NO. 103507-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

DENNIS MOWERY JR.,

Appellant.

RESPONSE TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The Respondent is the State of Washington, represented by Alysa S. Draper-Dehart, Deputy Prosecuting Attorney for Ryan P. Jurvakainen, Cowlitz County Prosecuting Attorney.

II. COURT OF APPEALS DECISION

The Court of Appeals correctly found that the trial court did not abuse its discretion in finding that imposition of sentences did not violate double jeopardy when charges did not merge. The Respondent respectfully requests this Court deny review of *State of Washington v. Dennis Mowery Jr*, Court of Appeals No. 58289-9-II.

III. ISSUES PRESENTED FOR REVIEW

(1) Does the Court of Appeals' decision, holding Mowery's convictions did not merge and do not violate double jeopardy, conflict with a prior decision of the Supreme Court?

IV. STATEMENT OF THE CASE

Jane Doe was born March 6, 2015 to Shacura Brown and Dennis Mowery. Mowery was charged with rape of a child in the first degree – domestic violence ("DV"), child molestation in the first degree – DV, incest in the first degree, and incest in the second degree. CP 2-3. On February 22, 2023 Mowery pled guilty as charged. CP 5-16.

When Mowery pled guilty to rape of a child in the first degree – DV he stated: "[o]n or about July 2, 2021… I was at least 24 months older than T.A.M. when I intentionally manipulated and thereby penetrated her vagina …T.A.M was less than 12 years old and … was a family member as she was my daughter." CP 15. When he pled guilty to child molestation in the first degree- DV, Mowery stated: "…I was at least 36 months older than T.A.M. when I engaged in sexual contact with T.A.M. … Specifically, I had T.A.M. touch my erect penis while I was masturbating… ." *Id.* When he pled guilty to incest in the first degree, Mowery stated: "… I engaged in sexual intercourse

... with T.A.M., whom I knew to be my daughter." *Id.* When he pled guilty to incest in the second degree Mowery stated: "... I engaged in sexual contact ... with T.A.M., whom I knew to be my daughter." *Id.*

On April 19, 2023, the court sentenced Mowery. CP 24-38. Upon the agreement of the parties, the court found that count I rape of a child and count III incest in the first degree were the same criminal conduct and count II child molestation and count IV incest in the second degree were same criminal conduct. RP 55-56. The court sentenced Mowery to 150 months on rape of a child, 89 months on child molestation, 34 months on incest in the first degree and 20 months on incest in the second degree. CP 29.

In a unanimous decision, the Court of Appeals affirmed Mowery's sentences for rape of a child in the first degree DV, child molestation in the first degree DV, incest in the first degree and incest in the second degree as the sentences did not violate double jeopardy. Slip Opinion at 1. Further stating that the special allegation of DV does "not itself alter the elements of the

underlying offense." Slip Op. at 4, citing *State v. O.P.*, 103 Wn. App, 889, 892, 13 P.3d 1111 (2000). In summary, the court explained that Mowery's convictions "are not the same in law under the *Blockburger* "same evidence" test." Slip Op. at 5. While the crimes can be same criminal conduct they do not merge and the concept was validated by the legislature under RCW 9.94A.589(1)(a). Slip Op. at 6.

Mowery now petitions this Court for review.

V. THIS COURT SHOULD DENY REVIEW BECAUSE THE PETITION FAILS TO RAISE GROUNDS UNDER RAP 13.4(B).

Because Mowery's petition fails to raise any of the grounds governing review under RAP 13.4(b), it should be denied. Under RAP 13.4(b), a petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

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

Mowery claims the Court of Appeals' decision is in conflict with a Supreme Court decision RAP 13.4(b)(1). He does not claim any other grounds for review under RAP 13.4(b).

The Court of Appeals' decision is not in conflict a Supreme Court decision. Because Mowery fails to raise grounds for review under RAP 13.4(b), review should not be granted.

A. THE COURT OF APPEALS' HOLDING, THAT MOWERY'S CONVICTIONS DO NOT MERGE AND DO NOT VIOLATE DOUBLE JEOPARDY, DOES NOT CONFLICT WITH A DECISION BY THE SUPREME COURT.

The Court of Appeals correctly held Mowery's charges did not merge and did not violate double jeopardy. "Identifying a crime as a [DV] crime 'does not itself alter the elements of the underlying offense; rather, it signals the court that the law is to be equitably and vigorously enforced.'" *State v. Goodman*, 108

Wn. App. 355, 359, 30 P.3d 516, 519 (2001) citing *State v. O.P.*, 103 Wash.App. 889, 892, 13 P.3d 1111 (2000). Rape of a child in the first degree and incest in the first degree each contain independent elements. The DV designation does not add an element to rape of a child in the first degree. Further, child molestation in the first degree and incest in the second degree each contain independent elements. As with the rape of a child, the DV designation does not create an element.

The United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. 5. Similarly, the Washington State Constitution provides that "no person shall... be twice put in jeopardy for the same offense." WA Const. art. 1 § 9. "The Supreme Court has ruled double jeopardy applies if the two offenses for which the defendant is punished or tried cannot survive the "same elements" test". *State v. Gocken*, 127 Wash. 2d 95, 101, 896 P.2d 1267 (1995) citing *United States v. Dixon,* 509 U.S. 688, 113 S.Ct. 2849, 2856, 125 L.Ed.2d 556 (1993).

Whether two or more offenses have the same elements is determined by the Blockburger Test. *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test ... is whether each provision requires proof of a fact which the other does not." *Id* at 304. If, however, the legislature intended to impose separate punishments then double jeopardy is not at question.

A four-factor test is used to determine the intent and whether cumulative punishment is authorized:

> (1) consideration of any express or implicit legislative intent,
> (2) application of the *Blockburger*, or "same evidence," test,
> (3) application of the "merger doctrine," and
> (4) consideration of any independent purpose or effect that would allow punishment as a separate offense.

State v. Arndt, 194 Wn.2d 784, 816, 453 P.3d 696, 711 (2019). "If there is clear legislative intent to impose multiple punishments for the same act or conduct, this is the end of the

inquiry and no double jeopardy violation exists." *Arndt*, 194 Wn.2d at 816 (citing *State v. Kelley,* 168 Wash.2d 72, 77, 226 P.3d 773 (2010)). "Legislative intent may be express, *see* RCW 9A.52.050, or implied." *Arndt*, 194 Wn.2d at 816 (citing *State v. Freeman,* 153 Wash.2d at 771-72, 108 P.3d 753 (2005)). For example, RCW 9A.52.050 states that every person who in the commission of burglary and commits another crime "may be prosecuted for each crime separately." However, most other statutes are not as direct.

Here, the elements of incest in the first degree require sexual intercourse with a relative when the relationship is known. RCW 9A.64.020. Incest in the second degree requires sexual contact with a family member. *Id.* The elements of rape of a child in the first degree that Mowery was charged under and pled to were, sexual intercourse with a child less than twelve and who was not married to him and Mowery was at least twenty-four

months older than the victim. CP 15. *See also* RCW 9A.44.073 (1988)[1].

The elements of child molestation in the first degree that Mowery was charged under and pled to were, sexual contact for the purpose of sexual gratification with a child less then twelve years when Mowery was thirty-six months older than the child and were not married or in a domestic partnership with the child. CP 15. *See also* RCW 9A.44.083 (1988)[1].

In *State v. Calle,* 125 Wn.2d 769, 778, 888 P.2d 155 (1995), *Calle* was charged for first degree incest and second degree rape by forcibly engaging in sexual intercourse with his 18 year old daughter. The court held that the elements of first degree incest and second degree rape are not the same under either the *Blockburger* or same evidence test. *Calle,* 125 Wn.2d 769 (where incest required a proof of relationship and rape required a proof of force). The *Calle* Court stated:

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[1] RCW 9A.44.073 was amended effective April 26, 2021, removing the unmarried element.

> In examining the legislative history of the rape and incest statutes we see no such evidence. Rather, we find only support for our conclusion that the Legislature intended to punish incest and rape as separate offenses, even though committed by a single act. As the Court of Appeals noted, the differing purposes served by the incest and rape statutes, as well as their location in different chapters of the criminal code, are evidence of the Legislature's intent to punish them as separate offenses. Incest and rape have been regarded as separate crimes in Washington since before statehood. *See* Laws of 1873, ch. 7, § 127, p. 209 (grouping incest with offenses such as seduction, adultery, polygamy, and lewdness). Today, the offenses are defined in two separate sections of the criminal code. Incest and bigamy now constitute RCW 9A.64, Family Offenses, while second degree rape is defined in RCW 9A.44, Sex Offenses.

125 Wn.2d 769, 780, 888 P.2d 155, 160–61 (1995). Further amendments and changes have occurred in the chapters; however, the chapters remain separated between RCW 9A.64 Family Offenses and RCW 9A.44 Sex Offenses.

As the court noted in *Calle,* for purposes of punishment the courts can look to where the statutes are located. Domestic violence is in its own chapter, RCW 10.99. "Incest and bigamy now constitute RCW 9A.64, Family Offenses, while second

degree rape is defined in RCW 9A.44, Sex Offenses." *Calle,* 125 Wash.2d at 780. In fact, the intent of the domestic violence chapter "is to recognize the importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide." RCW 10.99.010.

With the DV designation, "domestic violence is not a separate crime with elements that the State must prove. Identifying a crime as a [DV] crime 'does not itself alter the elements of the underlying offense; rather, it signals the court that the law is to be equitably and vigorously enforced.'" *State v. Goodman*, 108 Wn. App. at 359, 30 P.3d at 519 (citing *State v. O.P.,* 103 Wn. App. 889, 892, 13 P.3d 1111 (2000)). The DV designation is not a charge in of itself, it is a designation for the purpose of determining an offender score and is an aggravating sentencing factor. *State v. Goodman*, 108 Wn. App. at 361, 30 P.3d at 520; *see also State v. Thaves*, 122 Wn. App. 1048 (2004)

(classifying the defendant's third degree assault against a family member as domestic violence did not create any additional elements, nor did it increase the defendant's punishment).

State v. Hughes, 166 Wn.2d 675, 684, 212 P.3d 558 (2009), is distinguishable from Mowery's case, as *Hughes* was charged with second degree child rape and second-degree rape for a single act of sexual intercourse which the court held violated double jeopardy. The domestic violence component was not addressed. The reason the court held that double jeopardy was violated, was that there was a single act, and the offenses were also the same in law noting "[e]ven if the two statutes pass the "same evidence" inquiry, multiple convictions may not stand if the legislature has otherwise clearly indicated its intent that the same conduct or transaction will not be punished under both statutes". *Id* at 682. This case is distinguishable from *Calle,* which noted the intent to punish rape and incest charges separately. *Hughes* is also distinguishable from Mowery's case

as there were two different acts as noted in the Statement of Plea on Guilty. CP 15.

Furthermore, the legislature has memorialized by statute the intent for how offenses with the same criminal conduct shall be sentenced. RCW 9.94A.589.

> (1)(a) Except as provided in (b), (c), or (d) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

RCW 9.94A.589(1)(a). Same criminal conduct and merger are different.

Here, Mowery argues that the inclusion of the "domestic violence component added a familial relationship" as an element to the offense. *Appellant's Brief* at 12. The charges in this case include the designation of DV. However, that does not add an element to the underlying crime. For rape of a child in the first degree – DV and child molestation in the first degree – DV, the DV designation is not its own unique or separate charge. Additionally, both counts had separate criminal conduct which the charges arose from.

Furthermore, the information indicates the elements of the crimes are distinct to the crime. The information then notes that the crime is also a crime of domestic violence under the definition of domestic violence. For example, count I rape of a child in the first degree – domestic violence, lists the elements of the charge and states that it is distinct to RCW 9A.44.073. CP 2. The information also states: "[a]nd further do accuse the defendant, Dennis Lee Mowery Jr., at said time of committing the above crime against a family or household member; a crime

of domestic violence as defined under RCW 10.99.020." The charge was not rewritten to add an element of the relationship. Rather, the designation was added to the end of the charge, thus separating the designation from the elements.

If by adding the DV designation, crimes that would not have otherwise merged, would be construed to merge, that would go against the intent of the domestic violence chapter. Courts have held rape and incest do not merge because they contain separate elements, exist in separate chapters, and the legislature has long intended them to be punished separately. [2] Courts have also held that the domestic violence designation does not add an element to the underlying charge. [3]

Counts I and III arose out of the same criminal conduct, but do not merge. Counts II and IV arose out of the same criminal

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[2] *State v. Calle,* 125 Wn.2d 769, 782, 888 P.2d 155, 161 (1995), *see also State v. Sorrell*, 160 Wn. App. 1008 (2011)
[3] *State v. Goodman*, 108 Wn. App. 355, 30 P.3d 516, (2001), *see also State v. Abdi-Issa*, 199 Wn.2d 163, 169, 504 P.3d 223, 227 (2022)

conduct, separate and apart from count I and III; however, counts II and IV still do not merge. By not merging they do not violate double jeopardy. The trial court did not err when Mowery was sentenced for both rape of a child in the first degree – DV and for incest in the first degree.

Child molestation in the first degree and incest in the second degree also contain distinct elements, exist in separate chapters and have a separate purpose for punishment between the chapters. The domestic violence designation on child molestation charge did not add a familial element to the charge. The trial court did not err when Mowery was sentenced for both child molestation in the first degree – DV and incest in the second degree. Sentencing requirements for charges arising from the same criminal conduct is clearly laid out by the legislature, and the trial court sentenced accordingly.

Now, the appellate court has unanimously stated that the "merger and same criminal conduct doctrines do not affect the underlying convictions validity." Slip Op. at 6, *citing to State v.*

Wilkins, 200 Wn. App. 794, 806 403 P.3d 890 (2017). Therefore, Mowery's convictions do not violate double jeopardy.

VI. CONCLUSION

Because the petition does not meet any of the considerations governing acceptance of review under RAP 13.4(b), it should be denied.

CERTIFICATE OF COMPLIANCE

I certify under RAP 18.17(b) that excluding appendices, title sheet, table of contents, table of authorities, certificate of compliance, certificate of service, signature blocks, and pictorial images, the word count of this document is 2,929 words, as calculated by the word processing software used.

Respectfully submitted this 14 day of November 2024.

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CERTIFICATE OF SERVICE

I, Jacqueline Renny, do hereby certify that the RESPONSE TO PETITION FOR REVIEW, was filed electronically via email to the below:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on 14th day of November, 2024.

Jacqueline Renny