

66708-4

66708-4

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.

COURT OF APPEALS DIV I  
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RONALD KESSLER

**BRIEF OF RESPONDENT AND CROSS-APPELLANT**

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**A. CROSS-ASSIGNMENT OF ERROR**

1. The trial court erred by dismissing defendant Jorge Pena-Fuentes' conviction for first-degree rape of a child.

**B. ISSUES ON CROSS-APPEAL**

1. The Washington Supreme Court has held that convictions for first-degree rape of a child and first-degree child molestation, even if based upon the same act, do not violate double jeopardy. Pena-Fuentes was convicted of first-degree rape of a child and first-degree child molestation. Did the trial court err in vacating the first-degree rape of a child conviction based upon double jeopardy?

2. When convictions on multiple offenses violate double jeopardy, the remedy is to vacate the conviction for the lesser offense. Did the trial court err in dismissing the greater offense: the rape of a child conviction?

**C. ISSUES ON APPEAL**

1. Dismissal for governmental misconduct under CrR 8.3(b) is an extraordinary remedy and should be used only as a last resort. Here, after the detective requested the jail recordings of telephone calls made by the defendant, the jail erroneously

included calls between the defendant and his attorney, which the detective then listened to. Given that these events occurred only after the jury had convicted the defendant and that the detective never communicated the substance of what he heard to the prosecutor, has Pena-Fuentes failed to establish that the trial court abused its discretion in denying his motion to dismiss the case?

2. After trial was concluded and the trial court denied his motion to dismiss, Pena-Fuentes demanded all information relating to a witness tampering investigation where he and his relatives were suspects. Has Pena-Fuentes failed to show that the trial court abused its discretion in denying this discovery request?

3. At trial, Pena-Fuentes agreed to an instruction limiting the jury's consideration of Exhibit 2 to impeachment purposes. However, in a motion for new trial, he argued that Exhibit 2 should have been admitted as substantive evidence. Given that none of the grounds for granting a new trial under CrR 7.5 apply, has Pena-Fuentes failed to show the trial court abused its discretion in denying his motion for a new trial?

4. Pena-Fuentes' assignment of error no. 4 contains no legal argument supporting it. Should this Court decline to consider it?

5. Whether Pena-Fuentes has failed to show that the trial court erred in denying his request for an exceptional sentence.

**D. STATEMENT OF THE CASE**

**1. SUBSTANTIVE FACTS<sup>1</sup>**

**a. The Sexual Abuse.**

J.B. was born in November of 1993. RP 146.<sup>2</sup> She is the daughter of Mirna Corona and Brian Bean. Id. In 1996, Corona and Bean split up. RP 147. In April of 1997, Corona began dating defendant Jorge Pena-Fuentes, and they started living together in July of 1997. RP 154-55. They had one daughter, L.P., born in April of 1998. RP 279-80. Corona and Pena-Fuentes married in October of 1999. RP 156.

Corona and Pena-Fuentes had, by all accounts, a volatile relationship. RP 101, 131, 156. They frequently argued, and the

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<sup>1</sup> Pena-Fuentes' opening brief includes a very short (one-half page) summary of the testimony at trial. Appellant's Opening Brief at 6. Instead, he devotes a significant portion of the fact section of his brief to complaints about his ex-wife, Corona. Appellant's Opening Brief at 6-10. None of these "facts" were offered or admitted at trial. In fact, at trial, Pena-Fuentes asked the court to limit testimony about his relationship with his ex-wife and sought to exclude specific instances of domestic violence involving her. RP 24-25.

<sup>2</sup> The verbatim report of proceedings consists of three consecutively-numbered volumes, and will be referred to in this brief as "RP."

children saw them hit each other. RP 156-57, 216-17, 281, 313-14.

The police came to their house many times. RP 131. During most of the time they were married, Corona worked in the evening, and

Pena-Fuentes was in charge of taking care of the girls. RP 159-61.

He fed them, gave them baths, and put them to bed. RP 161.

Corona and Pena-Fuentes split up in 2004. RP 161. Even after they separated, Pena-Fuentes continued to take care of the girls after they got out of school. RP 161, 282.

According to J.B., Pena-Fuentes was nice to her most of the time. RP 336. She later stated, "He would have been the perfect dad if he wouldn't have done it." RP 336. What Pena-Fuentes had done was sexually abuse J.B. for many years. RP 343, 361.

J.B.'s earliest memory of the abuse was an incident when she was in kindergarten or the first grade. Pena-Fuentes had her on his lap when she noticed that his penis was exposed. RP 315-16.

As time passed, Pena-Fuentes began grabbing and touching her more frequently. RP 316-17. He would do this when her mother was at work and her sister was taking a shower. RP 317-18.

Pena-Fuentes would begin by tickling J.B. and he then would start rubbing her chest. RP 317-18. He would occasionally bite her on her bottom and on the neck. RP 320, 323.

In April of 2003, when J.B. was nine years old, the family moved into a condominium in Redmond, and Pena-Fuentes' behavior escalated. RP 153-54, 324-25. He would rub her chest over her clothing; other times, he placed his hand under her clothing and rubbed her bottom. RP 324-27. When J.B. took a shower, he would insist on helping her and rubbed soap all over her body. RP 324-25, 330. J.B. tried to avoid him by entering the bathroom and locking the door. RP 330.

Several times, he kissed her, and placed his tongue in her mouth. RP 326-27. When she asked him to stop, he replied, "It was only one kiss." RP 333. A few times, Pena-Fuentes gave her hickeys on her neck. RP 334.

One time, he licked her vagina, telling her that she had not taken a good enough shower and needed to get cleaner. RP 325. Another time, he stuck his fingers in her bottom, stating to her that he wanted to show her something cool. RP 326.

b. The Disclosure Of The Abuse.

J.B. did not disclose the abuse for many years. RP 335. She was concerned about what she would go through if she disclosed what was happening, and she thought that her mother would not

believe her. RP 328, 348-49. Nonetheless, there were some clues that things were amiss.

Corona noticed a hickey on J.B.'s arm and one on the neck of her younger sister L.P. RP 185-86. She told Pena-Fuentes to stop leaving the marks, explaining that they would get in trouble if school officials noticed them. RP 186.

J.B. frequently told her mother, aunt and grandmother that she did not want to go home with Pena-Fuentes. RP 110-11, 132, 135, 218, 375. When she was home with Pena-Fuentes, she would refuse to take showers. RP 215. When Pena-Fuentes called J.B.'s mother, Corona, to complain, J.B. promised to take her shower only after her mother got home. RP 215-19. Corona attributed J.B.'s behavior to the fact that she was becoming a teenager. RP 215.

J.B.'s grandmother was suspicious and repeatedly asked J.B. whether Pena-Fuentes was touching her. RP 111, 122-23, 329. J.B. answered no, though she appeared sad when responding. RP 111-13, 329.

J.B.'s grandmother and aunt expressed concern to J.B.'s mother about Pena-Fuentes' behavior toward J.B. RP 201-02. However, Corona did not listen to them. RP 201-02, 213-24.

J.B. was close to her cousin Jennifer. RP 336, 379-80.

Several times, J.B. hinted at the subject and asked Jennifer what she would do if she learned that Pena-Fuentes was abusing J.B. RP 336, 364, 371, 379-81. When Jennifer stated that she would tell J.B.'s mom, J.B. told her it was not true. RP 336, 364, 380.

Finally, one day, J.B. admitted to Jennifer that Pena-Fuentes was abusing her. RP 382. Crying, she told Jennifer that Pena-Fuentes had placed his fingers in her vagina and engaged in oral sex. RP 382. J.B. asked Jennifer not to tell her mother. RP 384.

J.B. also told her close friend, Asmaa El-Ghazali, that Pena-Fuentes had sexually abused her.<sup>3</sup> RP 265-69, 337-38. She stated that he touched her with his fingers in a very inappropriate place. RP 269-71. J.B. told Asmaa not to tell anyone. RP 270.

Finally, on November 25, 2008, J.B. went to her school counselor and told her that Pena-Fuentes had been sexually abusing her for years.<sup>4</sup> RP 234-36, 241, 244. She told her counselor that she

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<sup>3</sup> The testimony at trial was inconsistent as to when J.B. told Asmaa about the abuse. Asmaa testified that J.B. told her in the eighth grade. RP 269-70. J.B. recalled that she told Asmaa only after she disclosed the abuse to her school counselor in the ninth grade. RP 239-40, 350, 366.

<sup>4</sup> J.B. decided to disclose the abuse after she learned that Pena-Fuentes had threatened to shoot her mother in the head. RP 164-66, 179-81, 338-39.

had confided in her cousin Jennifer. RP 242. The counselor contacted the police, Child Protective Services, and J.B.'s mother. RP 181-82, 237, 243-44.

Seattle Police Detective Casey Johnson was assigned to investigate the case. RP 399. In December of 2008, he went to Pena-Fuentes' work place and interviewed him in his manager's office. RP 403-04. Pena-Fuentes stated that he had a great relationship with J.B. Ex. 9; Ex. 16 at 4.<sup>5</sup> He admitted that he frequently bit her in various places on her body, including her butt. Ex. 9; Ex. 16 at 5-9. He acknowledged that he licked her face and gave her a hickey once while kissing her. Ex. 9; Ex. 16 at 5, 12. He acknowledged that he may have grabbed her breast up to 10 times, albeit unintentionally. Ex. 9; Ex. 16 at 8. He denied that he ever performed oral sex on J.B. or placed his fingers in her anus. Ex 9; Ex. 16 at 20-21.

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<sup>5</sup> Ex. 9 is a CD containing the audio for the interview. RP 406. Ex. 16 is the transcript provided to the jury. RP 412.

## 2. PROCEDURAL FACTS

### a. The Charges And The Trial.

The State charged Pena-Fuentes with one count of first-degree rape of a child, three counts of first-degree child molestation, and three counts of second-degree child molestation. CP 10-14. Pena-Fuentes was represented by attorney Tony Savage. RP 1. On October 28, 2010, the jury found Pena-Fuentes guilty of first-degree rape of a child and two counts of first-degree child molestation. CP 18-21. The jury acquitted him of one count of first-degree child molestation and was hung on the remaining second-degree child molestation counts.<sup>6</sup> CP 18-21.

### b. The Post-Trial Motions.

On November 8, 2010, Pena-Fuentes moved for a new trial, claiming that his right to be free from double jeopardy was violated because the jury may have relied upon the same act to convict him

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<sup>6</sup> The difference in the jury's verdicts may be attributable to the different charging periods for the crimes. The counts that the jury convicted Pena-Fuentes on had the same charging period: January 1, 2003 through November 25, 2005. CP 10-11. The count that they acquitted him on had an earlier charging period: November 26, 2000 through June 1, 2003. *Id.* The second-degree child molestation counts that the jury was hung on had a later charging period: November 26, 2005 through November 25, 2007. CP 12-14.

of first-degree rape of a child and first-degree child molestation.  
CP 53-56.

One month later, on December 8, 2010, a new attorney, Richard Hansen, filed a notice of appearance, informed the prosecutor that he would be handling the motion for a new trial, and moved to continue the sentencing hearing, set for December 10, 2010. CP 57, 182, 194. The trial court denied the motion to continue. CP 219; Supp. CP \_\_ (Sub No. 56A). Nonetheless, the hearing was postponed because Pena-Fuentes reported that he had hurt his head and was taken to the emergency room. CP 200-01, 220; Supp. CP \_\_ (Sub No. 58).

During the delay, Pena-Fuentes' family took action in connection with his motion for a new trial. On Sunday, December 12, 2010, Pena-Fuentes' new wife, Mihaela Pena, and her brother Corneliu Herthog, surprised J.B.'s younger sister L.P. and appeared at her church right before services were to begin. RP 446-47; CP 70, 213. They told L.P. that the defendant was doing poorly in jail and had to go to the emergency room. CP 213. They told her that her "testimony in court couldn't really be used because [L.P.] said a lot of 'I don't knows' and 'I don't remembers.'" CP 214. They produced a camera and pressured L.P. into making a videotaped

statement. Id. Mihaela instructed L.P. to say on the video that she knew that the accusations against Pena-Fuentes were not true and that she had heard her mother and J.B. plotting against him. Id. Mihaela further told L.P. to say that her mother and J.B. had fabricated the sexual abuse allegations because they were jealous that he had moved on. Id.

On December 16, 2010, Pena-Fuentes filed a supplemental motion for a new trial citing, among other things, the videotaped statement of L.P. CP 59-68. He claimed that it was newly discovered evidence, justifying a new trial.<sup>7</sup> CP 59-64. He also argued that the trial court had erred at trial by limiting the admission of a letter written by L.P. to impeachment purposes. CP 64-66. He now argued that it should have been admitted as substantive evidence. Id.

In response, the State obtained a declaration from L.P., dated December 28, 2010, wherein she described the circumstances behind the videotaped statement. CP 213-14. In

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<sup>7</sup> In his motion for a new trial, Pena-Fuentes also claimed that he had discovered new evidence, primarily police reports, which, he claimed, showed that Pena-Fuentes' ex-wife, Corona, had been involved in making false accusations against him. CP 87-88, 98-100. Most of what was cited had, in fact, been provided to Pena-Fuentes prior to trial. CP 221, 278.

this declaration, L.P. explained that she was scared that Mihaela Pena and Corneliu Herthog had found her, that she felt forced into making the video, and that what she stated on the videotape were lies. CP 214.

The prosecutor also asked Detective Johnson to investigate possible witness tampering by Pena-Fuentes, Mihaela Pena, and Corneliu Herthog. CP 220. The prosecutor was suspicious about the timing of events: that Pena-Fuentes had suddenly become too ill to attend sentencing right before his family members approached L.P. Id. The prosecutor asked the detective to obtain jail recordings of telephone calls made by Pena-Fuentes. Id. The jail processed Detective Johnson's request for the jail recordings on December 26, 2010. CP 215, 218.

On January 5, 2011, Detective Johnson sent an e-mail to the prosecutor indicating that he had listened to the recorded jail calls, and that they included calls between Pena-Fuentes and lawyer Hansen. CP 220, 223. In response, the prosecutor instructed the detective to not listen to any further recorded calls and to not disclose to anyone the substance of the calls. Id. At the prosecutor's request, a new detective was assigned to investigate the possible witness tampering. CP 220.

The record is not clear why the calls between Pena-Fuentes and attorney Hanson were recorded. The procedure at the King County jail is that "[a]ll telephone calls made by an inmate of the jail to a person other than the inmate's attorney are recorded and subject to monitoring." State v. Modica, 136 Wn. App. 434, 439, 149 P.3d 446 (2006), aff'd, 164 Wn.2d 83, 186 P.3d 1062 (2008). Attorney phone numbers are entered into the jail's computer system in order to ensure that those calls are not recorded. RP 579. When the trial court inquired, attorney Hansen represented that his phone number was registered with the jail, but that "[t]he jail somehow screwed up." Id.

On January 11, 2011, the prosecutor informed defense counsel that the detective had listened to the recorded phone calls. CP 220. The next day, Pena-Fuentes filed a motion to dismiss the convictions under CrR 8.3(b). CP 77-80. As part of the State's response to this motion, the prosecutor represented to the court that he was unaware of the substance of the calls between Hansen and Pena-Fuentes and that, "I have not relied upon the information that may be contained in the calls between Mr. Hansen and the defendant for any purpose, including trial preparation or the defendant's motion for a new trial." CP 220.

On January 14, 2011, the trial court heard argument on the post-trial motions. The court denied the motion for a new trial.

With respect to L.P.'s videotaped statement, the court commented:

As to the, um, recantation issue... it comes down partially to this Court's determination of the credibility of the recantation. I don't believe it. And the case law makes it clear that the Court does exercise, uh, look at the credibility with respect to that. And I find that the witness was already impeached during the trial and even if this evidence had come in it would not have changed the results. So I'm going to deny the motion for a new trial on that basis.

RP 593.

The court denied Pena-Fuentes' motion to dismiss the case, explaining:

[C]ertainly there was police misconduct.... However, I do not believe it 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.

With respect to the double jeopardy issue, the court dismissed the first-degree rape of a child conviction. RP 594. The court reasoned that "we don't know what evidence the jury considered to convict the defendant on Count 1" and "we don't know if it was evidence in other counts." Id. The court held that the proper remedy was to dismiss the child rape conviction and allow

for a new trial, but then held that retrial was barred due to the misconduct of the police detective in listening to the recorded jail calls. Id.

Pena-Fuentes later renewed his motion to dismiss and also moved for discovery of "all reports and any other evidence collected by Detective Johnson and others following the Defendant's conviction, and particularly pertaining to the continuing investigation of alleged witness tampering in connection with witness L.P." CP 295-96. The State also moved for reconsideration of the order dismissing the child rape conviction. The court denied the motions. CP 372.

The trial court imposed standard range sentences. CP 388-92. Pena-Fuentes filed a notice of appeal, and the State filed a notice of cross-appeal. CP 413, 424.

**E. ARGUMENT ON CROSS-APPEAL**

**1. THE TRIAL COURT ERRED IN DISMISSING THE FIRST-DEGREE RAPE OF A CHILD CONVICTION.**

The trial court dismissed Pena-Fuentes' first-degree rape of a child conviction under the theory that double jeopardy was violated because the jury may have relied upon the same act in convicting Pena-Fuentes of child rape and one of the child

molestation counts. This was clear error. The Washington Supreme Court and this Court have held that convictions for first-degree rape of a child and first-degree child molestation, even if based upon the same act, do not violate double jeopardy.

In addition, the trial court's remedy for the alleged double jeopardy violation was contrary to settled law. When convictions on multiple offenses violate double jeopardy, the remedy is to vacate the conviction for the lesser offense. In this case, the trial court dismissed the greater offense: the rape charge. This Court should reverse the dismissal of the child rape conviction and remand for resentencing.

a. Convictions For First-Degree Rape Of A Child And First-Degree Child Molestation Do Not Violate Double Jeopardy.

A defendant's conduct may violate more than one criminal statute, and double jeopardy is only implicated 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). In order to determine whether multiple punishments are authorized, the court uses the "same evidence" test, which asks if the crimes are the same in law

and in fact. Id. at 777-78. If each offense includes an element not included in the other, then the offenses are not the same in law under this test. Id. at 777.

Applying this test, this Court has held that convictions for first-degree rape of a child and first-degree child molestation, even if based upon the same act, are not the same in law and do not violate double jeopardy. State v. Jones, 71 Wn. App. 798, 824-26, 863 P.2d 85 (1993). The Court explained:

Child molestation requires that the offender act for the purpose of sexual gratification, an element not included in first degree rape of a child, and first degree rape of a child requires that penetration or oral/genital contact occur, an element not required in child molestation. Each offense requires the State to prove an element that the other does not, and therefore the offenses are not the "same offense" for double jeopardy purposes.

Id. at 825 (footnotes omitted).

In State v. French, 157 Wn.2d 593, 610, 141 P.3d 54 (2006), the Washington Supreme Court affirmed the reasoning of Jones. After examining the elements of first-degree rape of a child and first-degree child molestation, the court concluded that they were not the same in law, and that convictions for both crimes thus did not violate double jeopardy. "The two crimes are separate and

can be charged and punished separately." French, 157 Wn.2d at 611.

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). The Legislature is deemed to acquiesce in the court's interpretation of a statute if no change is made for a substantial time after the decision. In re Reed, 136 Wn. App. 352, 361, 149 P.3d 415 (2006); see also State v. Kier, 164 Wn.2d 798, 805, 194 P.3d 212 (2008) (holding that the legislature had acquiesced in a previous decision on double jeopardy). With respect to the crimes at issue in this case, for nearly 20 years the relevant caselaw has provided that there is no double jeopardy violation for convictions for child rape and child molestation based upon the same act. Given the passage of time and the lack of any contrary legislative action, there should be no doubt that these appellate decisions accurately reflect the legislature's intent.

Here, the trial court dismissed Pena-Fuentes' child rape conviction because of the possibility that the jury could have relied upon the same act when it convicted him of child rape and one of the child molestation counts. However, given the well-settled,

controlling caselaw, 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.

- b. Even If The Multiple Convictions Violated Double Jeopardy, The Remedy Was To Dismiss The Lesser Crime - First-Degree Child Molestation.

Even if convictions for child molestation and child rape violated double jeopardy, the trial court erred in the remedy that it imposed. The court dismissed the greater crime, the first-degree rape of a child conviction. Under well-settled law, the court should have dismissed the lesser crime, one of the child molestation counts.

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, 149 P.3d 646 (2006). The lesser offense is the offense that carries the lesser punishment. Id. at 266-69.

Between first-degree rape of a child and first-degree child molestation, the latter crime is the lesser offense. First-degree rape

of a child is a level XII offense and carries a standard range of 93 to 123 months for an offender score of 0. RCW 9.94A.510, .515.

First-degree child molestation is a level X offense and carries a standard range of 51 to 68 months for an offender score of 0. Id.

First-degree child molestation carries the lesser punishment.

Here, the trial court vacated the greater crime, the rape of a child conviction. During argument on the motion, defense counsel insisted this was the proper remedy under the "rule of leniency." RP 585. In its ruling, the trial court did not clearly articulate why it was dismissing the child rape conviction rather than one of the child molestation convictions.<sup>8</sup> RP 594. After the trial court ruled, Pena-Fuentes filed a brief arguing that the rape conviction was properly vacated because the court could not know which of the two child molestation convictions might have been based upon the same act as the child rape conviction. CP 369.

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<sup>8</sup> The trial court also held that the remedy for the double jeopardy violation was to vacate the child rape conviction and grant *a new trial* on that count. RP 594; CP 398. This ruling was certainly wrong; the remedy for a double jeopardy violation is to vacate the lesser conviction and sentence on the remaining conviction. State v. League, 167 Wn.2d 671, 672, 223 P.3d 493 (2009). However, the trial court's error in granting a new trial is moot because the court then held that the State was barred from retrying the rape count due to police misconduct. RP 594.

Pena-Fuentes' belated effort to justify the trial court's ruling does not withstand serious scrutiny. Based upon the jury instructions, the jury could have relied upon the same act to convict Pena-Fuentes of the rape count and only *one* of the child molestation counts. The jurors were provided a unanimity instruction for the rape of a child count and told that they had to all agree on a single act supporting that count. CP 35. The jury was also instructed that it had to rely upon separate and distinct acts in convicting Pena-Fuentes of the two child molestation counts. CP 38-39. Given these instructions and the verdicts rendered, the jury found at least two separate and distinct acts of child molestation and one act of child rape. Assuming that double jeopardy was implicated by convictions for child rape and child molestation, any violation would have been remedied by dismissing one of the child molestation convictions. The trial court erred by vacating the greater crime.

**F. ARGUMENT ON APPEAL**

**1. THE TRIAL COURT PROPERLY DENIED PENA-FUENTES' MOTION TO DISMISS THE CASE.**

Pena-Fuentes claims that the trial court erred in denying his motion to dismiss the case for governmental misconduct under

CrR 8.3(b). This argument is without merit. The trial court has considerable discretion in determining the remedy when there is governmental misconduct. Here, the detective listened to the taped conversations only after the jury had rendered their verdicts, and the substance of any of the conversations was not communicated to the prosecutor or used in responding to the defendant's motion for a new trial. The trial court acted well within its discretion in denying the defendant's motion to dismiss the case.

The trial court's power to dismiss under CrR 8.3(b) is discretionary, and the decision is reviewable only for manifest abuse of discretion. State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). Dismissal is an extraordinary remedy, one that the trial court should use only as a last resort. State v. Wilson, 149 Wn.2d 1, 12, 65 P.3d 657 (2003). To justify dismissal, the defendant must show actual prejudice; the mere possibility of prejudice is insufficient. State v. Krenik, 156 Wn. App. 314, 320, 231 P.3d 252 (2010).

Pena-Fuentes has not shown that the trial court abused its discretion in this case. The United States Supreme Court has rejected a per se rule that any government intrusion into private attorney-client communications establishes a violation of the Sixth

Amendment right to the effective assistance of counsel. In Weatherford v. Bursey, 429 U.S. 545, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977), Weatherford, an undercover law enforcement agent, and Bursey were arrested together after they vandalized an office. After the arrest, Weatherford met twice with Bursey and his trial counsel, where trial strategy was discussed. Id. at 547-48. Weatherford did not discuss with his superiors or the prosecuting attorney any details or information regarding Bursey's trial plans. Id. at 548.

On appeal, the Fourth Circuit held that "whenever the prosecution knowingly arranges or permits intrusion into the attorney-client relationship the right to counsel is sufficiently endangered to require reversal and a new trial." Id. at 549. The Supreme Court reversed, emphasizing that Weatherford had not acted with intent to learn of the defense trial strategy and that he had not communicated any information to the prosecution. Id. at 556-57. "There being no tainted evidence in this case, no communication of defense strategy to the prosecution, and no purposeful intrusion by Weatherford, there was no violation of the Sixth Amendment." Id. at 558.

Subsequently, in State v. Granacki, 90 Wn. App. 598, 959 P.2d 667 (1998), this Court recognized that even a purposeful

intrusion did not require dismissal and that the trial court had considerable discretion in fashioning a remedy when a police officer infringed upon a defendant's attorney-client communications.

In Granacki, during a recess in the trial, the lead detective looked at defense counsel's notes, which contained communications between the defendant and his attorneys. 90 Wn. App. at 600. The detective claimed that he had only briefly looked at the notes and saw that his name was on the bottom of the page. Id. However, the court clerk observed the detective reading the notes for some period of time, and the notes did not have the detective's name on the bottom of the page. Id. at 600-01. The trial court dismissed the case with prejudice after finding that the detective was not credible and had violated the defendant's right to effective representation of counsel. Id. at 601.

This Court affirmed the trial court's dismissal of the case, explaining:

There is also more than one purpose for dismissing a case where the State violates a defendant's right to communicate privately with his or her attorney. The dismissal not only affords the defendant an adequate remedy but discourages "the odious practice of eavesdropping on privileged communication between attorney and client." As the Cory court noted, there is no way to isolate the prejudice resulting from such an intrusion. Where the behavior is egregious, as it was

here, the trial court does not abuse its discretion by presuming there was prejudice to the defendant's right to counsel.

Id. at 603-04.

However, the Court went on to recognize that the trial court would not have abused its discretion had it decided not to dismiss the case:

We recognize this case is unusual. Normally misconduct does not require dismissal absent actual prejudice to the defendant. See, e.g., State v. Koerber, 85 Wn. App. 1, 931 P.2d 904 (1996). Even then, the trial court may properly choose to impose a lesser sanction because this is a classic example of trial court discretion. Had the court chosen to ban Detective Kelly from the courtroom, exclude his testimony and prohibit him from discussing the case with anyone, we would not find an abuse of its discretion.

Id. at 604.

Here, the misconduct complained of was far less egregious than that in Granacki and similar to that in Weatherford. There was no purposeful intrusion; the calls between Pena-Fuentes and his attorney were taped and provided due to an apparent mistake by the jail. After listening to the telephone calls, the detective honestly reported to the prosecutor that he had listened to conversations between Pena-Fuentes and his attorney. The prosecutor took immediate steps to remove the detective from any further

involvement in the case. It occurred after the jury had rendered its verdicts and it had no impact on the trial.

The two cases cited by Pena-Fuentes are easily distinguishable given that the misconduct in those cases occurred prior to trial and the behavior was more egregious. In State v. Cory, 62 Wn.2d 371, 382 P.2d 1019 (1963), the sheriff secretly eavesdropped on and taped conversations in a room that the jail provided for meetings between prisoners and their attorneys. The trial judge refused to dismiss the case, but indicated that he would exclude any evidence derived from the eavesdropping. Id. at 372.

The Supreme Court held that dismissal was warranted because "[t]here is no way to isolate the prejudice resulting from an eavesdropping activity, such as this." Id. at 377. The court further endorsed dismissal, rather than a new trial, as a deterrent for engaging in such behavior: "[I]f the investigating officers and the prosecution know that the most severe consequence which can follow from their violation of one of the most valuable rights of a defendant, is that they will have to try the case twice, it can hardly be supposed that they will be seriously deterred from indulging in this very simple and convenient method of obtaining evidence and knowledge of the defendant's trial strategy." Id.

In State v. Perrow, 156 Wn. App. 322, 325, 231 P.3d 853 (2010), before charges were filed, a detective seized attorney-client writings while executing a search warrant, examined and copied the writings, and delivered them to the prosecutor. The trial court dismissed the case, finding that the detective's conduct violated Perrow's constitutional right to counsel and his right to privileged communication with his attorney. Id. at 327. A two-judge majority for the Court of Appeals affirmed, characterizing the detective's behavior as "egregious" and holding that "[a]s in Cory, it is impossible to isolate the prejudice presumed from the attorney-client privilege violation." Id. at 331-32.

Detective Johnson's conduct cannot be placed on the same level as the conduct in Cory and Perrow. Detective Johnson did not listen to the telephone calls for the purpose of eavesdropping on attorney-client communications. He reported that he had heard such calls, and he did not communicate the information to anyone else. The behavior occurred after the jury rendered its verdict and could not have affected the trial or the jury's decision.

Pena-Fuentes attempts to link the misconduct with his motion for a new trial and insinuates that the detective was instrumental in defeating his motion for a new trial. However, the

notion that the detective gleaned information from the taped calls and that such information was used in responding to the motion for a new trial is completely unsupported by the record. The prosecutor represented under oath that he had "not relied upon the information that may be contained in the calls between Mr. Hansen and the defendant for any purpose, including trial preparation of the defendant's motion for a new trial." CP 220.

The only factual information offered by the State in response to the motion for a new trial was L.P.'s declaration. CP 213-14. That declaration was submitted by the prosecutor, and, contrary to Pena-Fuentes' assertions on appeal, there was no evidence that that Detective Johnson had listened to the telephone conversations at the time the declaration was signed.<sup>9</sup> The trial court did not abuse its discretion in denying the motion to dismiss.

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<sup>9</sup> In his brief on appeal, Pena-Fuentes repeatedly claims that *after* the detective listened to the taped attorney-client phone calls, he was involved in obtaining L.P.'s declaration. Appellant's Opening Brief at 17, and 23 n.3. Pena-Fuentes provides no citation to the record to support these assertions, and, in fact, there is no evidence in the record to support them. The record establishes that the jail produced the calls to the detective on December 26, 2010, and the detective did not report to the prosecutor that he actually had listened to the calls until January 5, 2011. CP 198, 218. L.P.'s declaration was signed a week earlier, on December 28, 2010. CP 214.

**2. THE TRIAL COURT PROPERLY DENIED PENA-FUENTES' MOTION FOR DISCOVERY.**

Pena-Fuentes claims that the trial court erred in denying his motion for discovery, brought only after the trial court had denied his motion to dismiss. Given the timing and broadness of the discovery demand, the trial court acted well within its discretion in denying this motion.

Pena-Fuentes extensively briefed his post-trial motion for dismissal, and never suggested that further discovery was necessary. CP 77-80, 271-78. However, after the trial court denied his motion to dismiss the case, Pena-Fuentes renewed his motion to dismiss and filed a motion for discovery. CP 295. In the motion, he demanded "all reports and other evidence collected by Detective Johnson and others following the Defendant's conviction, and particularly pertaining to the continuing investigation of alleged witness tampering in connection with witness L.P." CP 295-96. The trial court denied the renewed motion to dismiss and the motion for discovery. CP 372.

This Court reviews a trial court's denial of a motion to compel discovery for abuse of discretion. State v. Norby, 122 Wn.2d 258, 268, 858 P.2d 210 (1993). Pena-Fuentes claims that he was

entitled to the discovery requested under CrR 4.7 and the State's obligation under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). However, other than recite general propositions of law, he does not explain why he was entitled to the material that he requested.

Under Brady, the State is required to disclose exculpatory and impeachment evidence that is favorable to the accused and material to guilt or punishment. 373 U.S. at 87. Pena-Fuentes' discovery demand did not simply request Brady material. Instead, he sought all material relating to an ongoing witness tampering investigation where he and his relatives were suspects. Under Brady, he was not entitled to all of this material.

With respect to CrR 4.7, Pena-Fuentes never cited to what portion of that rule that entitled him to the material that he demanded. See CP 295-98. Absent clear argument, the trial court was not obliged to determine the basis of Pena-Fuentes' demand.

When a defendant seeks discovery beyond that which the prosecutor is specifically required to disclose under CrR 4.7, the defendant must show that the information sought is material and the discovery request is reasonable. Norby, 122 Wn.2d at 266. With respect to the materiality requirement, “[t]he mere *possibility*

that an item of undisclosed evidence *might* have helped the defense... does not establish 'materiality' in the constitutional sense." Blackwell, 120 Wn.2d at 828, citing State v. Mak, 105 Wn.2d 692, 704, 718 P.2d 407 (1986) (emphasis in original).

Here, Pena-Fuentes' belated speculation that there might be something relevant to his motion to dismiss, which the trial court had already denied, was insufficient to justify his broad discovery request. The trial court did not abuse its discretion in denying the motion for discovery.

### **3. THE TRIAL COURT PROPERLY DENIED THE MOTION FOR NEW TRIAL.**

Pena-Fuentes argues that the trial court should have granted his motion for a new trial because the court erred in not admitting L.P.'s letter as substantive evidence. But Pena-Fuentes never made this argument at trial; he agreed to the court's instruction limiting the jury's consideration of the letter to impeachment evidence. Because none of the cited bases for granting a new trial applied, the trial court did not abuse its discretion in denying his motion.

a. Relevant Facts.

The State called J.B.'s younger step-sister, twelve-year-old L.P., as a witness at trial. RP 279. L.P. confirmed that Pena-Fuentes would watch her and J.B. while her mother worked. RP 282. L.P. testified that she avoided discussions of the accusations of sexual abuse against her dad. RP 284. She stated that she missed her father and had not been able to see him for one year. RP 283, 286-87.

During cross-examination, L.P. testified that she never saw anything improper between her father and J.B. RP 293. When asked whether "[J.B.] ever tell you that the things you were saying were not true," she responded "I don't remember." RP 295. Defense counsel then offered a letter that L.P. had written to a judge one year earlier, shortly after charges had been filed. RP 294-95; Ex. 2. In the letter, L.P. stated that she had overheard her mother tell her sister to lie and say that her father had sexually abused her. Ex. 2. The court admitted the letter and allowed defense counsel to read it to the jury. RP 296-97.

During redirect examination, the prosecutor elicited the circumstances of the letter. At the time L.P. wrote the letter, she was living in the home of the parents of Pena-Fuentes' new wife.

RP 298, 457-59. Pena-Fuentes was present in the home. RP 299, 416-20. L.P. wanted to live with her dad, and her relatives encouraged her to write the letter on his behalf. RP 302-03.

The prosecutor questioned L.P. about her lack of memory, and she testified that "every time someone would talk about something like that I would just try to not listen." RP 305. When asked whether J.B. had ever told her that she fabricated the sexual abuse allegations, L.P. responded, "no." RP 306.

The court subsequently instructed the jury as follows: "Exhibit 2 may only be considered by you for any bearing it may have in assessing [L.P.]'s credibility. You may not consider Exhibit 2 for the truth of the matter asserted within it." RP 533; CP 48. The defense did not take exception or object to this instruction. RP 518.

As discussed above, as part of his motion for a new trial, Pena-Fuentes offered a new videotaped statement taken from L.P. after trial. RP 62-63. He also argued that the letter should have been admitted at trial as substantive evidence under the hearsay exception for recorded recollections. CP 65. The trial court rejected this argument, finding that it had properly exercised its

discretion in admitting the letter as impeachment evidence.

RP 593.

- b. Pena-Fuentes Was Not Entitled To A New Trial Because He Agreed To The Limiting Instruction And Did Not Ask To Admit Exhibit 2 As A Recorded Recollection.

The decision to grant a new trial is within the trial court's discretion and will be disturbed only for a clear abuse of that discretion. State v. Carlson, 61 Wn. App. 865, 871, 812 P.2d 536 (1991). "The erroneous admission of evidence is grounds for a new trial only when the evidence at issue was timely and specifically objected to at trial." Id. at 865. Here, Pena-Fuentes agreed to the trial court's instruction limiting the purpose for which Exhibit 2 was admitted, and none of the bases for a new trial cited on appeal justified granting him relief.

Pena-Fuentes argues that he was entitled to a new trial under CrR 7.5(a)(4) because L.P.'s lack of memory at trial, which he claims justified admission of the letter as a substantive evidence, was an "accident or surprise." However, he waived any right to claim surprise as a ground for a new trial because he did not claim surprise at the time that L.P. testified and did not request

a continuance. State v. McKenzie, 56 Wn.2d 897, 355 P.2d 834 (1960); State v. Isaacs, 3 Wn. App. 49, 52, 472 P.2d 548 (1970).

He also claims that L.P.'s lack of memory at trial constitutes newly discovered evidence under CrR 7.5(a)(3). However, when moving for a new trial based upon a claim of newly discovered evidence, the defendant must establish that the evidence "(1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching." State v. Williams, 96 Wn.2d 215, 223, 634 P.2d 868 (1981); State v. D.T.M., 78 Wn. App. 216, 219, 896 P.2d 108 (1995). The absence of any one of these factors is grounds for denying a new trial. Williams, 96 Wn.2d at 223.

Pena-Fuentes does not discuss any of these factors. It is readily apparent that this basis for a new trial does not apply. L.P.'s lack of memory was not discovered after the trial -- it was elicited during the trial. Moreover, there is no reason to believe that advance knowledge of her lack of memory, which she testified to at the trial, would probably have changed the result of the trial. Nor is there evidence that the defense could not have discovered her lack

of memory earlier.<sup>10</sup> L.P.'s lack of memory did not qualify as "newly discovered evidence" justifying a new trial.

Pena-Fuentes also cites CrR 7.5(a)(8), which provides that the trial court may grant a new trial when "substantial justice has not been done." However, he cites no authority that substantial justice is not done because the court issues a limiting instruction concerning certain evidence when that instruction is agreed to by the parties.<sup>11</sup>

Finally, while it is unnecessary to address the issue, the underlying premise of Pena-Fuentes' motion for a new trial, that L.P.'s letter should have been admitted as a recorded recollection, is flawed. Had Pena-Fuentes actually sought admission of the letter as a recorded recollection, the trial court would have properly denied admission on that basis.

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<sup>10</sup> Pena-Fuentes can hardly claim that he was surprised by L.P.'s lack of memory. When L.P. was interviewed prior to trial, she stated that she could not remember what she had written in the letter. Ex. 3 at 4, 14.

<sup>11</sup> In a footnote in the fact section of his brief, Pena-Fuentes acknowledges that his trial counsel did not seek admission of the letter as a recorded recollection, and then summarily states that, to the extent that trial counsel waived the issue, it would be ineffective assistance of counsel. Appellant's Opening Brief at 5 n.1. However, Pena-Fuentes never argued to the trial court that he was entitled to a new trial due to ineffective assistance of counsel. On appeal, this Court should not address an ineffective assistance claim given that such a claim is not mentioned in the assignments of error and the brief contains no argument supporting it. See State v. Johnson, 69 Wn. App. 189, 194 n.4, 847 P.2d 960 (1993) (court declined to address merits of claim mentioned only in a footnote in appellant's opening brief).

Under ER 803(a)(5), a record is admissible as a recorded recollection only when the following factors are met: (1) the record pertains to a matter about which the witness once had knowledge; (2) the witness has an insufficient recollection of the matter to provide truthful and accurate trial testimony; (3) the record was made or adopted by the witness when the matter was fresh in the witness's memory; and (4) the record reflects the witness's prior knowledge accurately. State v. White, 152 Wn. App. 173, 183, 215 P.3d 251 (2009). Regarding the requirement that the recorded recollection accurately reflect the witness' knowledge, "[t]he court must examine the totality of the circumstances, including (1) whether the witness disavows accuracy; (2) whether the witness averred accuracy at the time of making the statement; (3) whether the recording process is reliable; and (4) whether other indicia of reliability establish the trustworthiness of the statement." State v. Alvarado, 89 Wn. App. 543, 551-52, 949 P.2d 831 (1998).

Pena-Fuentes made no effort to establish this foundation at trial, and, not surprisingly, the record does not support a finding that the letter was admissible as a recorded recollection. There was no testimony about whether the letter was written when the matter was still fresh in L.P.'s memory. The circumstances behind the letter

were highly suspect; L.P. was living with Pena-Fuentes' family and the evidence indicated that they had pressured her to write the letter on his behalf. L.P. never testified that the letter reflected her knowledge accurately; in fact, she testified to the contrary: that J.B. never had stated that she fabricated the sexual abuse allegations. RP 306. An examination of the totality of the circumstances does not support a finding of accuracy.<sup>12</sup> Had Pena-Fuentes sought to admit the letter as a recorded recollection, the trial court would have acted within its discretion in denying admission on that basis.

**4. PENA-FUENTES HAS WAIVED ASSIGNMENT OF ERROR NO. 4 BY NOT PROVIDING ANY ARGUMENT IN SUPPORT OF IT.**

Pena-Fuentes' assignment of error no. 4 states that the trial court erred in denying the motion for a new trial "based upon newly discovered evidence, consisting of the alleged victim's videotaped statement...." Appellant's Opening Brief at 2. While he discusses this videotaped statement in the fact section of his brief, he makes no legal argument supporting this assignment of error. Instead, his

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<sup>12</sup> In addition, the letter was also double hearsay; it was an out-of-court statement by L.P. that also included statements by L.P.'s mother and J.B. On appeal, Pena-Fuentes offers no argument as to how the hearsay within the letter would have been admissible.

argument about his motion for a new trial asserts only that the trial court erred in not admitting L.P.'s *letter* as substantive evidence. Id. at 27-34. Because Pena-Fuentes does not support this assignment of error with argument or authority, this Court should not consider it. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004); RAP 10.3(a)(6).

**5. THE TRIAL COURT PROPERLY DENIED THE REQUEST FOR AN EXCEPTIONAL SENTENCE.**

At sentencing, Pena-Fuentes requested an exceptional sentence downward. CP 383-84; RP 608-09. The trial court imposed a standard range sentence. RP 617.

On appeal, Pena-Fuentes does not assign error to the trial court's decision to deny his request for an exceptional sentence. Appellant's Opening Brief at 1-2. Nonetheless, his brief contains a section arguing that there were evidentiary grounds for an exceptional sentence downward. Id. at 34-38. Pena-Fuentes simply repeats the factual basis for his request for an exceptional sentence; he provides no argument explaining how the trial court erred.

Where an appellant fails to assign error or present argument in support of the assignment of error, this Court will not consider the issue. Ang v. Martin, 154 Wn.2d 477, 487, 114 P.3d 637 (2005); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); RAP 10.3(a). Because Pena-Fuentes did not assign error, and has provided no legal argument explaining how the trial court committed any error, this Court should decline to consider the exceptional sentence issue.

Even if the issue had been properly raised and briefed, it is without merit. A standard range sentence is generally not appealable. State v. Kinneman, 155 Wn.2d 272, 283, 119 P.3d 350 (2005). Review of a trial court's denial of an exceptional sentence below the standard range is limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for its refusal to impose an exceptional sentence. State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). Pena-Fuentes provides no argument explaining how the trial court erred in this regard. His claim is without merit.

**G. CONCLUSION**

For the reasons cited above, 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 25<sup>th</sup> day of August, 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 BRIEF OF RESPONDENT AND 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.

W Brame  
Name  
Done in Seattle, Washington

8/25/11  
Date

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