

NO. 49746-8-II

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

STATE OF WASHINGTON, Respondent

v.

COREY ALLEN PEARSON, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-8-00167-5

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

I. Pearson's multiple convictions to do not violate the prohibition against double jeopardy.

STATEMENT OF THE CASE

Corey Pearson (hereafter 'Pearson') was charged in Juvenile Court with Rape of a Child in the Second Degree and Child Molestation in the Second Degree, both against K.L.M., alleged to have occurred during the summer of 2015 during the same incident. CP 1-2.

This case went to trial on October 26, 2016 in Clark County Juvenile Court. At trial, the evidence showed that K.L.M. lived with her foster mother, Jessica Zink. RP 17. Pearson is Ms. Zink's ex-stepson. RP 12. Though Ms. Zink was divorced from Pearson's father, she acted as a mother figure to Pearson and often looked after him. RP 12, 24. K.L.M. considered Pearson to be like a brother to her. RP 41. During the summer of 2015, Pearson was 16 years old and K.L.M. was 12 years old. CP 5; RP 18, 19, 114.

At the trial, K.L.M. described a time when she and Pearson were laying in bed and he started kissing her. RP 41. K.L.M. told Pearson to stop because she did not want to get caught, but it did not stop and it "escalated." RP 41. Pearson then moved his hands towards K.L.M.'s vaginal area and went underneath her underwear, touching the skin of her

vagina. RP 42. Pearson's hand was moving while it was on her vaginal area. RP 43. Pearson then put his fingers where a tampon goes and moved his fingers in that location. RP 43. While he did this, Pearson was kissing K.L.M. on her lips and on her neck. RP 43. Before it went further, they heard the garage door open, which signaled that Ms. Zink was home, and Pearson stopped. RP 44. K.L.M. indicated this event occurred in the summer she was 12 years old, before school started but after a trip to the beach they had taken. RP 45.

K.L.M. did not immediately report what had happened to either Ms. Zink, her counselor, or anyone else. RP 47-49. After Pearson had moved out of her home and was no longer around, K.L.M. decided to tell about what had happened because she did not want to hold it all in by herself any longer. RP 60. She told her favorite teacher, Dena Picconi, she told Ms. Zink, and she told her counselor about what had happened. RP 61. K.L.M. also saw a doctor, Dr. Copeland, whom she told about the incident. RP 61.

Ms. Zink testified at the trial that she was K.L.M.'s foster mother, and is now her guardian. RP 17. Sometime in November 2015, K.L.M. disclosed to Ms. Zink that she had been sexually assaulted. RP 24. K.L.M. told Ms. Zink she had something to tell her, but that she was too scared to say it, so she sent her a text message. RP 25. While she sent the message,

K.L.M. was sitting behind Ms. Zink and was shaking and crying. RP 25. Ms. Zink described K.L.M. as acting like a “scared dog.” RP 25. At the time of the disclosure to Ms. Zink, they had not seen Pearson in a month to a month and a half. RP 25.

Dena Picconi is a teacher at Cascade Middle School. RP 67. Ms. Picconi testified that after class one day K.L.M. asked if she could speak with her in private. RP 68. K.L.M. then disclosed she had been sexually assaulted. RP 68. Ms. Picconi could tell K.L.M. was upset as she was not her happy, normal self. RP 69. Ms. Picconi then reported this incident to DSHS. RP 69.

Sarah Arp-Howard is a marriage and family therapist. RP 72. In that capacity she treated K.L.M. for a little over a year, from either December 2014 or January 2015 through April 2016. RP 73, 76. At some point during their work together, K.L.M. disclosed that Pearson had raped her. RP 75. Ms. Arp-Howard talked to K.L.M. about how she defined the word ‘rape.’ RP 75. K.L.M. told Ms. Arp-Howard she was telling her about it now because Pearson was out of the home and no chance he would be coming back so K.L.M. said “[w]ell, I can say it now.” RP 75.

Dr. Kimberly Copeland also testified at trial. RP 93. She indicated that she specializes in pediatric emergency medicine and works as a child abuse medical provider. RP 94. On February 8, 2016, Dr. Copeland met

with K.L.M. in reference to her sexual assault by Pearson. RP 95. K.L.M. declined to have a physical sexual assault examination performed, but told Dr. Copeland that her “foster brother molested [her].” RP 106-07. Dr. Copeland followed up with K.L.M. about that statement, asking her what that meant to her; K.L.M. responded that “he fingered me.” RP 107. K.L.M. also said it involved her “private part” and pointed to her vaginal area. RP 107.

The trial court found Pearson committed both count 1 – Rape of a Child in the Second Degree and count 2 – Child Molestation in the Second Degree. RP 125-35. At the sentencing hearing, the Court sentenced Pearson to 15 to 36 weeks on Rape of a Child in the Second Degree, and 30 days on Child Molestation in the Second Degree, and ran each sentence concurrently to the other. RP 169; CP 24. The trial court found the two offenses merged for the purposes of disposition. CP 28. At a subsequent hearing, the trial court entered Findings of Fact and Conclusions of Law. RP 26-28.

ARGUMENT

I. Pearson’s multiple convictions to do not violate the prohibition against double jeopardy.

Pearson argues that his convictions for Rape of a Child in the Second Degree and Child Molestation in the Second Degree violated the prohibition against double jeopardy. As these offenses are not the same in law or fact, double jeopardy has not been violated. This Court should affirm Pearson's convictions.

This Court reviews double jeopardy claims de novo. *State v. Hughes*, 166 Wn.2d 675, 681, 212 P.3d 558 (2009). The Fifth Amendment to the United States Constitution provides that no person may be twice put in jeopardy of life and limb for the same offense. U.S. Const. amend V. The Washington State Constitution also prohibits double jeopardy stating that “[n]o person shall be ... twice put in jeopardy for the same offense.” Wash. Const. art I, § 9. When a trial court enters multiple convictions for the same offense it violates double jeopardy. *In re Pers. Restraint of Francis*, 170 Wn.2d 517, 523, 242 P.3d 866 (2010). But when “each count arises from a separate and distinct act, the defendant is not potentially exposed to multiple punishments for a single act.” *State v. Pena Fuentes*, 170 Wn.2d 808, 824, 318 P.3d 257 (2014).

If certain conduct supports charging under two different criminal statutes, the Court looks to legislative intent to determine whether the two crimes constitute the same offense for double jeopardy purposes. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004).

When the relevant statutes do not expressly disclose the legislature's intent, this Court employs the *Blockburger* same evidence test. *Blockburger v. U.S.*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). The statutory language of both RCW 9A.44.076 and RCW 9A.44.086 does not expressly speak to multiple punishments for the same act, thus the *Blockburger* test should be employed.

Under the *Blockburger* test, this Court presumes that the legislature did not intend to punish criminal conduct twice when evidence used to convict someone of one crime also supports a conviction for another crime. *Orange*, 152 Wn.2d at 820. Hence a defendant's right to be free from double jeopardy is violated if that defendant receives multiple convictions for offenses that are identical both in fact and in law. *Pena Fuentes*, 179 Wn.2d at 824; *State v. Freemani*, 153 Wn.2d 765, 776, 108 P.3d 753 (2005); *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995)). However, if each offense includes elements that are not included in the other offense, the offenses are not identical and multiple convictions do not violate double jeopardy. *Pena Fuentes*, 179 Wn.2d at 824.

Rape of a child in the Second Degree requires proof of "sexual intercourse" with a child under the age of 14 by a person who is at least thirty-six months older than the child and not married to the child. RCW 9A.44.076. Sexual intercourse occurs when the defendant achieves any

penetration of the victim's vagina, however slight. RCW 9A.44.010(1)(a), (b). In contrast, Child Molestation in the Second Degree requires proof that the defendant had "sexual contact" with a child under the age of 14 when he was at least thirty-six months older than the child and not married to the child. RCW 9A.44.086. Sexual contact is defined as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party." RCW 9A.44.010(2).

Pearson was charged with both Rape of Child in the Second Degree and Child Molestation in the Second Degree against K.L.M. CP 1-2. The evidence showed that the defendant touched K.L.M.'s genitals and digitally penetrated her vagina. RP 43. The State argued during closing that Pearson committed Rape of a Child by inserting his fingers into K.L.M.'s vagina – K.L.M. had testified that she had used a tampon before and that it went inside her body like a tampon would. RP 114, RP 42-43. The State argued that Pearson committed Child Molestation by touching and inserting his fingers into K.L.M.'s vagina while kissing her mouth and neck and that this was done for his own sexual gratification. RP 115. K.L.M. testified that Pearson laid down next to her and started kissing her. RP 42. Pearson then started touching her vagina and moved his hand while he was touching her unclothed vagina. RP 42-43.

The trial court made it clear it considered each crime separately in rendering its verdicts. RP 117-18, 125; CP 26-28. Regarding the trial court's verdict for Count 1, Rape of a Child in the Second Degree, the trial court found the State proved all elements of the crime beyond a reasonable doubt. RP 125-33. Specifically, the trial court found K.L.M. to be credible and that the State met its burden of proof in showing that Pearson used his finger to penetrate K.L.M.'s vagina in late-August 2015. RP 133. The trial court then separately addressed Count 2, Child Molestation in the Second Degree. RP 134-35. The trial court found all the elements of Child Molestation in the Second Degree were proven beyond a reasonable doubt; the court found that sexual contact occurred "because the penetration occurred, because there was touching of the vagina." RP 134. The trial court also found this sexual contact was done for the purpose of sexual gratification as there was no other reason for Pearson to touch K.L.M. in that way, the close proximity of Pearson to K.L.M. and the fact that he was kissing her at the time. RP 134-35.

At the sentencing hearing, in response to a question from the court, the State agreed the trial court could find the Rape of a Child and Child Molestation counts merge together and indicated that in the interests of justice it would have no objection to merging the counts. RP 151. Pearson

also agreed the two counts merged. RP 151. The trial court did find the two offenses merged for purposes of sentencing. RP 164.

Pearson argues that his convictions for Rape of a Child in the Second Degree and Child Molestation in the Second Degree violate the prohibition against double jeopardy because both convictions were based on the same act. This Court has rejected this argument in *State v. Land*, 172 Wn.App. 593, 295 P.3d 782, rev. denied, 177 Wn.2d 1016 (2013). In *Land*, this Court stated,

[w]here the only evidence of sexual intercourse supporting a count of child rape is evidence of penetration, rape is not the same offense as child molestation. And this is so even if the penetration and molestation allegedly occur during a single incident of sexual contact between the child and the older person. The touching of sexual parts for sexual gratification constitutes molestation up until the point of actual penetration; at that point, the act of penetration alone, regardless of motivation, supports a separately punishable conviction for child rape.

Land, 172 Wn.App. at 600. This holding from the Court in *Land* is directly applicable to the facts of this case.

At trial, K.L.M. testified that Pearson was laying down next to her, started kissing her and touching her vaginal area, while moving his hand, and then used his fingers to penetrate her vagina. RP 42-43. During her closing argument, the prosecutor specifically charged the court with considering each crime separately. RP 118-19. The trial court then clearly

addressed the proof for each count separately in rendering its verdicts and entering its findings. RP 125-35. The evidence and the court's verdict and findings make it abundantly clear that each count involved different elements and therefore different acts, even though these acts were part of the same incident.

Rape of a Child includes elements that are not included in Child Molestation. *State v. French*, 157 Wn.2d 593, 611, 141 P.3d 54 (2006). As they each include elements that are not included in the other crime, the offenses are separate and different in law. *Id.* As K.L.M. testified that Pearson touched her vagina and then digitally penetrated her vagina, the offenses are different in fact. Though these offenses occurred during a single incident, the Rape of a Child charge was not the same as the Child Molestation charge. *See Land, supra* at 600. These two crimes were different offenses and Pearson's conviction for both does not violate double jeopardy.

CONCLUSION

Pearson's convictions for Rape of a Child in the Second Degree and Child Molestation in the Second Degree do not violate double jeopardy. Both crimes include elements not included in the other, and while the two crimes occurred during the same incident, they were not the

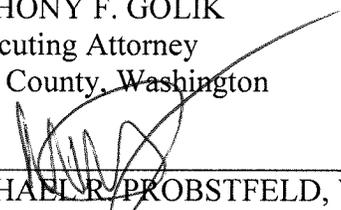
same act. Therefore, the offenses were different in law and in fact and Pearson's right to be free from twice being put in jeopardy for the same offense was not violated. His convictions should be affirmed.

DATED this 4 day of August, 2017.

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