SUPREME COURT NO. _____
COA NO. 74356-2-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARTIN AMAYA-ONTIVEROS,

Petitioner.

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

The Honorable John H. Chun, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Martin Amaya-Ontiveros asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Amaya requests review of the decision in State v. Martin Amaya-Ontiveros, Court of Appeals No. 74356-2-I (slip op. filed July 31, 2017), attached as appendix A.

C. ISSUE PRESENTED FOR REVIEW

Based on how the jury was instructed and in light of the entire record, did the convictions for two counts of child rape and two counts of child molestation violate the right to be free from double jeopardy?

D. STATEMENT OF THE CASE

The State charged Amaya with two counts of third degree child molestation and two counts of third degree child rape, committed against 15-year-old AAE during the same charging period. CP 7-8.

1. Trial Evidence

AAE lived with his family in a Bellevue apartment. 1RP[1] 56, 58-59. Amaya moved in by agreement with AAE's father. 1RP 66, 112-14, 118, 157-59. AAE testified to a number of incidents involving sexual

[1] The verbatim report of proceedings is referenced as follows: 1RP – six consecutively paginated volumes consisting of 9/10/15, 9/14/15, 9/15/15, 9/16/15, 9/17/15, 9/21/15; 2RP - 9/22/15; 3RP – 11/20/15.

contact with Amaya. AAE maintained Amaya touched his penis about 10 times altogether. 1RP 174. Amaya also sucked AAE's penis about 10 times. 1RP 179. Every time or nearly every time something happened between the two, Amaya sucked AAE's penis. 1RP 179.

AAE described some incidents in more detail. In October 2014, AAE was on the couch watching television when Amaya sat down, placed AAE's legs over his lap, put his hand up AAE's shorts, and fondled AAE's penis. 1RP 168-73. In the second week of October, Amaya pulled him into the hallway, felt AAE's body, touched AAE's penis and then performed oral sex on him. 1RP 174-80. In the third week of October, Amaya came up behind AAE while the latter was in the kitchen, placed AAE on the kitchen counter, put AAE's legs on his shoulders, and fondled his penis. 1RP 179-84.

Amaya masturbated and ejaculated on AAE in the hallway two times. 1RP 190, 192-93.[2] The first time it happened was the last week of October, where Amaya fondled AAE's penis, masturbated and then ejaculated on AAE's penis. 1RP 191. The second time this happened in the hallway was the first week of November. 1RP 193-94.

[2] AAE described two events of this nature happening in the hallway, a third in the bedroom. 1RP 193.

One time in October, Amaya took AAE into his bedroom and performed oral sex on AAE as he was lying in bed. 1RP 184-88. Amaya took AAE into his bedroom three or four times "to do something like this." 1RP 188. Another bedroom incident was similar, in which Amaya masturbated and sucked AAE's penis. 1RP 188-90.

The last time something happened, Amaya brought AAE into his room, put him on the bed, placed AAE's legs on his shoulders, rubbed his penis around AAE's buttocks and anal area, and ejaculated on AAE's stomach. 1RP 194-97. There was no penetration. 1RP 196.

2. Jury Instructions

The "to convict" instruction for third degree child molestation under count 1 provided in relevant part:

> To convict the defendant of the crime of child molestation in the third degree, as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That between October 1, 2014 and November 6, 2014, on an occasion separate and distinct from count II, the defendant had sexual contact with A.A.-E.;
>
> (2) That A.A.-E. was at least fourteen years old but less than sixteen years old at the time of the sexual contact and was not married to the defendant and was not in a state registered domestic partnership with the defendant;
>
> (3) That A.A.-E. was at least forty-eight months younger than the defendant; and

(4) That this act occurred in the State of Washington. CP 22.

The jury was given a corollary "to convict" instruction for third degree child molestation for count 2, specifying the sexual contact between October 1, 2014 and November 6, 2014 was "on an occasion separate and distinct from count I." CP 26.

The "to convict" instruction for third degree child rape under count 3 provided in relevant part:

> To convict the defendant of the crime of rape of a child in the third degree, as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That between October 1, 2014 and November 6, 2014, on an occasion separate and distinct from Count IV, the defendant had sexual intercourse with A.A.-E.;
>
> (2) That A.A.-E. was at least fourteen years old but was less than sixteen years old at the time of the sexual intercourse and was not married to the defendant and was not in a state registered domestic partnership with the defendant;
>
> (3) That A.A.-E. was at least forty-eight months younger than the defendant; and
>
> (4) That this act occurred in the State of Washington. CP 29.

The jury was given a corollary "to convict" instruction for third degree child rape for count 4, specifying the sexual intercourse between October 1, 2014 and November 6, 2014 was "on an occasion separate and distinct from count III." CP 31.

"Sexual intercourse" was defined for the jury as "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." CP 30. "Sexual contact" was defined as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party or a third party." CP 23. The jury also received two unanimity instructions, one addressing child molestation under counts 1 and 2 and the other addressing child rape under counts 3 and 4. CP 27, 32.

3. Arguments to Jury and Outcome

The prosecutor argued to the jury that "sexual contact" for child molestation under count 1 and 2 means "touching of the sexual or intimate parts of a person done for the purpose of gratifying the sexual desires of either party. Here what we're talking about is gratifying the sexual desires of the defendant. And for purposes of count I and II, what we're talking about is the defendant's fondling of [AAE's] penis, we're talking about the defendant masturbating and ejaculating on [AAE]. What we're saying when we talk about sexual contact is contact that is not accidental, contact that is purposeful, that is intentional, contact that's not between an adult and child for bathing purposes or medical purpose, but it is done for the purpose of sexual gratification." 1RP 334-35.

The prosecutor then addressed the offense of child rape under counts 3 and 4: "Sexual intercourse means any act of sexual contact involving the mouth of one and the sexual organs of the other, for purposes of counts III and IV, what we're talking about here is the defendant performing oral sex on [AAE]." 1RP 335.

The prosecutor summarized AAE's testimony: "He told you about many different incidents. He was able to describe in detail at least nine separate incidents for you here in court." 1RP 338. The prosecutor told the jury with reference to the unanimity instructions that "You must simply agree that two separate and distinct acts of child molestation in the third degree happened within that charging period, and, similarly, you must agree that two separate and distinct acts of rape of a child in the third degree happened within those charging periods." 1RP 343. The prosecutor then gave some "suggestions" on how the jury could go about doing that. 1RP 343-44.

Defense counsel argued AAE's credibility was the dispositive factor. 1RP 348. Counsel invited the jury to examine AAE's testimony and compare it with the pre-trial statements he gave to the detectives. 1RP 349-51. In the December interview with Detective McBride, AAE did not mention oral sex took place. 1RP 351. In the March interview with

Detective Moriarty, AAE said oral sex took place five times. 1RP 351. At trial, AAE inconsistently claimed oral sex happened 10 times. 1RP 351.

Defense counsel further argued the kitchen countertop incident was not mentioned in either of the detective interviews; it was mentioned for the first time at trial. 1RP 351-52. The incident involving masturbating AAE's penis in the bedroom was not mentioned in either interview. 1RP 352. AAE did not mention an incident in which Amaya ejaculated on his stomach in the interviews. 1RP 353. AAE made a new allegation at trial that Amaya orally copulated him in the bedroom. 1RP 353. In his December statement to McBride, AAE claimed four instances total. 1RP 356. In his March statement to Moriarty, AAE claimed 10 instances. 1RP 356. In his December statement to McBride, he said fondling happened two times. 1RP 356. In his March statement, he claimed fondling happened 10 times. 1RP 356. In his December statement, he said the hallway incidents happened twice. 1RP 356. In his March statement, he claimed four incidents in the hallway. 1RP 356.

The jury returned general guilty verdicts on all counts. CP 38-41.

4. Appeal

On appeal, Amaya argued his two molestation convictions violated his right to be free from double jeopardy because the jury instructions permitted the jury to rely on the same act of oral-genital contact for both

rape and molestation and it was not manifestly apparent to the jury that a double jeopardy violation was avoided. See Brief of Appellant at 1, 15-29; Reply Brief at 1-2. The Court of Appeals disagreed. Slip op. at 4-10.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. 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.

Amaya was convicted of two counts of child molestation and two counts of child rape based on the same charging period. The evidence showed multiple acts supporting conviction for those offenses. The two offenses were the same in fact and in law. Considering the entire record, the court's failure to instruct the jury that it needed to find acts of child molestation separate and distinct from acts of child rape exposed Amaya to multiple punishments for a single offense. This violated his right to be free from double jeopardy. Unfortunately, the rigorous standard of review previously announced by this Court has been relaxed in application, with the Court of Appeals' decision marking the latest example. Review is warranted because this case presents a significant question of constitutional law under RAP 13.4(b)(3) and, given the frequency with which this issue recurs, an issue of substantial public importance under RAP 13.4(b)(4).

a. The law against double jeopardy protects the accused from multiple punishments for the same offense.

The right to be free from double jeopardy "is the constitutional guarantee protecting a defendant against multiple punishments for the same offense." State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417 (2007); U.S. Const. amend. V; Wash. Const. art. I, § 9. Insufficient jury instructions can expose defendants to double jeopardy. Borsheim, 140 Wn. App. at 366-68. The reviewing court considers insufficient instructions "in light of the full record" to determine whether a double jeopardy error occurred. State v. Mutch, 171 Wn.2d 646, 664, 254 P.3d 803 (2011). Double jeopardy is violated if it is not "manifestly apparent to the jury that each count represented a separate act." Id. at 665-66.

b. Based on the full record, including the failure to instruct the jury that it needed to find an act of child molestation separate and distinct from an act of child rape, it is not manifestly apparent that double jeopardy was avoided.

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 jury instructions in Amaya's case do not satisfy this standard. In the "to convict" instructions for child molestation under counts 1 and 2, the jury was instructed that it

needed to find an act of molestation separate and distinct from another act of molestation under the other count. CP 22, 26. In the "to convict" instructions for child rape under counts 3 and 4, the jury was instructed that it needed to find an act of rape separate and distinct from another act of rape under the other count. CP 29, 31. But no instruction told the jury that, to convict for child molestation under counts 1 and 2, it needed to find acts separate and distinct from acts of rape under counts 3 and 4.

In Borsheim, the Court of Appeals 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. Borsheim, 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. Courts subsequently applied the instructional principle established in Borsheim in other cases.

Of particular relevance here, the Court of Appeals in State v. Land, 172 Wn. App. 593, 598-603, 295 P.3d 782, review denied, 177 Wn.2d 1016, 304 P.3d 114 (2013) considered whether a double jeopardy violation occurred where the jury was not instructed it must find separate and distinct acts, not of the same charged crime, but of child rape and child molestation. 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 penetration, 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).

When the act of rape is based on penetration, child rape and child molestation are not the same in fact and law, and a defendant can be punished for both offenses. Land, 172 Wn. App. at 600. But 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.

In Amaya's case, there was no penetration. The acts of rape were all based on oral-genital contact. The rape and molestation offenses are

thus the same in fact and law for double jeopardy purposes. Land, 172 Wn. App. at 600. The jury was instructed on the statutory definitions of "sexual contact" and "sexual intercourse" for purposes of child molestation and rape. CP 24, 30. The Supreme Court has recognized "[t]hese two elements are substantially identical." State v. Fuentes, 179 Wn.2d 808, 824 n.3, 318 P.3d 257 (2014).

We thus look to the full record to determine whether it was manifestly apparent to the jury that it could not convict Amaya of child molestation based on the same act of rape. Mutch, 171 Wn.2d at 664-66.

The Court of Appeals in Amaya's case recognized "[h]ere, as with Land, there is a potential for double jeopardy because there was no instruction that an act of molestation had to be separate and distinct from an act of rape." Slip op. at 6. "Because the flawed instructions created a potential double jeopardy violation," the Court of Appeals went on to determine whether Amaya's right to be free from double jeopardy was violated. Id. This is where its analysis goes off the rails.

The Court of Appeals opined "A.A.E. testified that there were four separate instances of abuse that did not involve any oral-genital contact or any other type of sexual intercourse." Slip op. at 7. This is a misleading description of his testimony. AAE testified that Amaya touched his penis about 10 times altogether and sucked his penis about 10 times, and that

every time or nearly every time something happened between the two, Amaya sucked AAE's penis. 1RP 174, 179. In answering the prosecutor's question about whether Amaya sucked his penis more than once, AAE answered "It happened like every, I guess, time, for ten times." 1RP 179. The prosecutor then asked "So nearly every time that something would happen, Martin would suck on your penis? Is that what I understand?" 1RP 179. AAE answered "yeah." 1RP 179. The Court of Appeals ignored this testimony.

Having just found the jury instructions were "flawed," the Court of Appeals then turned around and pronounced the jury instructions "do not support" Amaya's argument. Slip op. at 9. Contrary to the Court of Appeals' suggestion, the fact that there was a separate to-convict instruction for each count does not avoid a double jeopardy violation. Mutch, 171 Wn.2d at 662 (separate to-convict instructions for each count insufficient to avoid double jeopardy violation where none expressly stated that the jury must find that each charged count represents an act distinct from all other charged counts).

In refusing to find a double jeopardy violation, the Court of Appeals further relied on the presence of two unanimity instructions, one of which required the jury to find an act of child molestation "separate and distinct" from another act of child molestation and the other of which

required the jury to find an act of rape "separate and distinct" from another act of rape. Slip op. at 9-10; CP 27, 32. It does not explain how these instructions cured the double jeopardy problem when neither of them required the jury to find an act of child molestation separate and distinct from an act of rape. These unanimity instructions did not prevent double jeopardy because they did not "convey the need to base *each* charged count on a 'separate and distinct' underlying event." Borsheim, 140 Wn. App. at 367, 369-70. The jury was nowhere instructed the acts of child rape needed to be separate and distinct from the acts of child molestation. To confuse matters, the pattern unanimity instruction for each set of charges in Amaya's case is "designed for single-count cases and is confusing when read in a multicount case." State v. Carson, 184 Wn.2d 207, 217, 219, 357 P.3d 1064 (2015). Such instruction fails "to ensure that the jury relied on a separate act for each count." Id. at 219.

The jury in Amaya's case was also 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 20. 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. Mutch, 171 Wn.2d at 663 (citing Borsheim, 140 Wn. App. at 367, 369-70).

While the appellate court looks to the entire trial record when considering a double jeopardy claim, "review is rigorous and is among the strictest." Mutch, 171 Wn.2d at 664. "Considering the evidence, arguments, and instructions, if it is not clear that it was '*manifestly apparent* to the jury that the State [was] not seeking to impose multiple punishments for the same offense' and that each count was based on a separate act, there is a double jeopardy violation." Id. at 664 (quoting State v. Berg, 147 Wn. App. 923, 931, 198 P.3d 529 (2008), abrogated on other grounds by State v. Mutch, 171 Wn.2d 646, 254 P.3d 803 (2011)).

As set forth above, neither the evidence nor the jury instructions in Amaya's case made it manifestly apparent that the jury could not rely on the same act of rape to convict for the same act of child molestation. The arguments of counsel did not make it manifestly apparent either.

The Court of Appeals disagreed, claiming "the prosecutor's closing argument also clearly distinguished individual acts of child molestation and child rape," and so it was "manifestly apparent" that the State did not seek to impose multiple punishments for the same act. Slip op. 7-8.

The prosecutor in Amaya's case did not discuss every single act individually during closing argument. 1RP 338-39. The prosecutor did not clearly elect the specific acts it relied on to prove child molestation and child rape. Instead, the prosecutor acknowledged the multiple

offenses alleged by AAE and invited jurors to take their pick. The prosecutor talked about the masturbating and ejaculating as acts of child molestation and oral sex as an act of rape. 1RP 334-35. But sandwiched in between, the prosecutor argued "What we're saying when we talk about sexual contact is contact that is not accidental, contact that is purposeful, that is intentional, contact that's not between an adult and child for bathing purposes or medical purpose, but it is done for the purpose of sexual gratification." 1RP 334-35. That framing of the "sexual contact" issue applies to both acts of molestation and rape.

Later, in addressing the unanimity instructions, the prosecutor made "some suggestions" on how the jury could apply them, giving some examples of what the jury could rely on to convict for molestation and rape. 1RP 342-44. But the prosecutor never told the jury that it could not rely on an act of rape (oral sex) as the basis for finding guilt on a molestation count.

Even if the prosecutor's closing argument constituted a clear election of separate acts for the molestation and rape counts, that argument by itself is insufficient to avoid a double jeopardy problem, especially where, as here, "the jury was properly instructed to base its verdict on the evidence and instructions and not on the arguments of counsel." State v. Kier, 164 Wn.2d 798, 813, 194 P.3d 212 (2008); see CP 13-15. "The jury

should not have to obtain its instruction on the law from arguments of counsel." State v. Aumick, 126 Wn.2d 422, 431, 894 P.2d 1325 (1995). The Court of Appeals did not even acknowledge the existence of Kier.

Amaya's 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. Because there is no way to determine that the jury did not rely on the same acts, the benefit of the doubt regarding a potential double jeopardy violation should be given to the accused, not to the State. See Kier, 164 Wn.2d at 813-14 (applying rule of lenity in finding double jeopardy violation); State v. Lindsay, 171 Wn. App. 808, 846, 288 P.3d 641 (2012), rev'd on other grounds, 180 Wn.2d 423, 326 P.3d 125 (2014) (same); State v. DeRyke, 110 Wn. App. 815, 824, 41 P.3d 1225 (2002), aff'd, 149 Wn.2d 906, 73 P.3d 1000 (2003) (same); State v. Taylor, 90 Wn. App. 312, 317, 950 P.2d 526 (1998) (same).

c. The Court of Appeals' decision demonstrates the current trend toward disregarding the rigorous standard of review for double jeopardy claims set forth in Mutch and Kier.

In Mutch, the Supreme Court found no double jeopardy violation despite deficient jury instructions. Mutch, 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. In the wake of Mutch, however, appellate courts have routinely found no double jeopardy violation despite deficient jury instructions that exposed the defendant to double jeopardy. See, e.g., State v. Benson, No. 74815-7-I, 2017 WL 3017517, at *4-5 (July 17, 2017) (unpublished); State v. Nguyen, No. 74358-9-I, 2017 WL 3017516, at *5 (July 17, 2017) (unpublished); State v. Duenas, noted at 199 Wn. App. 10272017 WL 2561589, at *15 (2017) (unpublished); State v. Newland, noted at 198 Wn. App. 1027, 2017 WL 1163138, at *8-9 (2017) (unpublished); State v. Miller, noted at 198 Wn. App. 1008, 2017 WL 9595392, at *3-4 (2017) (unpublished). In practice, the exception in Mutch has become the rule. The "rigorous" standard announced in Mutch has been watered down. Lip service has replaced scrupulous application. Based on the way the intermediate appellate courts are deciding this issue, it is the rare circumstance where a double jeopardy violation will be found despite deficient jury instructions. The Mutch standard has been turned on its head.

These decisions, like the decision in Amaya's case, find no double jeopardy violation by placing prime emphasis on the prosecutor's argument. See id. Appellate courts are not faithfully applying the holding of Kier. 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. Kier, 164 Wn.2d at 813-14. There, the State argued the 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 claimed 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 this 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.

Unfortunately, the prosecutor's closing argument has since been elevated to the level of a litmus test for determining the absence of a double jeopardy violation. Amaya's case is an illustration of the trend. This Court should grant review to determine the continued vitality of Kier, whether the rigorous standard set forth in Mutch has been ignored, and whether a record like in Amaya's case really makes it manifestly apparent that the convictions were based on separate and distinct acts. The intermediate appellate courts generally express no interest in applying a standard of review with teeth. The Supreme Court should revitalize the standard.

F. CONCLUSION

For the reasons stated, Amaya requests that this Court grant review.

DATED this 30th day of August 2017.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. MARTIN AMAYA-ONTIVEROS, Appellant.	)	No. 74356-2-I DIVISION ONE UNPUBLISHED OPINION FILED: July 31, 2017

MANN, J. — Martin Amaya-Ontiveros appeals his conviction on two counts of third degree child rape and two counts of third degree child molestation. Amaya-Ontiveros argues that his right to be free from double jeopardy was violated, that the court abused its discretion in imposing several community custody conditions, and that the court erred in requiring Amaya-Ontiveros to obtain a court order before ending his duty to register as a sex offender. We affirm Amaya-Ontiveros's conviction but remand for corrections to his judgment and sentence.

FACTS

In 2013, A.A.E., a 14-year-old boy, lived with his parents in a two-bedroom apartment. In late 2013, A.A.E.'s father rented the apartment's second bedroom to an

acquaintance, Martin Amaya-Ontiveros. A.A.E began sleeping in his parents' bedroom and Amaya-Ontiveros slept in the second bedroom.

A.A.E.'s parents worked long hours. Amaya-Ontiveros also worked during the day, but kept a different schedule than A.A.E.'s parents, including one day off per week. Amaya-Ontiveros and A.A.E. were often alone in the apartment. For the first few months after Amaya-Ontiveros moved into the apartment, he had little interaction with A.A.E.

In October 2014, A.A.E., then fifteen, was lying on the sofa watching movies, in running shorts. Amaya-Ontiveros sat down next to A.A.E., moved A.A.E.'s bare legs over his lap, and began touching them. Amaya-Ontiveros then slid his hand up A.A.E.'s shorts and began touching A.A.E.'s penis. The touching continued, until apparently satisfied, Amaya-Ontiveros got up and went to his room, acting like nothing had happened. A.A.E. did not tell his parents because "I was like, basically, feeling like I had no control to say anything, and I couldn't really think clearly, and it was just like a confusion in my head."

Between October and December 2014, Amaya-Ontiveros sexually abused A.A.E. multiple times. Amaya-Ontiveros twice pulled A.A.E. into the apartment's hallway, knelt, touched A.A.E.'s body, and sucked on A.A.E.'s penis. Not long after, A.A.E. was in the kitchen one day and Amaya-Ontiveros came in, sat A.A.E. on the counter, draped A.A.E.'s legs over his shoulders, and fondled A.A.E.'s penis. During another event, Amaya-Ontiveros's pulled A.A.E. into his bedroom and bent A.A.E. over with his stomach on the bed and Amaya-Ontiveros rubbed his bare stomach against A.A.E.'s bare back. A.A.E. could feel Amaya-Ontiveros had an erection. Then Amaya-Ontiveros

rolled A.A.E. over onto his back and sucked his penis. This happened three or four times. On two occasions, Amaya-Ontiveros also took A.A.E. into the hallway, masturbated himself until he ejaculated onto A.A.E.'s penis. Amaya-Ontiveros did this same activity once in the bedroom. The last time Amaya-Ontiveros touched A.A.E. was in Amaya-Ontiveros's bedroom. Amaya-Ontiveros placed A.A.E. on the bed, placed A.A.E.'s legs over his shoulders, pinned A.A.E.'s arms down, and after rubbing his penis on—but not penetrating—A.A.E.'s anus, Amaya-Ontiveros ejaculated on A.A.E.'s stomach.

In early December 2014, one of A.A.E.'s teachers contacted the school counselor because she was concerned that A.A.E.'s behavior had changed. She reported that A.A.E. appeared depressed and was no longer cooperating or collaborating in the class. The counselor met with A.A.E. and he told her he had been molested. After consulting with the school's head counselor, they contacted Child Protective Services and A.A.E.'s parents. Amaya-Ontiveros was arrested shortly thereafter.

The State originally charged Amaya-Ontiveros with one count of third degree child molestation. Before trial, the information was amended to charge Amaya-Ontiveros with two counts of third degree child molestation (counts 1 and 2) and two counts of third degree child rape (counts 3 and 4). The State alleged that all four acts occurred in the same charging period, between October 1 and November 6, 2014. After a four-day trial, the jury convicted Amaya-Ontiveros on all four counts. Amaya-Ontiveros was sentenced to four concurrent terms of 60 months. This appeal followed.

ANALYSIS

Double Jeopardy

Amaya-Ontiveros first contends that, based on the manner in which the jury was instructed, the convictions for two counts of child rape and two counts of child molestation violated his right to be free from double jeopardy.

The constitutional guarantee against double jeopardy protects a defendant against multiple punishments for the same offense. United States Const. amend. V; Wash. Const. art. I, § 9; State v. Mutch, 171 Wn.2d 646, 661, 254 P.3d 803 (2011); State v. Land, 172 Wn. App. 593, 598, 295 P.3d 782 (2013). "A 'defendant's double jeopardy rights are violated if he or she is convicted of offenses that are identical both in fact and in law.'" State v. Peña Fuentes, 179 Wn.2d 808, 824, 318 P.3d 257 (2014) (quoting State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995)). A double jeopardy claim may be raised for the first time on appeal. Mutch, 171 Wn.2d at 661. This court's review is de novo. Mutch, 171 Wn.2d at 662. We consider claims of insufficient instructions "in light of the full record" to determine if a double jeopardy error occurred. Mutch, 171 Wn.2d at 664.

The jury was provided separate to-convict instructions for each of the four counts against Amaya-Ontiveros. In the to-convict instruction for child molestation under counts 1 and 2, the jury was instructed that it needed to find an act of child molestation separate and distinct from another act of child molestation under the other count. In the to-convict instruction for child rape under counts 3 and 4, the jury was instructed that it needed to find an act of child rape separate and distinct from another act of child rape under the other count. Amaya-Ontiveros argues that because child molestation and

child rape are the same offense, the failure to instruct the jury that it needed to find acts of child molestation separate and distinct from acts of child rape exposed him to multiple punishments for a single offense. We disagree.

A. Potential for Double Jeopardy

The starting point for our analysis is to determine whether the two offenses are legally and factually the same. "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 prove the other.'" Land, 172 Wn. App. at 599 (quoting State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983)).

Third degree child molestation requires proof of "sexual contact" with a child. RCW 9A.44.089(1). "Sexual contact" means "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2). Third degree child rape requires proof of "sexual intercourse" with a child. RCW 9A.44.079(1). "Sexual intercourse" can be proved by penetration or by "any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another." RCW 9A.44.010(1)(c); see Land, 172 Wn. App. at 601.

We examined whether child molestation and child rape are the same in Land. We explained that in a situation where the only evidence of sexual intercourse supporting a count of child rape is evidence of penetration then child rape is not the same as child molestation. But where, as here, there is no evidence of penetration then child rape and child molestation are the same. We explained that:

> where the only evidence of sexual intercourse supporting a count of child rape is evidence of sexual contact involving one person's sex organs and the mouth or anus of the other person, that single act of sexual intercourse, if done for sexual gratification, is both the offense of molestation and the offense of rape. In such a case, the two offenses are not separately punishable. They 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.

Land, 172 Wn. App. at 600.

Here, as with Land, there is a potential for double jeopardy because there was no instruction that an act of molestation had to be separate and distinct from an act of rape. Although the jury was instructed that "[a] separate crime is charged in each count" and that it "must decide each count separately," this instruction does not guard against a double jeopardy violation. Mutch, 171 Wn.2d at 662-63 (citing State v. Borsheim, 140 Wn. App. 357, 367, 165 P.3d 417 (2007) (affirming that the separate-crime instruction does not guard against double jeopardy because it fails to inform the jury that each crime requires proof of a different act)). Because the flawed instructions created a potential double jeopardy violation, we must determine whether Amaya-Ontiveros's right to be free from double jeopardy was actually violated.

B. Manifestly Apparent

When reviewing allegations of double jeopardy we review the entire record to establish what was before the court. Mutch, 171 Wn.2d at 664. We consider the evidence, arguments, and instructions to determine if it was "'manifestly apparent to the jury that the State [was] not seeking to impose multiple punishments for the same offense' and that each count was based on a separate act." Mutch, 171 Wn.2d at 664 (alteration in original) (quoting State v. Berg, 147 Wn. App. 923, 931, 198 P.3d 529

(2008)); Peña Fuentes, 179 Wn.2d at 824. This "review is rigorous and is among the strictest." Mutch, 171 Wn.2d at 664. If it was not manifestly apparent to the jury that the State was not trying to impose multiple punishments for the same offense and that each count was based on a separate act, then the defendant's potentially redundant convictions must be vacated. Mutch, 171 Wn.2d at 664. The remedy for a double jeopardy violation is to vacate the lesser offensé. State v. Albarran, 187 Wn.2d 15, 21-22, 383 P.3d 1037 (2016).

1. Trial Testimony

The trial testimony does not support Amaya-Ontiveros's position. A.A.E. testified that there were four separate instances of abuse that did not involve any oral-genital contact or any other type of sexual intercourse. For example, A.A.E. testified that Amaya-Ontiveros fondled A.A.E.'s penis without oral contact once on the couch, in the kitchen, in the hallway, and on the bed. This testimony supports only the molestation counts, not the rape counts. A.A.E. also testified to multiple events of oral-genital contact. Amaya-Ontiveros sucked A.A.E.'s penis at least three times: once in the hallway and twice in Amaya-Ontiveros's room. This testimony supports the rape counts.

2. Closing Argument

It may be manifestly apparent that the State is not seeking to impose multiple punishments for the same act if the prosecutor's closing argument clearly distinguished between rape and child molestation and the separate and distinct acts that fit each crime. For example, in Peña Fuentes, the jury convicted the defendant of one count of first degree rape of a child and two counts of first degree molestation. As here, the

instructions did not include an instruction that the child rape must have occurred on an occasion separate and distinct from the child molestation charges. Peña Fuentes, 179 Wn.2d at 823. The court focused on the State's closing:

> 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 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.

179 Wn.2d at 825-26 (citations omitted).

Here, the prosecutor's closing argument also clearly distinguished individual acts of child molestation and child rape. She first distinguished the molestation counts: "And for purposes of Count I and Count II, what we're talking about is the defendant's fondling of [A.A.E.]'s penis, we're talking about the defendant masturbating and ejaculating on [A.A.E.]" The prosecutor then distinguished the rape counts: "Sexual intercourse means any act of sexual contact involving the mouth of one and the sexual organs of another, for purposes of Counts III and IV, what we're talking about here is the defendant performing oral sex on [A.A.E.]" The prosecutor then recounted how A.A.E. testified about nine acts of touching and oral sex. Immediately after this, the prosecutor discussed the jury instructions in relation to the evidence:

> The charging dates that you have for all four counts are October 1st through November 6th of 2014. The instruction number 12 and number 17 tells you that you need not decide beyond a reasonable doubt on every single incident that [A.A.E.] described for you. You need not decide on a particular date that each of those incidents happened. You must simply

> agree that two separate and distinct acts of child molestation in the third degree happened within that charging period, and, similarly, you must agree that two separate and distinct acts of rape of a child in the third degree happened within those charging periods.
>
> I have some suggestions for you on how you can become clear about that as you read that instruction. [A.A.E.] described for you the first time this happened. You could decide beyond a reasonable doubt that that incident is one for which you want to rest your verdict on, Count I or II [child molestation].
>
> [A.A.E.] gave you a detailed account of the defendant molesting him in the kitchen. You could describe beyond a reasonable doubt that that incident is one upon which you want to rest your verdict.
>
> He described for you the defendant ejaculating on him in the hallway. You could decide beyond a reasonable doubt that that is an incident upon which you want to rest your verdict for Counts I and II.
>
> With respect to Counts III or IV [child rape], again, [A.A.E.] described these happening on many different times, but he described to you the first time in the hallway. He described for you it happening in his bedroom, on his bed. You could describe beyond a reasonable doubt that either one of those incidents is one upon which you want to rest your verdict, on Counts III or IV.

The prosecutor's argument was clear and organized; it made clear for the jury that each count of rape or molestation needed to be based on a separate and distinct act. The argument delineated between the type of conduct that supported the child molestation counts and gave examples. The argument did the same for the child rape counts.

3. Instructions

Finally, the jury instructions also do not support Amaya-Ontiveros's argument. There were four separate to-convict instructions, one for each count of molestation and rape. Instructions 7 and 11, the to-convict instructions for child molestation, informed the jury that to convict Amaya-Ontiveros of third degree child molestation it had to find that he had "sexual contact" with A.A.E. during the charging period "on an occasion

separate and distinct" from the other molestation count. Instructions 14 and 16, the to-convict instructions for child rape, informed the jury that in order to convict Amaya-Ontiveros of third degree child rape it had to find that he had "sexual intercourse" with A.A.E. during the charging period "on an occasion separate and distinct" from the other rape count.

We conclude, based on the evidence, argument, and instructions that it was manifestly apparent to the jury that the State was not seeking to impose multiple punishments for the same offense. Mutch, 171 Wn.2d at 664. Amaya-Ontiveros's right to be free from double jeopardy was not violated. Accordingly, we affirm his conviction.

Community Custody Conditions

Amaya-Ontiveros next contends that the trial court erred by imposing certain community custody conditions. We address each challenge in turn.

A. Sex Related Businesses and Explicit Materials

Amaya-Ontiveros argues first that two of the community custody conditions imposed by the sentencing court exceed the court's statutory authority because the conditions are not crime-related. We disagree.

The sentencing court imposed various community custody conditions related to sex offenses. At issue are the conditions prohibiting Amaya-Ontiveros from entering "sex-related businesses, including: x-rated movies, adult bookstores, strip clubs, and any location where the primary source of business is related to sexually explicit material," and requiring Amaya-Ontiveros to "not possess, use, access or view any sexually explicit material as defined by RCW 9.68.130 or erotic materials as defined by RCW 9.68.050 or any material depicting any person engaged in sexually explicit

conduct as defined by RCW 6.68A.011(4) unless given prior approval by your sexual deviancy provider."

We review the imposition of crime-related community custody conditions for an abuse of discretion. State v. Sanchez Valencia, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010). A sentencing court abuses its discretion if its decision is manifestly unreasonable or if exercised on untenable grounds or for untenable reasons. State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). We review the factual bases for crime-related conditions for substantial evidence. State v. Irwin, 191 Wn. App. 644, 656, 364 P.3d 830 (2015).

Pursuant to RCW 9.94A.505(9) and RCW 9.94A.703(3)(f), a sentencing court may impose crime-related prohibitions while a defendant is in community custody. A "'crime-related prohibition' means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). "Directly related" includes conditions that are "reasonably related" to the crime. Irwin, 191 Wn. App. at 656.

Because Amaya-Ontiveros was convicted of sex offenses (child molestation and child rape), conditions limiting his access to sexually explicit materials and sex-related businesses are crime-related. See, e.g., State v. Magana, 197 Wn. App. 189, 201, 389 P.3d 654 (2016) (holding that the community custody conditions prohibiting an offender who was convicted of child rape from accessing X-rated movies, adult book stores, and sexually explicit materials was crime-related). There was no abuse of discretion.

B. Dating Relationships

Amaya-Ontiveros next argues that the community custody condition requiring him to "Inform the supervising [community custody officer] and sexual deviancy treatment provider of any dating relationship" is unconstitutionally vague. We disagree.

The due process guarantee requires that laws not be vague. U.S. Const. amend XIV, § 1; Wash. Const. art. I, § 3. "The laws must (1) provide ordinary people fair warning of proscribed conduct and (2) have standards that are definite enough to 'protect against arbitrary enforcement.'" Irwin, 191 Wn. App. at 652-53 (internal quotation marks omitted) (quoting State v. Bahl, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008)). "'[A] community custody condition is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.'" Sanchez Valencia, 169 Wn.2d at 793 (internal quotation marks omitted) (quoting State v. Sanchez Valencia, 148 Wn. App. 302, 321, 198 P.3d 1065 (2009)). If "persons of ordinary intelligence can understand what the [law] proscribes, notwithstanding some possible areas of disagreement, the [law] is sufficiently definite." City of Spokane v. Douglass, 115 Wn.2d 171, 179, 795 P.2d 693 (1990).

Amaya-Ontiveros contends that this condition is vague because the words "dating relationship" can be arbitrarily enforced and fail to give him adequate notice of what he cannot do. He relies on United States v. Reeves, 591 F.3d 77 (2d Cir. 2010). The court in Reeves concluded that a condition requiring an offender to notify his probation officer when "he establishes a significant romantic relationship" was insufficiently clear. 591 F.3d at 80-81.

Amaya-Ontiveros's reliance on Reeves is misplaced. The condition imposed in Reeves required the defendant to report "significant romantic relationships." 591 F.3d at 81. The court concluded that the qualifiers "significant" and "romantic" were too vague to inform the defendant of the type of relationship he was to report because there were no objective criteria with which to tether the terms. Reeves, 591 F.3d at 81.

But here, a "dating relationship" is readily distinguishable from the condition challenged in Reeves. A "date" is defined as "an appointment between two persons . . . for the mutual enjoyment of some form of social activity," "an occasional (as an evening) of social activity arranged in advance between two persons. . . ." WEBSTER'S THIRD INTERNATIONAL DICTIONARY 576 (2002). The phrase "dating relationship" is also defined by statute in the context of domestic relations: "a social relationship of a romantic nature." RCW 26.50.010(2).

"Terms must be considered in the context in which used." Bahl, 164 Wn.2d at 759. Moreover, "'impossible standards of specificity' are not required since language always involves some degree of vagueness." Bahl, 164 Wn.2d at 759 (quoting State v. Halstien, 122 Wn.2d 109, 118, 857 P.2d 270 (1993). When the challenged terms are considered together, and in light of their dictionary and statutory definitions, the condition is sufficiently clear. The condition is not constitutionally vague.

C. Curfew

Amaya-Ontiveros next argues that the community custody condition that prohibits him from staying out between 10:00 p.m. and 5:00 a.m. without his supervisor's permission is not crime-related. The State concedes that this condition is unrelated to

Amaya-Ontiveros's crime. We accept the State's concession. On remand, this condition should be stricken.

D. Use or Consumption of Alcohol

Amaya-Ontiveros finally argues that the sentencing court abused its discretion in imposing a community custody condition prohibiting the "use or consum[ption] of alcohol." We disagree.

Amaya-Ontiveros concedes that, pursuant to RCW 9.94A.703(3)(e), the sentencing court has the discretion to prohibit a defender from "possessing or consuming alcohol" whether or not the possession or consumption is crime-related. Amaya-Ontiveros takes issue with the sentencing court's prohibition on the "use" of alcohol arguing that there are uses for alcohol other than consumption, including sterilizing cuts, killing garden snails, and removing food's odor from wooden cutting boards. Although Amaya-Ontiveros is technically correct that the statute does not use the word "use" it is a distinction without a difference. It is undisputed that the sentencing court had authority to prohibit "possession" of alcohol. A person cannot "use" alcohol if that person cannot possess it. There was no abuse of discretion.

Judgment and Sentence

Amaya-Ontiveros challenges two additional errors within the judgment and sentence. Amaya-Ontiveros first contends the sentencing court erred by imposing a requirement within the sex offender registration requirements stating that Amaya-Ontiveros's duty to register as a sex offender does not end until he obtains a "court order specifically relieving [him]" or he has been "informed in writing by the sheriff's office." The State concedes that this is incorrect. We agree.

Third degree child rape and third degree child molestation are both class C felonies. RCW 9A.44.079(2); RCW 9A.44.089(2). A person convicted of a class C felony is required to register for the ten year period following the release from confinement. RCW 9A.44.140. The duty to register ends after ten years—there is no requirement that the offender obtain a court order. On remand, the sentencing court should correct this error.

Second, the judgment and sentence contains a scrivener's error. Under the findings section, count 1 states that the crime is "Child Molestation in the Third Degree–Domestic Violence." The State concedes that labeling child molestation as a domestic violence crime is a scrivener's error. We agree.

Statement of Additional Grounds

Amaya-Ontiveros filed a pro se statement of additional grounds in which he alleges errors relating to a plea deal, a ruling on the victim's immigration status, and his counsel's trial tactics. The issues raised are vague and devoid of argument. An appellate court will not consider a statement of additional grounds if it does not "inform the court of the nature and occurrence of the alleged errors." RAP 10.10(c). The court will also not consider allegations that rest on matters outside of the record. RAP 10.10(c).

We decline to consider Amaya-Ontiveros's statement of additional grounds. His allegation that there was an error in his plea deal rests on matters outside the record. The only evidence of a plea deal in this record is a pretrial colloquy in which Amaya-Ontiveros's defense counsel acknowledges the deal and pleads not guilty. Similarly, vague allegations relating to a ruling prohibiting the prosecutor from raising the victim's

immigration status and defense counsel's trial tactics do not adequately inform us of the error's nature and occurrence.

CONCLUSION

Amaya-Ontiveros's conviction is affirmed. The judgment and sentence is remanded, however, for the trial court to: (1) strike the community custody condition imposing a curfew between 10:00 p.m. and 5:00 a.m., (2) modify sex offender notice of registration requirements to clarify that the duty to register expires ten years after release from confinement, and (3) correct the scrivener's error and correct count 1 by removing the domestic violence clause from child molestation in the third degree.

Mann, J.

WE CONCUR:

Schindler, J.

Applewick, J.

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

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