SUPREME COURT NO. _____
COURT OF APPEALS NO. 57477-2-II

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CRISPÍN RENDÓN TAPIA,

Appellant.

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

The Honorable Robert A. Lewis, Judge

PETITION FOR REVIEW

KEVIN A. MARCH
Attorney for Petitioner

NIELSEN KOCH & GRANNIS, PLLC
The Denny Building
2200 Sixth Avenue, Suite 1250
Seattle, WA 98121
(206) 623-2373

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES (CONT'D)

Page

STATUTES, RULES, AND OTHER PROVISIONS

A. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Petitioner Crispín Rendón Tapia, the appellant below, seeks review of the Court of Appeals decision State v. Rendón Tapia, noted at ___ Wn. App. 2d ___, 2024 WL 2938813, No. 57477-2-II (Jun. 11, 2024).[1]

B. ISSUE PRESENTED FOR REVIEW

The trial evidence showed numerous acts of oral-genital contact and rubbing contact before the complainant turned 12 and between ages 12 and 14. The acts of oral-genital contact are the same in fact and the same in law as regards both rape of a child and child molestation. The jury was not instructed that it was required to rely on separate and distinct acts to convict of first degree child rape and first degree child molestation or to convict of second degree child rape and second degree child molestation. Although the state's closing argument distinguished between the acts it relied on for child rapes (oral-

[1] A copy of the Court of Appeals slip opinion is appended to this petition and cited accordingly.

genital contact) and the acts it relied on for child molestations (rubbing), the jury later asked what the difference was between child rape and child molestation, showing that it could not distinguish or categorize the acts and the crimes at issue.

There is significant conflict in the law between and among the Supreme Court and Court of Appeals regarding whether a prosecutor's closing argument, in itself, is sufficient to resolve a deficiency in jury instructions that exposes the accused to double jeopardy. Given this conflict and that the record here establishes that the prosecutor demonstrably failed to make it manifestly apparent that the jury could not rely on the same acts to convict of multiple counts, should review be granted to address and resolve the conflicting constitutional case law and clarify whether and the extent to which a prosecutor's closing argument may resolve a double jeopardy claim arising from defective jury instructions under every RAP 13.4(b) criterion?

C. STATEMENT OF THE CASE

Mr. Rendón Tapia lived with his girlfriend and her daughter, EZV, at four different residences with various sets of relatives between 2009 and 2016. RP 223, 225-26, 231-32, 239, 253, 295, 306. EZV testified she considered Mr. Rendón Tapia a stepfather. RP 224. EZV was born in December 2002. RP 222.

EZV testified to four different sets of incidents involving Mr. Rendón Tapia, each based on where they lived, so the incidents were presented chronologically. When she was eight or nine years old, EZV testified that she, her mother, and Mr. Rendón Tapia shared a room and a bed in his brother's house. RP 226-27. She testified that while they were all spooning together in bed the first night they stayed there, Mr. Rendón Tapia touched her vaginal area over her clothes, thinking it was perhaps an accident. RP 227-28. She reported a cousin doing something similar when she lived in Mexico. RP 228. EZV reported that this type of touching happened more than once while living in Mr. Rendón Tapia's brother's house, though she

could not say how many times. RP 229. She said the touching consisted of strong pressure in a circular motion. RP 230.

After about a year, EZV, who was nine or 10 years old, her mother, and Mr. Rendón Tapia moved into an apartment where EZV had her own bedroom. RP 231-32. Before she had a bed, EZV stated she would sleep on the couch or in her mother's bedroom. RP 232. EZV stated that Mr. Rendón Tapia would approach her when she was half asleep, remove the bottom portion of her pajamas, and "lick [her] vulva area down there." RP 233-34. She said the oral-genital contact happened "[a] lot of times." RP 245. EZV testified that Mr. Rendón Tapia also rubbed her pelvic area. RP 235. She also said he would get on top of her and, while clothed, rub himself on her pelvic area. RP 234-35. She also said Mr. Rendón Tapia tried to move her hand to his groin, but he never successfully did so. RP 236.

EZV, her mother, and Mr. Rendón Tapia moved to a house about a year later when she was going to enter the sixth grade. RP 239. She testified that rubbing in a circular motion over

clothing would occur. RP 240. In the house, she said there was no touching under the clothing but there was licking under the clothes. RP 240-41. She said the licking occurred a lot of times. RP 245. At the house, EZV stated that Mr. Rendón Tapia would also get on top of her and rub himself on her but could not say how many times. RP 249.

Finally, when she was 12 or 13 years old in in the seventh grade, EZV moved again from the house to another apartment. EZV testified that licking did not happen in the apartment but also that it happened some; she also said she did not remember him touching her vulva in that apartment but noted that him rubbing up against her would happen less frequently. RP 254-55. EZV also said that the last time Mr. Rendón Tapia touched her was at this house: she said she felt angry while he was licking her vulva and kicked him in the head. RP 255-56.

A year or so after this last incident, EZV said her mother and Mr. Rendón Tapia decided to separate; EZV was 13 years old, about to turn 14, in the eighth grade, and EZV and her

mother moved to a different apartment. RP 258. The year was 2016. RP 281. EZV had not told anyone about what was happening except a boyfriend. RP 257-59. She told her mother about it the first night she was living at a new apartment without Mr. Rendón Tapia and said her mother confronted Mr. Rendón Tapia with the accusation. RP 259-60.

EZV did not report any issue to law enforcement until 2020. RP 261, 281. She explained that one reason she decided to report the incident is that she saw his photo on Facebook and he was with two people and a child. RP 266. No physical evidence corroborated her account. RP 365-66.

Based on this evidence, the state proceeded at trial with a second amended information. CP 24-27; RP 322-27. The prosecution explained that the amendments were intended to conform to the testimony about her ages and where she was living when the incidents were alleged to have occurred. RP 322. The second amended information included two counts of first degree child molestation between December 26, 2009 and

December 26, 2011 (Counts 1 and 2), a count of first degree child rape and a count of first degree child molestation, each between December 27, 2011 and December 25, 2014 (Counts 3 and 4), and a count of second degree child rape and second degree child molestation, each between December 27, 2014 and December 25, 2014.[2] CP 24-26.

The jury instructions are central here. For counts 3 and 4, the jury was provided to-convict instructions for first degree child rape and first degree child molestation, respectively. CP 45, 48. The jury was also provided to-convict instructions for second degree child rape and second degree child molestation for counts 5 and 6, respectively. CP 50, 52. The instructions did not specify that counts 3 and 4 or that counts 5 and 6 must arise from a separate and distinct act in order to convict.

During its deliberations, the jury inquired, "What is the difference between 1st and 2nd degree molestation and rape."

[2] The state moved to dismiss another count of second degree child rape. CP 26-27; RP 325-26.

CP 32. The court answered this inquiry by referring the jury back to the court's instructions, stating, "you will see differences between what they have to prove" for first and second degree child rape and first and second degree child molestation. RP 439.

The jury returned guilty verdicts on all six counts. CP 67, 69, 71, 73, 75, 77.

The trial court imposed standard range sentences on all counts. CP 175.[3] For the first and second degree child rape counts (counts 3 and 5), the court imposed an indeterminate sentence of 280 months to life. CP 175. For the three first degree child molestation convictions (counts 1, 2, and 4), the court imposed an indeterminate sentence of 198 months to life. CP 175. For the second degree child molestation conviction (count

[3] The judgment and sentence was originally filed on September 16, 2022, the same day as the sentencing hearing. CP 95. But, due to a scrivener's error, the trial court entered an amended judgment and sentence on October 17, 2022. CP 170-91; see also CP 169 (order correcting judgment and sentence); Rendón Tapia, slip op. at 6 n.3 (noting and referring corrected judgment and sentence).

6), the trial court imposed a determinate sentence of 116 months. CP 175. All sentences ran concurrently. CP 175.

Mr. Rendón Tapia appealed. CP 121. He asserted that the jury instructions permitted multiple convictions for the same act, given that the jury instructions did not require the purported acts of child rape to be separate and distinct acts from the purported acts of child molestation. Br. of Appellant at 1-2, 11-24. He acknowledged that the prosecutor's summation distinguished between the acts, relying on the oral-genital contacts for the rapes and the rubbing incidents for the molestations and this Court's decision in State v. Peña Fuentes, 179 Wn.2d 808, 318 P.3d 257 (2014). Br. of Appellant at 19-21. He emphasized that the jury instructions still permitted the jury to rely on the same act for the child rapes and the child molestations notwithstanding any argument by the prosecution. And, in this case, it was clear that the prosecutor's argument had *not* made the distinction manifestly clear to the jury, given that the jury submitted a question asking what the difference was. Br. of Appellant at 21-

22. Although the trial court referred the jury back to the instructions, the instructions do not make the rape-versus-molestation distinction clear in cases of oral-genital contact, which may be both rape or molestation, there being no factual or legal distinction between the two. Br. of Appellant at 15-16 (discussing State v. Land, 172 Wn. App. 593, 600, 295 P.3d 782 (2013), and its holding that oral-genital contact, "if done for sexual gratification, is both the offense of molestation and the offense of rape" and thus the "same in fact and in law").

The Court of Appeals agreed with Mr. Rendón Tapia that there was a potential double jeopardy violation based on the jury instructions. Rendón Tapia, slip op. at 8. However, relying exclusively on the prosecution's closing argument, the Court of Appeals determined that the state made it "manifestly apparent to the jury that the State was not seeking to impose multiple punishments for the same act." Id. at 9-10. In response to Mr. Rendón Tapia's assertions that the jury question asking what the difference was between rape and molestation showed that the

distinction was *not* manifestly apparent to the jury, the Court of Appeals reasoned, "At best, the question is ambiguous as to what the jury meant by 'the difference'" and indicated the trial court instructed the jury to refer to the instructions and the jury asked no additional questions thereafter. Id. at 10.

D. ARGUMENT IN SUPPORT OF REVEW

Review should be granted to address conflicting case law on how far prosecutors' closing arguments should be credited to disregard jury instructions that establish a potential double jeopardy violation

Freedom from double jeopardy under the Fifth Amendment to the United States Constitution and article I, section 9 of the Washington Constitution "is the constitutional guarantee protecting a defendant against multiple punishments for the same offense." State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417 (2007). Double jeopardy claims are reviewed de novo. State v. Mutch, 171 Wn.2d 646, 661-62, 254 P.3d 803 (2011).

There is no dispute here that the jury instructions in Mr. Rendón Tapia's case effected a potential double jeopardy violation. Oral-genital contact establishes both child rape and child molestation, and is the same in fact and in law, and so the jury must be instructed that the act it relies on for child rape must be separate and distinct from the act that it relies on for child molestation. Peña Fuentes, 179 Wn.2d at 823-24 & n.3; Land, 172 Wn. App. at 600. Because Mr. Rendón Tapia's jury was not instructed that it must rely on separate and distinct acts between the rapes and the molestations, there is a potential double jeopardy violation. CP 45, 48, 50, 52.

The dispute here is whether the prosecutor's argument alone cured it. The case law is in conflict regarding the extent to which counsel's arguments may resolve a potential double jeopardy issue, with Peña Fuentes and more recent cases suggesting that they alone may do so. Review should be granted pursuant to all RAP 13.4(b) criteria to resolve this conflict and

clarify the law to ensure that Washington fully honors Fifth Amendment and article I, section 9 protections.

In addition, in this case, relying on the prosecutor's closing argument alone is not logical because the jury asked a question showing it did not understand the distinction between child rape and child molestation (in either degree), thereby showing that the distinction was not manifestly apparent, even with the aid of the prosecutor's arguments. The jury understandably sought clarification: as the jury instructions establish, there is no manifestly apparent distinction when the offenses, in this context, are the same in fact and law. Based on the question, the record establishes that prosecutor's argument did not in fact make it manifestly apparent that Mr. Rendón Tapia could not be punished for both child molestation and child rape based on the same act. Review should be granted under RAP 13.4(b)(3) and (4) to address the extent courts may rely on prosecutor's arguments in satisfying the "manifestly apparent" standard, particularly where the record otherwise undermines such reliance.

1. Conflict in the case law regarding double jeopardy claims supports RAP 13.4(b)(1)-(3) review

In State v. Kier, 164 Wn.2d 798, 814, 194 P.3d 312 (2008), the Supreme Court held that a prosecutor's argument did not resolve a double jeopardy claim. The state asserted that second degree assault and first degree robbery convictions did not merge because they were committed against two different victims. Id. at 808. But, based on the evidence, instructions, and verdicts, it was not clear whether the jury committed the crimes against the same or different victims, analogizing "to a multiple acts" situation. Id. at 811, 814. Because the instructions and evidence at trial permitted a single victim to be considered for both crimes, the verdict was ambiguous and the assault merged with the robbery. Id. at 814.

The prosecutor argued strenuously in Kier that one man was the assault victim and the other was the robbery victim, which resolved the double jeopardy issue. Id. This Court disagreed: "While the prosecutor at the close of the trial

attempted to require this finding, the jury was properly instructed to base its verdict on the evidence and instructions and not on the arguments of counsel." Id. at 813. There was a double jeopardy violation based on the jury instructions "notwithstanding the State's closing argument." Id. at 814.

Likewise, in State v. DeRyke, 110 Wn. App. 815, 824, 41 P.3d 1225 (2002), there was no way to determine whether the jury had not considered the kidnapping as the basis to elevate an attempted rape charge. As such, double jeopardy required that the kidnapping merge into the attempted rape. Id. at 824. "Principles of lenity require us to interpret the ambiguous verdict in favor of DeRyke." Id.; accord State v. Borsheim, 140 Wn. App. 357, 366-38, 165 P.3d 417 (2007) (without separate and distinct language in the jury instructions to ensure reliance on separate and distinct act for each count of child rape, there was double jeopardy violation).

Applying Kier and DeRyke to Mr. Rendón Tapia's case would require reversal. Here, too, the jury was instructed that the

prosecutor's arguments should not be the basis of the jury's decision. CP 35; cf. Kier, 164 Wn.2d at 814. And while the prosecutor did distinguish between the acts it claimed were the rapes and the acts it claimed were the molestations in closing argument, nothing in the prosecutor's argument or the jury instructions conveyed that it was mandatory that the jury rely on separate and distinct asks. At most, the prosecutor's arguments were suggestions about how to view the evidence rather than a firm assertion to view the evidence in a way that ensures no double jeopardy violation. This simply does not make the mandatory standard manifest apparent.

Furthermore, the jury asked what the distinction was between child rape and child molestation—as here, there is none—showing that the prosecutor's argument had not in fact made this requirement manifestly clear. Applying Kier, DeRyke, or Borsheim, Mr. Rendón Tapia's double jeopardy claim would prevail.

The same is true if we were to apply State v. Mutch, 171 Wn.2d 646, 254 P.3d 803 (2011), to these circumstances. Under Mutch, a double jeopardy violation occurs if it is not "manifestly apparent to the jury that each count represented a separate act." Id. at 665-66. It was manifestly apparent in Mutch because the state charged five identical counts of rape within the same charging period. Id. at 662. The jury was not instructed that each count represented a separate and distinct act, creating the potential double jeopardy violation. Id. at 662-63.

However, the alleged victim testified to precisely the same number of acts of rape contained in the information and to-convict instructions, the defense had not challenged the number of episodes and instead argued consent, and the prosecution closing discussed each act for each count individually. Id. at 665. In these circumstances, it was manifest apparent to the jury that each count represented a separate act and so the deficient jury instructions did not effectuate a double jeopardy violation. Id. at 665-66. However, this circumstance—deficient jury instructions

not effecting an actual double jeopardy violation—was a "rare circumstance." Id. at 665.

In addition, ensuring "separate and distinct" language in jury instructions isn't particularly and it has been legally required in Washington for almost 30 years. State v. Hayes, 81 Wn. App. 425, 431, 914 P.2d 788 (1996). In other double jeopardy contexts, the courts have correctly held that prosecutors' arguments should be considered, but do not themselves overcome defects in the jury instructions that allow double jeopardy violations, particularly given that juries are instructed not to credit the prosecutor's arguments that are not supported by the law in the jury instructions. When the instructions themselves permit the double jeopardy violation, it should indeed be a "rare circumstance" where the prosecutor's argument resolves the issue.

Nevertheless, in Peña Fuentes, this Court suggested but did not hold that a prosecutor's arguments alone could resolve any double jeopardy concern: it was "manifestly apparent that the

convictions were based on sperate acts because the prosecution made a point to clearly distinguish between the acts that would constitute rape of a child and those that would constitute child molestation." 179 Wn.2d at 825. This near exclusive reliance on the prosecution's closing argument is inconsistent with what this Court recognized in Kier and in Mutch and what the Court of Appeals has recognized in Borsheim, Hayes, and DeRyke. Ambiguities that remain in the record about whether a double jeopardy violation was effected are resolved in favor of the accused. Peña Fuentes cannot be squared with these previous decisions, establishing a conflict in the law that should be resolved by granting review under RAP 13.4(b)(1), (2), and (3).

Since Peña Fuentes, the Court of Appeals has used it as shorthand to mean that anytime a prosecutor clearly argues which evidence she is relying on support conviction on each count, it is manifestly apparent that the state does not intend to impose multiple punishments for the same offense. E.g., State v. Reedy, 26 Wn. App. 2d 379, 390-91, 527 P.3d 156, review denied, 1

Wn.3d 1029, 534 P.3d 798 (2023); State v. Nguyen, noted at 199 Wn. App. 1056, 2017 WL 3017516, at *3-*5 (2017), rev'd on other grounds, 191 Wn.2d 671, 425 P.3d 847 (2018); State v. Benson, No. 74815-7-I, 2017 WL 3017517, at *5 (2017) (unpublished) (finding no double jeopardy violation primarily because "the State's closing argument was clear"); State v. Duenas, No. 48119-7-II, 2017 WL 2561589, at *15 (2017) (unpublished) (finding no double jeopardy violation where the prosecutor conflated child rape and child molestation in closing, but thee "evidence and jury instructions made it manifestly apparent to the jury that each count involved distinct acts of sexual assault, even if the acts were part of the same incident"); State v. Miller, No. 33252-7-III, 2017 WL 959539, at *5 (2017) (unpublished) (no double jeopardy violation because "the prosecutor repeatedly distinguished between the acts the State alleged as a basis for the rape charge and the acts the State alleged as a basis for the molestation charge").[4]

[4] Mr. Rendón Tapia cites unpublished cases as nonbinding,

These decisions, which nearly exclusively rely on the prosecutor's arguments to resolve double jeopardy concerns, cannot be squared with this Court's admonition that double jeopardy review is among the strictest, and it is a rare circumstance where defective jury instructions evincing a double jeopardy error do not result in a double jeopardy violation. Mutch, 171 Wn.2d at 664. As the Kier court recognized, prosecutors' arguments are not the law contained in the instructions, and the jury is required to disregard any argument inconsistent with the law in the instructions. CP 35; Kier, 164 Wn.2d at 813-14. Defects and ambiguities in the verdict violate double jeopardy "notwithstanding the State's closing argument." Kier, 164 Wn.2d at 814. The conflict between or among Mr. Rendón Tapia's case and the several cases cited above about when a double jeopardy violation is effected, merits review under RAP 13.4(b)(1), (2), and (3).

---

persuasive authority pursuant to GR 14.1.

2. The Court should grant RAP 13.4(b)(3) and (b)(4) review to hold that the prosecutor's closing argument cannot resolve the potential double jeopardy violation where the record shows the prosecutor's argument failed to make distinction between child rape and child molestation manifestly apparent

As noted, the prosecutor's argument did not resolve the potential double jeopardy problem. If it had, then the jury would not have needed to ask what the distinction was between child rape and child molestation. Given that the jury asked its question, it was not manifestly apparent to the jury that it could not rely on the same act for both the child rapes and the child molestations, notwithstanding that the jury had already heard the state's argument on the subject. The jury could not distinguish between the acts based on the law and, correctly so, because in the circumstances here, there was no legal distinction between them.

The Court of Appeals addressed the jury question by calling it "ambiguous as to what the jury meant by 'the difference.'" Rendón Tapia, slip op. at 10. The jury's question,

however, is not ambiguous at all. It asks what the difference is between the crime of child rape and the crime of child molestation. This question is not ambiguous but astute: as discussed, in cases involving multiple instances of oral-genital contact, like this one, there is no legal or factual difference at all. The question made clear that, despite the state's closing argument, the jury was unclear from the instructions about how to distinguish and categorize the alleged acts vis-à-vis the crimes of child rape and/or child molestation.

The Court of Appeals also pointed out that the trial court responded to the jury to read the to-convict instructions and the jury instructions as a whole, noting that, after that, the jury asked no further questions. Id. The Court of Appeals presumed that the question the jury had was clarified by the court's instruction to review the instructions. Id.

But the potential double jeopardy violation is caused by the defective jury instructions in the first place. There can be no dispute that the jury instructions should have included separate

and distinct acts language to protect against a double jeopardy violation. But no such language was present, allowing the jury to rely on the same act to support both child rape and child molestation convictions. Referring the jury back to defective instructions that do not clarify that the jury may not rely on the same act for both the rapes and the molestations does not and cannot cure the defective instructions.

The jury could not draw a distinction between the acts that supported child rape and the acts that supported child molestation, as evidenced in their question. They could not draw a distinction because there was none. Under these circumstances, where the jury had heard the state's argument and still not understood what the distinction had to be to protect Mr. Rendón Tapia's double jeopardy rights, the potential double jeopardy violation became an actual double jeopardy violation.

The Court of Appeals' reasoning is in error based on the factual circumstances here and illustrates the problem with relying solely on the prosecutor's closing argument to resolve a

double jeopardy claim. Rendón Tapia, slip op. at 9-10. Because the record in this case shows the prosecutor's argument did not make the standard manifestly apparent here, the prosecutor's argument cannot be the dispositive consideration. Yet the Peña Fuentes decision suggests that it should be.

The Supreme Court should clarify the scope of that decision. Certainly, prosecutors' arguments are one consideration for determining whether a double jeopardy violation was effected, but they should not be used as shorthand for disposing of double jeopardy claims, as they were by the Court of Appeals here. Nothing on this factual record resolved the potential double jeopardy violation. The Supreme Court should grant review under RAP 13.4(b)(3) and (4) to provide needed parameters, limitations, and clarifications in the law about the extent to which prosecutors' closing arguments are or are not sufficient to make it manifestly apparent that the jury may not use the same act to convict the defendant of multiple counts even when the jury instructions allow the jury to do so.

E. CONCLUSION

Because he satisfies review all RAP 13.4(b) review criteria, Mr. Rendón Tapia asks the Supreme Court to grant review, resolve the inconsistency in the case law about double jeopardy violations when the government fails to require the jury to convict based on separate and distinct act, and reverse the Court of Appeals.

DATED this 11th day of July, 2024.

I certify this document contains 4,478 words. RAP 18.17.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC

KEVIN A. MARCH, WSBA No. 45397
Office ID No. 91051
Attorneys for Petitioner

APPENDIX

Filed
Washington State
Court of Appeals
Division Two

June 11, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CRISPÍN RENDÓN TAPIA, Appellant.	No. 57477-2-II UNPUBLISHED OPINION

LEE, J. — Crispín Rendón Tapia appeals his convictions for first and second degree child molestation, arguing that deficient instructions allowed the jury to punish him multiple times for the same conduct, a double jeopardy error. Rendón Tapia also challenges various community custody condition fees and the $500 crime victim penalty assessment (CVPA) imposed at sentencing.

Because the record shows the State made it manifestly apparent to the jury that it was not seeking multiple punishments for the same acts, there is no double jeopardy error. Thus, we affirm Rendón Tapia's convictions. However, we remand to the trial court with instructions to strike certain legal financial obligations (LFOs) from Rendón Tapia's judgment and sentence consistent with this opinion.

FACTS

In 2020, E.Z.-V.[1] told law enforcement that Rendón Tapia sexually abused her as a child. The State initially charged Rendón Tapia with several child sex crimes committed against E.Z.-V. During trial, the State filed a second amended information charging Rendón Tapia with first degree child rape (count 3), first degree child molestation (count 4), second degree child rape (count 5), and second degree child molestation (count 6).[2] The charging period for the first degree child rape and first degree child molestation counts were the same, and the charging period for the second degree child rape and second degree child molestation counts were the same. The State also alleged the following aggravating circumstances for each count: use of a position of trust to facilitate the crime and an ongoing pattern of sexual abuse.

A. E.Z.-V.'s TRIAL TESTIMONY

At trial, E.Z.-V. testified to multiple instances of abuse. Relevant here, E.Z.-V. testified that when she was 9 or 10, she, her mother, and Rendón Tapia moved into Oakbrook Apartments. During this time, Rendón Tapia would enter E.Z.-V.'s room while she was asleep or feigning sleep, remove whatever "bottoms" E.Z.-V. had on, and lick her vaginal area. Verbatim Rep. of Proc. (VRP) (Aug. 3, 2022) at 233. While E.Z.-V. could not remember the first time this happened, she described an incident she remembered clearly: she was in her mother's room and Rendón Tapia

[1] We use initials to protect the victim's identity and privacy interests. *See* General Order 2023-2 of Division II, *Using Victim Initials* (Wash. Ct. App.), available at: https://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=2023-2&div=II.

[2] The State also charged an additional two counts of first degree child molestation. Those charges are not at issue in this appeal.

woke her by removing her underwear and licking her vaginal area. E.Z.-V. remembered this particular instance because she was wearing dress-like pajamas her mother had gifted her. E.Z.-V. also testified that while she lived at the Oakbrook Apartments, Rendón Tapia would get on top of her and rub his pelvic area against hers and try to kiss her.

About a year after moving into the Oakbrook Apartments, E.Z.-V., her mother, and Rendón Tapia moved into a house "near Heritage." VRP (Aug. 3, 2022) at 239. When asked whether she remembered a specific instance where Rendón Tapia licked her while living in the house, E.Z.-V. recounted an incident where she was watching YouTube in the living room. Rendón Tapia entered the room, so E.Z.-V. pretended to be asleep, at which point Rendón Tapia carried her to his bedroom, took off her underwear, and licked her vaginal area. E.Z.-V. also testified that while she could not remember a specific instance at the Heritage house where Rendón Tapia got on top of her and rubbed against her, she did "remember . . . that would happen sometimes." VRP (Aug. 3, 2022) at 249.

B. JURY INSTRUCTIONS

The trial court gave the jury a separate to-convict instruction for each count. The first and second degree rape instructions required proof of "sexual intercourse" between E.Z.-V. and Rendón Tapia. Clerk's Papers (CP) at 48, 50. An instruction defined "sexual intercourse" as "any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex." CP at 54. The jury instructions for first and second degree molestation required proof of "sexual contact" between E.Z.-V. and Rendón Tapia. CP at 45, 52. An instruction defined "sexual contact" as "any touching

of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party or a third party." CP at 55.

The trial court also instructed the jury that it must decide each count separately, and that while multiple acts of molestation and rape were alleged, the jury had to agree unanimously as to which acts had been proved. The trial court did not instruct the jury that each of its guilty findings must be based on separate and distinct acts.

C. CLOSING ARGUMENTS

During closing arguments, the State listed each count for the jury, specifically explaining which alleged acts corresponded to which counts. The State explained that "sexual contact" was the key element for the first degree child molestation charges, and that "[s]exual contact is different from that in rape of a child. This is the touching of intimate parts." VRP (Aug. 4, 2022) at 408.

The State argued, "Count 3: Rape of a child in the first degree. This count is the Oakbrook Apartment pajama incident that [E.Z.-V.] told you about." VRP (Aug. 4, 2022) at 411. The State then defined "sexual intercourse" for the jury as "sexual contact . . . involving . . . the sex organs of one person and the mouth of another" and argued that when E.Z.-V.'s underwear was pulled off and she felt "wet in her vaginal area," that satisfied the definition. VRP (Aug. 4, 2022) at 411-12.

Next, the State argued, "Count 4: Child molestation in the first degree. While living in the Oakbrook Apartments, [E.Z.-V.] told you that there was an incident of rubbing with Mr. Tapia" where he got "on top of her . . . and rub[bed] himself on her" while trying to kiss her. VRP (Aug. 4, 2022) at 412, 413. The State contended that "this is that sexual contact again, which is the any touching of sexual or other intimate parts of a person, done for the purpose of gratifying sexual desires of either party." VRP (Aug. 4, 2022) at 413.

The State then continued, "Count 5 is rape of a child in the second degree. After the Oakbrook Apartments, [E.Z.-V.] told you that they moved to the house near Heritage. This count is specific to the incident of abuse that happened on the couch." VRP (Aug. 4, 2022) at 413. The State explained that the "key element" of this charge was "sexual intercourse," arguing that Rendón Tapia had sexual intercourse with E.Z.-V. when he carried her from the couch to his bedroom and licked her. VRP (Aug. 4, 2022) at 414.

Finally, the State argued, "Count 6: Child molestation in the second degree. Again, this was at the Heritage house, and this was another incident of rubbing that [E.Z.-V.] told you about." VRP (Aug. 4, 2022) at 415. The State defined "sexual contact" for the jury once again and argued that Rendón Tapia made sexual contact with E.Z.-V. "at this house" when he rubbed his pelvic area against hers. VRP (Aug. 4, 2022) at 415.

Rendón Tapia's closing argument attacked E.Z.-V.'s credibility, stressing there was only "[o]ne single witness, the alleged victim, who can tell you that any sort of abuse occurred." VRP (Aug. 4, 2022) at 427. Rendón Tapia argued that E.Z.-V. provided no evidence corroborative of her claims, and suggested that E.Z.-V. fabricated her accusations.

D. JURY DELIBERATION, VERDICT, AND SENTENCING

As the jury deliberated, it asked the trial court the following question: "What is the difference between 1st and 2nd degree molestation and Rape[?]" CP at 32. In response, the trial court directed the jury to the separate to-convict instructions it had been provided, stating those instructions would delineate the differences in what the State had to prove for each charge. The trial court also urged the jury to review and read its instructions and definitions "as a whole." VRP (Aug. 4, 2022) at 440. The jury did not submit any more questions to the trial court.

The jury found Rendón Tapia guilty as charged. Rendón Tapia was sentenced to an indeterminate sentence of 280 months to life.[3] The trial court also found Rendón Tapia indigent based on his "financial circumstances," and stated it would "impose only the mandatory minimum, $500 victim . . . penalty—assessment, and restitution, if any, to be set." VRP (Sep. 16, 2022) at 456.

The trial court imposed several community custody conditions. Relevant here, community custody condition 12 requires Rendón Tapia to "submit to polygraph examinations at the request of DOC and/or your sexual deviancy treatment provider" and to bear the cost of any requested polygraph examination. CP at 186. Finally, the trial court did not check the box on the judgment and sentence that addresses whether Rendón Tapia would be expected to pay community custody supervision fees or whether such fees would be waived due to his indigency.

Rendón Tapia appeals.

ANALYSIS

A. DOUBLE JEOPARDY

Rendón Tapia argues that the jury instructions permitted multiple punishments for the same criminal act and, therefore, violated double jeopardy.[4] We disagree.

[3] Rendón Tapia's original judgment and sentence contained a scrivener's error that the trial court corrected in response to a motion from the State. This opinion refers to the corrected judgment and sentence.

[4] Rendón Tapia did not object to the jury instructions below, but double jeopardy claims can be raised for the first time on appeal. *State v. Mutch*, 171 Wn.2d 646, 661, 254 P.3d 803 (2011).

1. Legal Principles

"'The constitutional guaranty against double jeopardy protects a defendant . . . against multiple punishments for the same offense.'" *State v. Mutch*, 171 Wn.2d 646, 661, 254 P.3d 803 (2011) (alteration in original) (quoting *State v. Noltie*, 116 Wn.2d 831, 848, 809 P.2d 190 (1991)); *see* U.S. CONST. amend. V; WASH. CONST. art. I, § 9. We review double jeopardy claims de novo. *Id.* at 661-62.

To convict a defendant of child rape, the State must prove there was "sexual intercourse" with a child.[5] RCW 9A.44.073(1), .076(1). Sexual intercourse includes penetration of the vagina or anus, but also "any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another." RCW 9A.44.010(14)(b), (c).

To convict a defendant of child molestation, the State must prove there was "sexual contact" with a child.[6] RCW 9A.44.083(1), .086(1). "Sexual contact" means "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(13).

While child rape and child molestation are separate offenses, "double jeopardy potentially is implicated when the defendant is charged with both child rape and child molestation based only on oral-genital contact rather than on penetration." *State v. Sanford*, 15 Wn. App. 2d 748, 753, 477 P.3d 72 (2020). As Division One has explained:

[5] First degree child rape differs from second degree child rape in the age of the victim and the defendant at the time of the offense. RCW 9A.44.073(1), .076(1).

[6] First degree child molestation differs from second degree child molestation in the age of the victim at the time of the offense. RCW 9A.44.083(1), .086(1).

> [W]here the only evidence of sexual intercourse supporting a count of child rape is evidence of sexual contact involving one person's sex organs and the mouth or anus of the other person, that single act of sexual intercourse, if done for sexual gratification, is both the offense of molestation and the offense of rape. In such a case, the two offenses are not separately punishable. They are the same *in fact and in law* because all the elements of the rape as proved are included in molestation, and the evidence required to support the conviction for molestation also necessarily proves the rape.

State v. Land, 172 Wn. App. 593, 600, 295 P.3d 782 (emphasis in original), *review denied*, 177 Wn.2d 1016 (2013).

The trial court must give a separate and distinct acts instruction when there is a possibility that the jury could convict the defendant of both child rape and child molestation based on the same act of oral/genital contact. *Sanford*, 15 Wn. App. 2d at 753. A separate and distinct acts instruction informs the jury that "they are to find 'separate and distinct acts' for each count when the counts are identically charged." *State v. Hayes*, 81 Wn. App. 425, 431, 914 P.2d 788, *review denied*, 130 Wn.2d 1013 (1996).

Here, E.Z.-V. testified that Rendón Tapia either engaged in oral/genital contact or got on top of her and rubbed his pelvic area against her. Thus, there is a potential for the jury to convict Rendón Tapia for child rape and child molestation based on the same act of oral/genital contact. Because the trial court did not include a separate and distinct acts instruction, there is a potential double jeopardy violation.

However, failure to give a separate and distinct acts instruction is not a per se double jeopardy violation; rather, "it simply means that the defendant *potentially* received multiple punishments for the same offense." *Mutch*, 171 Wn.2d at 663 (emphasis in original). In such a situation, we must decide whether it was "'manifestly apparent to the jury that the State [was] not

seeking to impose multiple punishments for the same offense' and that each count was based on a separate act." *Id.* at 664 (emphasis omitted) (alteration in original) (quoting *State v. Berg*, 147 Wn. App. 923, 931, 198 P.3d 529 (2008)). In doing so, we consider "the evidence, arguments, and instructions" presented at trial. *Id.*

2. No Double Jeopardy Violation

Rendón Tapia argues that the record fails to show that it was "manifestly apparent that the jury based its convictions for counts 3 and 4 and for counts 5 and 6 on separate and distinct acts." Br. of Appellant at 18. We disagree.

In its closing argument, the State made it manifestly apparent to the jury that the State was not seeking to impose multiple punishments for the same act. The State explicitly distinguished between child molestation and child rape, stating that while sexual contact was a key element of child molestation, the sexual contact required for child molestation "is different from that in rape of a child." VRP (Aug. 4, 2022) at 408. The State also repeated the definition for sexual intercourse when discussing the child rape charges. The State highlighted the testimony about oral/genial contact "as the crucial element proving [the] rape" charges. *See Land*, 172 Wn. App. at 602. At no point did the State argue that the alleged acts of oral sex supported the child molestation charges. *See Sanford*, 15 Wn. App. 2d at 757 (finding "the prosecutor . . . did not make it clear in closing argument that the State was relying on different acts to prove rape and . . . molestation" where prosecutor "expressly relied" on same acts of oral/genital contact "to support both the rape . . . and . . . molestation charges").

Moreover, the State discussed each count separately and the distinct evidence that supported each count. *See State v. Reedy*, 26 Wn. App. 2d 379, 390-91, 527 P.3d 156, *review*

denied, 1 Wn.3d 1029 (2023); *see also State v. Peña Fuentes*, 179 Wn.2d 808, 825, 318 P.3d 257 (2014) (holding that it was "manifestly apparent that the convictions were based on separate acts because the prosecution made a point to clearly distinguish between the acts that would constitute rape of a child and those that would constitute child molestation"). In its closing arguments, the State linked each count with specific acts E.Z.-V. described, along with details of the specific location where the acts occurred and what E.Z.-V. was doing or wearing at the time.

Rendón Tapia argues that "even if the prosecutor's argument considered in isolation could support an argument that the jury was clear that it must rely on separate and distinct acts," the jury's question during deliberations "destroys any notion that the prosecutor's argument made it manifestly apparent that the jury could not rely on the same acts" for the child molestation and child rape charges. Br. of Appellant at 21. We disagree.

Here, the jury asked the trial court, "What is the difference between 1st and 2nd degree molestation and Rape[?]" CP at 32. At best, the question is ambiguous as to what the jury meant by "the difference." Furthermore, the trial court responded to the question by instructing the jury to read the separate to convict instructions and the instructions as a whole. After being so instructed by the trial court, there were no further questions from the jury. Presumably, whatever question the jury might have had as to the charges was clarified by the trial court's instruction for the jury to review the jury instructions.

Given the record as a whole, it was manifestly apparent that the State was not seeking to impose multiple punishments for the same offenses but was seeking a conviction on each count based on separate and distinct acts. Thus, we affirm Rendón Tapia's convictions.

B. CHALLENGED COMMUNITY CUSTODY CONDITIONS AND LFO

Rendón Tapia asks that the $500 CVPA and requirement that he pay for polygraph testing be stricken from his judgment and sentence. Rendón Tapia also asks that this court "direct the trial court to amend the judgment and sentence to specify that no community custody supervision fees are authorized." Br. of Appellant at 26. The State concedes that "the polygraph fee provision, the victim penalty assessment, and any Department of Corrections supervision fee should be stricken from the judgment and sentence." Br. of Resp't at 14. We accept the State's concession and remand to the trial court with instructions to strike the CVPA fee, strike the requirement that Rendón Tapia pay for polygraph testing, and clarify that Rendón Tapia is not required to pay community custody supervision fees.

Effective July 1, 2023, RCW 7.68.035(4) prohibits courts from imposing the CVPA on indigent defendants. *See State v. Ellis*, 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023), *pet. for rev. filed*, No. 102378-2 (Sept. 13, 2023). Although this amendment took effect after Rendón Tapia's sentencing, it applies to cases pending on appeal. *Id.*

To have the CVPA stricken, Rendón Tapia must have been found indigent as defined in RCW 10.01.160(3). RCW 7.68.035(4). For purposes of RCW 10.01.160(3), a defendant is indigent if they meet the criteria in RCW 10.101.010(3)(a)-(c). A person is indigent under RCW 10.101.010(3)(c) if they "[r]eceiv[e] an annual income, after taxes, of one hundred twenty-five percent or less of the current federally established poverty level."

Here, the sentencing court determined that Rendón Tapia was indigent because he "receives an annual income, after taxes, of one hundred twenty-five percent or less of the current federally established poverty level." CP at 174. Thus, Rendón Tapia is indigent pursuant to RCW

10.101.010(3)(c), and we remand to the sentencing court with instructions to strike the $500 CVPA fee from his judgment and sentence.

As for the polygraph fee provision, Rendón Tapia argues that the provision should be stricken based on his indigency and the trial court's intention to only impose mandatory fees. The State agrees that the polygraph fee provision should be stricken from his judgment and sentence. We accept the State's concession and remand with instructions to strike the polygraph fee provision.

As for the community custody supervision fees, the trial court did not indicate whether Rendón Tapia would pay supervision fees or whether they would be waived due to his indigency. Effective July 1, 2022, the imposition of community custody supervision fees is no longer statutorily authorized. LAWS OF 2022, ch. 29, § 8(2)(d); *see* RCW 9.94A.703. Thus, on remand, the trial court should clarify on Rendón Tapia's judgment and sentence that he will not be responsible for community custody supervision fees.

CONCLUSION

Because it was manifestly apparent that the State was not seeking multiple punishments for the same conduct, the failure to give a separate and distinct acts jury instruction did not violate double jeopardy. Thus, we affirm Rendón Tapia's convictions. However, we remand to the trial court with instructions to strike the CVPA fee, strike the requirement that Rendón Tapia pay for polygraph testing, and clarify that Rendón Tapia is not required to pay community custody supervision fees.

No. 57477-2-II

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Maxa, P.J.

Che, J.

NIELSEN KOCH & GRANNIS, PLLC

July 11, 2024 - 3:41 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	57477-2
Appellate Court Case Title:	State of Washington, Respondent v. Crispin Rendon Tapia, Appellant
Superior Court Case Number:	20-1-01953-4

The following documents have been uploaded:

- 574772_Petition_for_Review_20240711154021D2170883_2814.pdf
  This File Contains:
  Petition for Review
  The Original File Name was PFR 57477-2-II.pdf

A copy of the uploaded files will be sent to:

- Sloanej@nwattorney.net
- cntypa.generaldelivery@clark.wa.gov
- lauren.boyd@clark.wa.gov

Comments:

Sender Name: Kevin March - Email: marchk@nwattorney.net
Address:
2200 6TH AVE STE 1250
SEATTLE, WA, 98121-1820
Phone: 206-623-2373

Note: The Filing Id is 20240711154021D2170883