

SUPREME COURT NO. 95035-1
COURT OF APPEALS NO. 74356-2-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARTIN AMAYA-ONTIVEROS,

Petitioner.

ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION

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TABLE OF CONTENTS

	Page
A. <u>IDENTITY OF RESPONDENT</u>	1
B. <u>COURT OF APPEALS OPINION</u>	1
C. <u>ISSUE PRESENTED FOR REVIEW</u>	1
D. <u>INTRODUCTION AND STATEMENT OF THE CASE</u>	1
E. <u>ARGUMENT</u>	2
1. THE COURT SHOULD DENY THE PETITION FOR REVIEW	2
2. CHILD MOLESTATION AND CHILD RAPE ARE NOT IDENTICAL OFFENSES	6
F. <u>CONCLUSION</u>	9

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

<u>State v. Amaya-Ontiveros</u> , No. 74356-2-1 (Wash. Ct. App. Jul. 31, 2017) (unpublished)	1, 3, 6, 7
<u>State v. Brown</u> , 78 Wn. App. 891, 899 P.2d 34 (1995)	8
<u>State v. Calle</u> , 125 Wn.2d 769, 888 P.2d 155 (1995)	7
<u>State v. Gurrola</u> , 69 Wn. App. 152, 848 P.2d 199 (1993)	8
<u>State v. Jones</u> , 71 Wn. App. 798, 863 P.2d 85 (1993)	8
<u>State v. Kelley</u> , 168 Wn.2d 72, 226 P.3d 773 (2010)	7
<u>State v. Kier</u> , 164 Wn.2d 798, 194 P.3d 212 (2008)	3, 5
<u>State v. Louis</u> , 155 Wn.2d 563, 120 P.3d 936 (2005)	7, 8
<u>State v. Mutch</u> , 171 Wn.2d 646, 254 P.3d 803 (2011)	3, 4, 5
<u>State v. Newland</u> , 2017 WL 1163138 (2017).....	4
<u>State v. Pena-Fuentes</u> , 179 Wn.2d 808, 318 P.3d 257 (2014)	5, 6

Rules and Regulations

Washington State:

RAP 1.2 6

RAP 13.42, 6, 7

RAP 13.7 6

A. IDENTITY OF RESPONDENT

The State of Washington is the Respondent in this case.

B. COURT OF APPEALS OPINION

The Court of Appeals decision at issue is State v. Amaya-Ontiveros, No. 74356-2-1, filed July 31, 2017 (unpublished).

C. ISSUE PRESENTED FOR REVIEW

The State asks this Court to deny the petition for review. If this Court accepts review, the State seeks cross-review of the Court of Appeals' conclusion that the jury instructions, which did not inform the jury that an act of molestation had to be separate and distinct from an act of child rape, created a potential double jeopardy violation.

D. INTRODUCTION AND STATEMENT OF THE CASE

Amaya-Ontiveros was convicted of two counts of third-degree child molestation and two counts of third-degree child rape. CP 38-41. The relevant facts are set forth in the State's briefing before the Court of Appeals. Brief of Respondent at 3-6.

The Court of Appeals affirmed the convictions in a unanimous unpublished opinion. State v. Amaya-Ontiveros, No. 74356-2-1 (Wash. Ct. App. Jul. 31, 2017).

E. ARGUMENT

For the reasons outlined below, this Court should reject Amaya-Ontiveros's petition for review. If the court accepts review, the State requests that the court also accept review of the Court of Appeals' conclusion that the jury instructions created the potential for a double jeopardy violation. RAP 13.4(d).

1. THE COURT SHOULD DENY THE PETITION FOR REVIEW.

RAP 13.4(b) governs consideration of a petition for review. It provides that a petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The State's briefing in the Court of Appeals adequately addressed the substantive issue raised by Amaya-Ontiveros. For the following reasons, review should be denied.

The Court of Appeals determined that because there was evidence of oral intercourse, the jury should have been instructed that a conviction for molestation was required to be based on an act

separate and distinct from an act of child rape.¹ In State v. Mutch, this Court concluded that when multiple acts of child rape occurred during the same charging period, the jury must be provided a “separate and distinct acts” instruction to ensure that the defendant is not convicted twice for the same offense. 171 Wn.2d 646, 254 P.3d 803 (2011). However, this Court clarified that the potential for a double jeopardy violation is insufficient, and reversal unnecessary, when the entire record made it manifestly apparent to the jury that each count was based on a separate act. Id. at 664.

Here, the Court of Appeals properly applied Mutch by examining the trial testimony, closing argument, and jury instructions and concluding that it was manifestly apparent to the jury that the molestation charges were based on acts not involving intercourse, and the rape charges were based on acts of sexual intercourse. Amaya-Ontiveros, Slip Op. at 6-10.

Amaya-Ontiveros alleges there exists a recent trend in the court of appeals to “disregard[] the rigorous standard of review for double jeopardy claims” set forth in Mutch and State v. Kier, 164 Wn.2d 798, 194 P.3d 212 (2008). Pet. for Review at 17. He contends that the court of appeals has ignored this Court’s observation that it

¹ The State has cross-petitioned on this issue to preserve the right to challenge it should this Court accept review.

would be a “rare circumstance” when reversal would not be required. In support of this argument, he cites to several recent unpublished opinions concluding that a review of the entire record made apparent to the reviewing court that no double jeopardy violation occurred. Pet. for Review at 18.

However, in this case and the others cited by Amaya-Ontiveros, the offenses allegedly constituting a double jeopardy violation were child molestation and child rape – crimes with different elements and easily distinguished on their facts.² In each of the cited cases, as here, it was manifestly apparent to the jury that the child molestation counts were based on acts of sexual contact not involving intercourse, and the child rape counts were based on acts of oral intercourse. Unlike Mutch, where the defendant was charged with five identical counts of child rape occurring in the same time frame, Amaya-Ontiveros was charged with separate offenses for obviously distinct conduct. Given the specific facts presented in this case and the others cited, it is not an unusual or rare circumstance that the record was manifestly apparent that the child molestation and child

² Amaya-Ontiveros cites to one case, State v. Newland, that involved multiple counts of the identical crime. However, there, as in Mutch, the victim testified to a specific number of acts of intercourse that corresponded to the exact number of charges, the jury was given separate “to-convict” instructions and separate verdict forms for each count, and during closing argument, the prosecutor specifically referenced each count and which specific act each represented. 2017 WL 1163138, at *9 (2017).

rape counts were based on separate and distinct acts. Because Mutch had no occasion to consider the circumstances presented here and in the other cases Amaya-Ontiveros cites, his argument that the Court of Appeals is “watering down” the Mutch standard is baseless.

Amaya-Ontiveros also contends that the court of appeals is not faithfully applying this Court’s holding in Kier, supra. However, in Kier, this Court merely held that the prosecutor’s “election” was insufficiently clear to avoid a double jeopardy violation in light of the entire record, which included ambiguous jury instructions and testimony. 164 Wn.2d at 812-13. However, in this case, the Court of Appeals correctly noted that the trial testimony made it quite evident that acts of child molestation involving no intercourse occurred separate from other acts of intercourse. That unambiguous testimony, combined with the prosecutor’s clear statements in closing that the molestation was based on acts of non-intercourse while the rapes were based on acts of intercourse, made it manifestly apparent that no double jeopardy violation occurred. The court of appeals did not disregard Kier.

Moreover, in alleging that the court of appeals is not properly applying Mutch and Kier, Amaya-Ontiveros ignores State v. Pena-Fuentes, where this Court concluded that no double jeopardy violation occurred when the State’s closing argument clearly distinguished individual acts of molestation from acts of child rape, and where the

defendant challenged the victim's credibility generally and did not challenge the number of acts or whether they overlapped. 179 Wn.2d 808, 825-26, 318 P.3d 257 (2014). Similarly here, Amaya-Ontiveros testified and denied *all* of the acts, asserting that the victim was not believable as to *any* of the charged offenses. RP 311-12. The court of appeals properly recognized the similarity to Pena-Fuentes when it concluded that there was no double jeopardy violation. Amaya-Ontiveros, Slip Op. at 7-8.

Because Amaya-Ontiveros has failed to establish that the court of appeals opinion in this case or any other fails to properly apply decisions of this Court, review should be denied. RAP 13.4(b), (4).

2. CHILD MOLESTATION AND CHILD RAPE ARE NOT IDENTICAL OFFENSES.

The provisions of RAP 13.4(b) are inapplicable because the State is not seeking review and believes that review by this Court is unnecessary. However, if the Court grants review, in the interests of justice and full consideration of the issues, the Court should also grant review of the lower court's conclusion that child molestation and child rape are identical offenses when there is evidence of oral intercourse. RAP 1.2(a); RAP 13.7(b). This argument is summarized below and is set forth more fully in the briefing in the court of appeals.

The court of appeals concluded that if a charge of child rape is based on evidence of sexual intercourse in the form of oral-genital contact rather than penetration, then child molestation and child rape are identical offenses for double jeopardy purposes. Amaya-Ontiveros, Slip Op. at 5. If review is accepted, the State seeks cross-review of that conclusion. RAP 13.4(d).

A defendant's conduct may violate more than one criminal statute, and double jeopardy is implicated only when the court exceeds its legislative authority by imposing multiple punishments where multiple punishments are not authorized. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). The question of whether multiple punishments are authorized is ultimately a question of the legislature's intent. State v. Kelley, 168 Wn.2d 72, 77, 226 P.3d 773 (2010).

To determine legislative intent, courts consider the "same evidence" test, which asks whether the crimes are the same in both law and in fact. State v. Louis, 155 Wn.2d 563, 569, 120 P.3d 936 (2005). If each offense contains an element not included in the other, then the offenses are not the same in law and multiple convictions are permissible. Id. Only clear evidence of contrary legislative intent can override the results of the same evidence test. Calle, 125 Wn.2d at 780.

Child rape requires sexual intercourse, while child molestation requires sexual contact. State v. Jones, 71 Wn. App. 798, 824-26, 863 P.2d 85 (1993). Although sexual intercourse can be accomplished by oral/genital sexual contact, the definition of sexual contact that applies to child molestation does not apply to sexual intercourse for purposes of child rape. State v. Gurrola, 69 Wn. App. 152, 157, 848 P.2d 199 (1993). Applying the statutory definition of “sexual contact” to child rape cases would eliminate any distinction between rape of a child and molestation of a child when the contact was oral/genital – a result clearly contrary to legislative intent. Id.; see also State v. Brown, 78 Wn. App. 891, 895-96, 899 P.2d 34 (1995) (due to the improbability of inadvertent oral/genital contact, legislature did not intend statutory definition of “sexual contact,” which includes sexual gratification requirement, to apply to rape cases).

The possibility that a jury may read its instructions in a manner that permits it to base multiple convictions upon the same act is a separate question from whether multiple punishments are legally authorized by the legislature in the first instance. As noted above, the correct inquiry to determine legislative intent is the same evidence test. Louis, 155 Wn.2d at 569. Because child molestation and child rape include different elements (sexual contact/gratification vs. sexual intercourse), the crimes are not identical offenses for double jeopardy

purposes. The court of appeals here erred when it concluded that the trial court was required to provide a "separate and distinct acts" instruction as to the child rape counts and child molestation counts in this case.

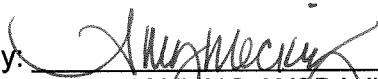
F. CONCLUSION

The State respectfully asks that the petition for review be denied. However, if review is granted, in the interests of justice the State seeks cross review of the issue in Section 2 above.

DATED this 28th day of September, 2017.

Respectfully submitted,

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