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NO. 66708-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,
Respondent and Cross-Appellant,

v.

JORGE PENA-FUENTES,
Appellant and Cross-Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE RONALD KESSLER

REPLY BRIEF OF CROSS-APPELLANT

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A. ARGUMENT

1. THE DOUBLE JEOPARDY ISSUE IS NOT MOOT.

Pena-Fuentes claims that "the State's double jeopardy issue is moot because the trial court dismissed Count I with prejudice due to police misconduct...." Appellant's Response to State's Cross-Appeal and Reply ("Response Brief") at 21. This argument mischaracterizes the trial court's rulings.

Pena-Fuentes moved the trial court to dismiss his convictions with prejudice due to police misconduct. CP 77-80. Because the misconduct occurred after the trial, the trial court denied this motion. The court explained that, "I do not believe [the police misconduct] affected the trial and I'm not satisfied that it will affect, sufficiently, well, that it has affected the motion for a new trial. I'm going to deny the motion to dismiss on that basis." RP 593-94.

However, based upon double jeopardy, the court dismissed the first-degree rape of a child conviction and held that "the right remedy for that is to grant a new trial." RP 594. The trial court then ordered that retrial was barred due to the post-trial police misconduct and then dismissed that count with prejudice. Id.

Accordingly, absent the double jeopardy ruling dismissing the child rape conviction, the trial court would not have dismissed that count. The double jeopardy issue is not moot.

2. THE CONVICTIONS FOR FIRST-DEGREE RAPE OF A CHILD AND FIRST-DEGREE CHILD MOLESTATION DID NOT VIOLATE DOUBLE JEOPARDY.

The State has argued that Pena-Fuentes' convictions for first-degree rape of a child and first-degree child molestation did not violate double jeopardy under the "same evidence" test. The "same evidence" test examines whether the crimes are the same in law and in fact. State v. Calle, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995). The Supreme Court and the Court of Appeals have held that first-degree rape of a child and first-degree child molestation are not the same in law, and that convictions for both crimes do not violate double jeopardy. State v. French, 157 Wn.2d 593, 610, 141 P.3d 54 (2006); State v. Jones, 71 Wn. App. 798, 824-26, 863 P.2d 85 (1993).

In response, Pena-Fuentes ignores these cases and offers two different arguments. First, he argues that because the same conduct may have been used to prove both charges, there is a violation of double jeopardy. Response Brief at 23-30. This fact-based type analysis for determining double jeopardy has been rejected by both the United States Supreme Court and the Washington State Supreme Court. In 1993, the United States Supreme Court specifically overruled the "same conduct" fact-based test for determining double jeopardy. United States v. Dixon, 509 U.S. 688, 704, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993). Two years later, the Washington State Supreme Court did the same. State v. Gocken, 127 Wn.2d 95, 896 P.2d 1267 (1995).

Pena-Fuentes cites to State v. Birgen, 33 Wn. App. 1, 651 P.2d 240 (1982) and State v. Potter, 31 Wn. App. 883, 645 P.2d 60 (1982). In Calle, the Supreme Court held that these cases stood for the proposition that the "same evidence" test is not always dispositive on the issue of whether multiple punishments violate double jeopardy. 125 Wn.2d at 779-80. Instead, the court held that the result of the "same evidence" test is presumed to be the legislature's intent, but it is not controlling where there is clear

evidence of contrary legislative intent. Id. at 780; In re Percer, 150 Wn.2d 41, 50-51, 75 P.3d 488 (2003).

Here, Pena-Fuentes does not offer "clear evidence" of a contrary legislative intent with respect to first-degree rape of a child and first-degree child molestation. Instead, he notes that both crimes are both focused on protecting children from sexual abuse and that both crimes are located in the same chapter of the criminal code. Response Brief at 30. These similarities do not establish that the legislature intended that they be treated as a single offense for double jeopardy purposes.

The absence of "clear evidence of contrary legislative intent" stands in stark contrast to settled caselaw on the issue. As noted above, since 1993, the appellate courts have consistently held that there is no double jeopardy violation for convictions for child rape and child molestation. Had the legislature disagreed with these holdings, it has had decades to take action and express its contrary intent. It has not, and, therefore, there should be no doubt that the appellate decisions accurately reflect the legislature's intent.

Pena-Fuentes also claims that the merger doctrine required dismissal of his first-degree child rape conviction. Under the merger doctrine, when separately criminalized conduct raises another offense to a higher degree, the court presumes that the legislature intended to punish only the more serious crime with the greater sentence. State v. Freeman, 153 Wn.2d 765, 771-73, 108 P.3d 753 (2005); State v. L.U., 137 Wn. App. 410, 415-16, 153 P.3d 894 (2007). The doctrine applies only "where the Legislature has clearly indicated that in order to prove a particular degree of crime (e.g., first degree rape) the State must prove not only that a defendant committed that crime (e.g., rape) but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes (e.g., assault or kidnapping)...." State v. Vladovic, 99 Wn.2d 413, 421, 662 P.2d 853 (1983).

Here, the merger doctrine clearly does not apply to the crimes at issue. First-degree child molestation does not elevate the crime of rape of a child to a higher degree. Instead, the various degrees of child rape are based upon the age of the child victim. RCW 9A.44.073-.079. There is no basis to apply the merger doctrine.

The trial court clearly erred in holding that Pena-Fuentes' convictions for child rape and child molestation violated double jeopardy. This Court should reverse the trial court's order dismissing the child rape count and remand for resentencing.

3. THE TRIAL COURT ERRED BY DISMISSING THE GREATER CRIME.

In prior briefing, the State has argued that, assuming a double jeopardy violation, the trial court dismissed the wrong conviction. When convictions on multiple offenses violate double jeopardy, the remedy is to vacate the conviction for the lesser offense. State v. Weber, 159 Wn.2d 252, 266-69, 149 P.3d 646 (2006). In this case, the trial court dismissed the greater offense, the first-degree rape of a child conviction. In his response brief, Pena-Fuentes does not respond to this argument. Accordingly, even if this Court holds that the multiple convictions violate double jeopardy, the case should be remanded with instructions to the trial court to re-instate the first-degree rape of a child conviction and to dismiss a first-degree child molestation conviction.

B. CONCLUSION

For the reasons discussed above and in the State's prior briefing, this Court should reverse the trial court's order dismissing Pena-Fuentes' first-degree rape of a child conviction and remand for resentencing. The Court should affirm the judgment and sentence in all other respects.

DATED this 2nd day of November, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Richard Hansen, the attorney for the appellant, at 600 University Street, Suite 3020, Seattle, WA 98101 containing a copy of the REPLY BRIEF OF CROSS-APPELLANT, in STATE V. JORGE PENA FUENTES, Cause No. 66708-4-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

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Name
Done in Seattle, Washington

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