuming we all know what act we're talking about. We're all talking about the allegation of oral sex; correct?

STATE: Uh-huh.

DEFENSE: We're not talking about the all fours on the bed.

STATE: There is no penetration testified to.

COURT: Correct. All right. So then there would be no exceptions to the giving or not giving of any of the court's instructions.[3]

The court based its to-convict instructions for first degree child molestation on pattern jury instruction WPIC 44.11.[4] Each instruction required the jury to find an "act separate and distinct from" the other two counts of child molestation.[5] The court's to-convict instruction for the single count of first degree rape of a child was based on WPIC 44.11.[6] The instruction did not require an "act separate and distinct from" the counts of molestation.[7] The instructions included a definition of "sexual contact"[8] and "sexual intercourse."[9] The definition for "sexual intercourse" did not include penetration.[10]

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[3] RP (Dec. 16, 2015) at 11-12.

[4] 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 44.21, at 866 (4th ed. 2016) (WPIC).

[5] CP at 75-77.

[6] CP at 74.

[7] Id.

[8] CP at 78 ("Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party.").

[9] CP at 79.

[10] Id. ("Sexual intercourse means 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.").

In closing, the State elected which act it relied on for the single count of first degree rape of a child:

> Now we get to Count No. 9 and *it's the only charge of rape of a child in the first degree and it involves [A.L.F.]. And what we're talking about is her holding his penis in her mouth.* . . . Sexual intercourse is what's required for rape of a child in the first degree, and sexual intercourse is defined in jury instruction No. 14. "Sexual intercourse means 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." *So sex organs of one person, penis, mouth of another, mouth or anus of another. So that's mouth on penis. That is rape of a child in the first degree.*[11]

The State also elected which acts it relied on for the three counts of first degree child molestation:

> Now, in regard to the other counts regarding, referring to [A.L.F.], there are three more. Okay. *So there are three more counts of child molestation in the first degree relating to [A.L.F.].*
>
> So what do we have with [A.L.F.]? We have her telling us that *she touched his penis with her hand* more than one time. She actually said more than one, maybe less than ten. So we have at least two.
>
> *Then we have the whole getting on all fours.* She said—well, let me back up. So she said he was naked. She was naked. *His penis was touching her vagina. That's unquestionably sexual contact.* She said that happened maybe seven times. I mean, that's well more than three.
>
> And then we have the one time that was different . . . .
>
> . . . She said that time he wanted to try something that was different. *So they were both naked and his penis—they were facing each other that time and his penis was on her vaginal area. That's clearly sexual contact.* It didn't work. So they didn't do it again.
>
> Now, it's not rape because there was no penetration. She clearly said, no, his penis didn't actually go in. . . . But, anyway, that's sexual contact, but it's short of penetration, so that would be child molestation.[12]

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[11] RP (Dec. 16, 2015) at 227-28 (emphasis added).

[12] Id. at 229-31 (emphasis added).

The jury convicted Benson on all counts.

Benson appeals.

ANALYSIS

Double Jeopardy

Benson argues the jury instructions violated his right to be free from double jeopardy because they exposed him to multiple punishments for the same offense.

"The constitutional guaranty against double jeopardy protects a defendant against multiple punishments for the same offense."[13] This court reviews a double jeopardy claim de novo, and it may be raised for the first time on appeal.[14] We "may consider insufficient instructions 'in light of the full record' to determine if the instructions 'actually effected a double jeopardy error.'"[15]

In State v. Land, this court recognized when an act of sexual intercourse involves oral-genital contact only, if done for sexual gratification, that conduct is both molestation and rape.[16] Because they are the same in fact and in law, they are not separately punishable.[17] When both are charged, the jury instructions must require that the rape of a child and child molestation counts be based on separate and distinct acts.[18] The absence of such language presents the potential for double jeopardy.[19] But there is no

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[13] State v. Land, 172 Wn. App. 593, 598, 295 P.3d 782 (2013) (citing U.S. CONST. AMEND. V; WASH. CONST. art. I, § 9).

[14] Id.

[15] State v. Peña Fuentes, 179 Wn.2d 808, 824, 318 P.3d 257 (2014) (quoting State v. Mutch, 171 Wn.2d 646, 664, 254 P.3d 803 (2011)).

[16] 172 Wn. App. 593, 600, 295 P.3d 782 (2013).

[17] Id.

[18] Id. at 600-01.

[19] Id.

violation of the defendant's guarantee against double jeopardy if, considering the evidence, arguments, and jury instructions in their entirety, it is "'*manifestly apparent* to the jury that the State [was] not seeking to impose multiple punishments for the same offense.'"[20]

As clarified at oral argument, the State concedes the jury should have been given the "separate and distinct acts" instruction, but contends it was manifestly apparent to the jury that the State was not seeking to impose multiple punishments for the same offense. We agree there was no double jeopardy violation.

In State v. Peña Fuentes, the defendant was convicted of one count of first degree rape of a child and two counts of first degree child molestation.[21] The jury instructions for one count of rape of a child did not require that the conduct must have occurred on an occasion separate and distinct from the child molestation charges.[22] Our Supreme Court held it was "manifestly apparent that the convictions were based on separate acts because the prosecution made a point to clearly distinguish between the acts that would constitute rape of a child and those that would constitute child molestation."[23]

The Peña Fuentes court focused on the clear election by the State in closing argument:

> In the prosecutor's closing argument, he *addressed count I (child rape)* and *identified the two specific acts that occurred* at the condo that supported a child rape conviction. The prosecutor *then addressed counts*

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[20] Mutch, 171 Wn.2d at 664 (quoting State v. Berg, 147 Wn. App. 923, 931, 198 P.3d 529 (2009)).

[21] 179 Wn.2d 808, 823, 318 P.3d 257 (2014).

[22] Id.

[23] Id. at 825.

> *III and IV, which involved child molestation that occurred during the same time period as count I.* The prosecutor *clearly used "rape" and "child molestation" to describe separate and distinct acts.* He divided Peña Fuentes's behaviors into two categories—the acts involving penetration, which constituted rape, and the other inappropriate acts, which constituted molestation. And again, the defendant did not challenge the number of acts or whether the acts overlapped; he challenged only J.B.'s believability. The jury ultimately believed J.B.'s testimony regarding the various acts that occurred at the condo.[24]

In addition to a clear election in closing argument, the "manifestly apparent" cases recognize other factors such as clear and distinct references to rape of a child and molestation, separate to-convict instructions, clarity of the evidence presented at trial, and whether the defense challenged the credibility of the victim rather than the number of acts or whether the acts overlapped.[25]

Consistent with Peña Fuentes, the State here clearly identified the single incident of oral-genital contact during the Truth or Dare game as the incident supporting the single count of rape of a child. The State then identified categories of the conduct that the State relied on for the child molestation counts: multiple incidents of A.L.F. touching Benson with her hand, a single face-to-face incident of genital-to-genital contact without penetration, and numerous incidents of genital-to-genital contact with A.L.F. on all fours without penetration.

The State drew a clear distinction between the alleged counts of rape of a child and child molestation, similar to the prosecutor's closing remarks in Peña Fuentes.[26]

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[24] Id. at 825-26 (emphasis added) (citations omitted).

[25] See id. at 825; Land, 172 Wn. App. at 602-03; State v Borsheim, 140 Wn. App. 357, 368, 165 P.3d 417 (2007); State v. Wallmuller, 164 Wn. App. 890, 898-99, 265 P.3d 940 (2011); State v. Daniels, 183 Wn. App. 109, 118-21, 332 P.3d 1142 (2014).

[26] Peña Fuentes, 179 Wn.2d at 825 ("The prosecutor clearly used 'rape' and 'child molestation' to describe separate and distinct acts.").

Additionally, the jury received separate to-convict instructions, the evidence presented at trial did not confuse or blur the single incident of sexual intercourse by oral-genital contact with other acts of sexual contact, and Benson focused on credibility of the victim rather than challenge the number of acts or whether the acts overlapped.

Benson's attempts to distinguish Peña Fuentes are not persuasive. Benson contends the Peña Fuentes court relied on the prosecutor's division of the acts into two categories: "'acts involving penetration, which constituted rape, and the other inappropriate acts, which constituted molestation.'"[27] But Peña Fuentes is not so narrow. The court emphasized the clarity of the prosecutor's election at closing, not the specific categories described by the prosecutor.[28]

Relying on State v. Kier,[29] Benson argues that an election in closing cannot cure a double jeopardy violation. But the Kier court merely noted that it could not "consider the closing statement *in isolation*."[30] Here, we do not rely on the State's closing argument in isolation. As discussed, other factors recognized in the "manifestly apparent" cases are also present.

Alternatively, Benson contends the State's use of a unanimity instruction does not cure a double jeopardy violation. Benson relies on State v. Borsheim.[31] In that case, this court held a unanimity instruction did not cure a double jeopardy violation

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[27] Appellant's Reply Br. at 6 (quoting Peña Fuentes, 179 Wn.2d at 825).

[28] Peña Fuentes, 179 Wn.2d at 826 ("*Because of the clarity of the prosecutor's closing argument*, we believe . . . .") (emphasis added).

[29] 164 Wn.2d 798, 194 P.3d 212 (2008).

[30] Id. at 813 (emphasis added).

[31] 140 Wn. App. 357, 165 P.3d 417 (2007).

where the jury was given one single to-convict instruction for four separate identical counts.[32] Here, we do not rely on a unanimity instruction to resolve a separate and distinct act requirement for *identical counts*, as was rejected in Borsheim.

The jury received separate to-convict instructions for each count and the jury reached individual verdicts for each count.[33] As discussed, the State clearly elected the acts on which it relied for each count. None of the acts the State elected for child molestation included oral-genital contact.

In conclusion, the State's closing argument was clear. There was no suggestion, direct or indirect, that the act of oral-genital contact was the basis for any of the three counts of first degree child molestation. The State clearly referred to rape of a child and child molestation as distinct counts. And the defense challenged A.L.F.'s credibility rather than the number of acts or whether the acts overlapped.[34] It was manifestly apparent to the jury that the State was not seeking to impose multiple punishments for the same act. Benson was not denied his right to be free from double jeopardy.

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[32] Id. at 370.

[33] Benson does not assert a need for separate and distinct acts to support multiple identical counts as addressed in Borsheim. See Borsheim, 140 Wn. App. at 367; see Appellant's Br. at 1. As to the three counts of first degree child molestation, he was charged with separate and distinct acts.

[34] See Peña Fuentes, 179 Wn.2d at 825.

Community Custody Condition

The State concedes the condition of community custody deferring to the community corrections officer to define areas where children tend to congregate is invalid. We agree.[35]

Appellate Costs

Appellate costs are generally awarded to the substantially prevailing party.[36] However, when a trial court makes a finding of indigency, that finding remains throughout review "unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency."[37]

Here, Benson was found indigent on appeal by the trial court. If the State has evidence indicating that Benson's financial circumstances have significantly improved since the trial court's finding, it may file a motion for costs with the commissioner. Otherwise, the State is not entitled to appellate costs.

Statement of Additional Grounds for Review

In his statement of additional grounds for review, Benson denies that anything ever happened. He refers to his medical records, but those are not part of the record on appeal. He suggests others can confirm he was not in the household for a period of time, but the record on appeal does not include any such information. Arguments

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[35] See State v. Irwin, 191 Wn. App. 644, 652-53, 364 P.3d 830 (2015); State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); State v. Sanchez Valencia, 169 Wn.2d 782, 792-93, 239 P.3d 1059 (2010).

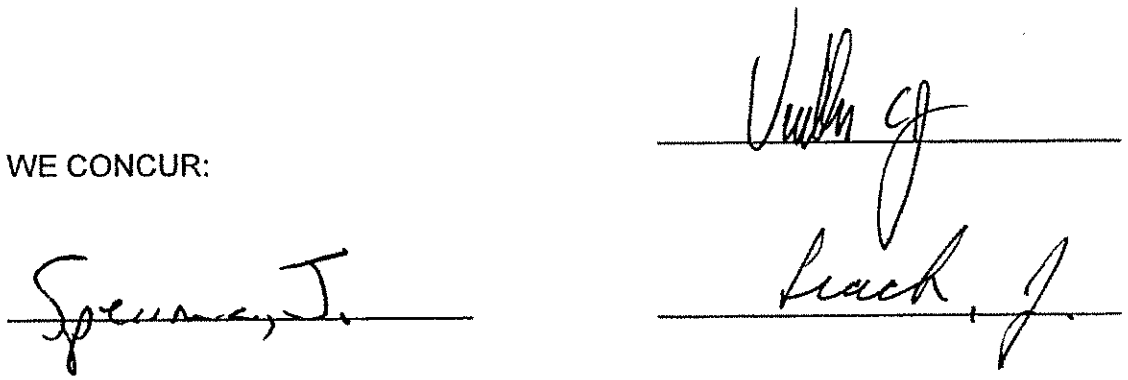
[36] RAP 14.2.

[37] Id.

relying on facts or evidence not included in the record on appeal are properly raised through a personal restraint petition, not a statement of additional grounds.[38]

We affirm and remand with instructions to strike additional condition of community custody 6, "Do not frequent areas where minor children are known to congregate, as defined by the supervising Community Corrections Officer," in appendix 4.2 to the judgment and sentence.[39]

WE CONCUR:



[38] State v. Alvarado, 164 Wn.2d 556, 569, 192 P.3d 345 (2008).

[39] CP at 52.

NIELSEN, BROMAN & KOCH P.L.L.C.

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