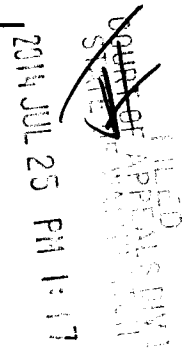
NO. 70643-8-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE



STATE OF WASHINGTON,

Respondent,

v.

MANUEL JUAREZ-GARCIA,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. The jury's finding that E.L. became pregnant as a result of three separate acts of rape violated Mr. Jaurez-Garcia's right to due process because the evidence showed E.L. became pregnant only once.

a. Under *State v. Hickman*, the jury instructions required the jury to find E.L. became pregnant as a result of a specific act of rape.

Manuel Juarez-Garcia was convicted of raping his stepdaughter, E.L., on three separate occasions.[1] CP 113-14. For each of the three acts, the State charged Mr. Juarez-Garcia with second degree rape, second degree rape of a child, and second child degree molestation. CP 36-41. The jury instructions properly directed that the jury must find each act constituting second degree rape "separate and distinct" from any other act constituting second degree rape in order to convict Mr. Juarez-Garcia, and provided the same instruction for second degree rape of a child and second degree child molestation. CP 75-85.

Jury instructions not objected to become the law of the case. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). Where the State fails to object to an instruction limiting an element, the State must submit sufficient evidence to prove that element as delineated by the

instructions. See, e.g., id. at 105; City of Spokane v. White, 102 Wn. App. 955, 964-65, 10 P.3d 1095 (2000); State v. Nam, 136 Wn. App. 698, 706-07, 150 P.3d 617 (2007); State v. Price, 33 Wn. App. 472, 474-75, 655 P.2d 1191 (1982). This holds true because regardless of whether the instruction was rightfully given; once given it becomes binding and conclusive upon the jury. Hickman, 135 Wn.2d at 101 n.2.

In its response, the State at first concedes the evidence demonstrated E.L. became pregnant only once. Resp. Br. at 13. But it then argues "under the circumstances in the present case, there is sufficient evidence to sustain the finding as to all three rapes that Jaurez-Garcia's rapes of E.L. caused her to be pregnant." Resp. Br. at 14. It declines, however, to address the applicability of Hickman. The State mentions only that Mr. Juarez-Garcia provides no authority for his argument except that the "jury instructions somehow compel" the State to prove which act of rape impregnated E.L. Resp. Br. at 18.

In fact, the holding in Hickman, and Mr. Juarez-Garcia's reliance on it, is clear. Hickman required that any elements included in the "to convict" instructions be proved beyond a reasonable doubt. 135

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[1] Mr. Juarez-Garcia was also convicted of attempted rape and child molestation as a result of two separate incidents. CP 113-14.

Wn.2d at 99. Contrary to the State's suggestion that the instructions permitted the jury to find "Juarez-Garcia's rapes of E.L. caused her to be pregnant," the "to convict" instructions in this case properly required that the jury find each act of rape separate and distinct from the other acts. Resp. Br. at 14; CP 75-85. The jury found E.L. became pregnant as a result of each of the three separate acts. Because the evidence showed that E.L. only became pregnant once, and the evidence did not show the pregnancy was a result of a specific act, this special verdict was not supported by sufficient evidence and Mr. Juarez-Garcia's due process rights were violated. See In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

b. The State should be required to proceed according to what it is able to show at trial, rather than engage in a fiction that multiple rapes are responsible for one pregnancy.

The State makes the policy argument that requiring the State to prove which rape caused the alleged victim to become pregnant "would lead to the absurd result that in cases with multiple rapes the court would be unable to impose an exceptional sentence for pregnancy whereas in a case with a single rape that led to pregnancy, the court would be able to do so." Resp. Br. at 16. However, the danger of

allowing the State to prove the pregnancy aggravator without tying it to a specific act of rape is demonstrated by this record.

The State ignores the fact it successfully excluded the evidence that would have shown the age of the fetus beyond a reasonable doubt. E.L. terminated her pregnancy on December 20, 2012. 5/30/12 RP 69. Outside of the jury's presence, the nurse practitioner who collected the fetus testified that she was informed the fetus was 25 weeks old at the time of termination. 5/30/12 RP 71. If E.L. was 25 weeks pregnant on December 20, 2012, she was in her first week of pregnancy July 5, 2012. This was more than two weeks before the family arrived in Washington and several months before the three rapes proved at trial.

The evidence showed the first incident occurred before the school year began. The jury found, based on Mr. Juarez-Garcia's actions during this incident, that he was not guilty of second degree rape of a child and guilty of second degree child molestation. CP 102-03. As the State argued to the trial court below, the remaining incidents, for which Mr. Juarez-Garcia was found guilty of rape, occurred after mid-October. 5/29/13 RP 78. Thus, had the State presented testimony about the age of the fetus, this age would not have aligned with the allegations made by E.L. Because the State

successfully excluded this evidence and was not required to tie the rape to a specific act, it proceeded to trial using E.L.'s testimony that she menstruated after moving to Washington and there were no other incidents of rape. 5/30/12 RP 30, 65.

Thus, when the State warns of absurd results, it fails to acknowledge that had it been required to identify which act of rape caused E.L.'s pregnancy, it would have been unable to meet its burden because the evidence actually indicated the acts of rape described at trial were not responsible for E.L.'s pregnancy. Instead, the jury was permitted to find that all three acts of rape caused E.L. to become pregnant. This result is far more alarming than requiring the State to proceed according to its evidence, and prove that a specific act of rape resulted in the alleged victim's pregnancy. This is true regardless of whether it makes it more difficult for the State prove the pregnancy aggravator in some cases. Indeed, the State's argument that this requirement would make the State's job harder is not a reasonable counter to Mr. Juarez-Garcia's right to due process.

Because the State failed to prove, beyond a reasonable doubt, that E.L. became pregnant as a result of a specific act of rape alleged at

trial, the special verdict as to this aggravating factor must be reversed and the case remanded for sentencing.

2. The convictions for second degree rape of a child and the aggravating factor that E.L. was under 15 years of age violate double jeopardy.

a. The Court's analysis in *Rice* was invalidated by *Alleyne*.

Under the double jeopardy clauses of the state and federal constitutions, the State may not engage in multiple prosecutions for the same conduct and multiple punishments for the same offense. U.S. Const. amend V; Const. art. I, § 9; Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); United States v. Dixon, 509 U.S. 688, 696, 113 S.Ct. 2349, 125 L.Ed.2d 556 (1993). The jury found Mr. Juarez-Guilty guilty of three counts of second degree rape of a child. CP 96, 99, 104. One of the elements of this crime is the age of the victim. The jury was required to find E.L. was at least 12 years old, but less than 14 years old, at the time of the crime. RCW 9A.44.076(1). The jury also convicted Mr. Juarez-Garcia of three counts of second degree rape, and answered the "special allegation" affirmatively, finding E.L. was under 15 years old. CP 108-110; see RCW 9.94A.837. Because both the conviction for second

degree rape of a child and the aggravating fact that E.L. was under 15 years of age were based on E.L.'s status, finding Mr. Juarez-Guilty of both violated his double jeopardy rights. See State v. Hughes, 166 Wn.2d 675, 686, 212 P.3d 558 (2009).

The State argues Mr. Juarez-Garcia's rights were not violated because the Washington courts have "long held that sentence enhancements do not implicate double jeopardy concerns" and the Supreme Court determined that Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 40 (2004) did not change this analysis. Resp. Br. at 25-26; State v. Kelley, 168 Wn.2d 72, 229 P.3d 773 (2010); State v. Aguirre, 168 Wn.2d 350, 229 P.3d 669 (2010). However, it acknowledges, as it must, that the Court has not addressed its decision in State v. Rice, 159 Wn. App. 545, 246 P.3d 234 (2011) since the U.S. Supreme Court decided Alleyne v. United States, __ U.S. __, 133 S.Ct. 2151, 2162, 186 L.Ed.2d 314 (2013).

In Rice, the court found that the defendant's double jeopardy rights were not violated because the "special allegation" that the victim was under 15 years old raised the minimum sentence rather than allowing the court to impose an exceptional sentence. 159 Wn. App. at

569. In Alleyne, the Court eliminated the distinction between sentencing enhancements and aggravating factors, finding that a fact which increases the legally prescribed floor of the sentencing range necessarily aggravates the punishment. __ U.S. __, 133 S.Ct. at 2161. This decision invalidated the finding, and analysis, in Rice. This issue must be revisited in light of Allyene.

b. The legislature did not clearly show it intended to punish an offender twice for the victim's age.

The State argues there is no violation of double jeopardy because the legislature "clearly intended to impose additional punishment when the victim of the forcible rape is under fifteen." Resp. Br. at 27. It relies on Kelley to show that when the legislature is clear in its intent, there is no violation of double jeopardy. Resp. Br. at 25; 168 Wn.2d at 77. In Kelley, The statute at issue mandated a firearm sentence enhancement, subject to express exceptions, when an offender committed a felony while armed with a firearm. 168 Wn.2d at 78. Thus, the sentencing statute acknowledged, and worked in tandem with, the statute governing the underlying crime that the defendant claimed violated double jeopardy. Id. As a result, the court found "the intent to impose multiple punishments could hardly be clearer." Id.

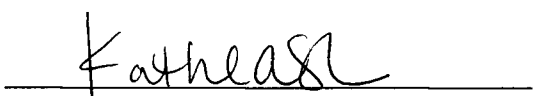
This is not the case here. In this case, the statute directing the State to file the "under 15" sentencing enhancement in no way acknowledges that the defendant may also be charged with a count of rape of a child that allows for greater punishment based on the alleged victim's age, making the legislature's intent to punish an offender twice for the victim's age entirely unclear. See RCW 9.94A.837. Because there is no apparent indication as to the legislature's intent, the "same evidence" test applies, and the conviction for second degree rape of a child and affirmative finding of the "under 15" sentencing enhancement violates double jeopardy. See Op. Br. at 14-17. The aggravator must be vacated and the case remanded for resentencing.

B. CONCLUSION

For the reasons stated above and in his opening brief, Mr. Jaurez-Garcia respectfully requests this Court vacate the jury's special verdicts and remand for resentencing.

DATED this 24th day of July, 2014.

Respectfully submitted,



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

STATE OF WASHINGTON, Respondent, v. MANUEL JUAREZ-GARCIA, Appellant.	)))))))))	NO. 70643-8-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 24TH DAY OF JULY, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 24TH DAY OF JULY, 2014.

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