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

STATE OF WASHINGTON,	)	No. 66708-4-I
	)	
Respondent/Cross Appellant,	)	
	)	
v.	)	
	)	
JORGE PENA FUENTES,	)	PUBLISHED IN PART
	)	
Appellant/Cross Respondent.	)	FILED: January 14, 2013
	)	

Ellington, J.P.T. — The purposeful and unjustified invasion of attorney-client communication by law enforcement is inexcusable. In this case, a detective listened to several recorded telephone calls between the defendant and his attorney. This is plainly egregious misconduct, and gives rise to a presumption of prejudice.

The misconduct occurred at the point of a motion for new trial, so it had no effect on the fairness of the trial itself, and the trial court expressly found the misconduct had no effect upon the resolution of the motion for a new trial. The detective's astonishing behavior thus had no effect on Jorge Pena Fuentes' convictions for child rape and child molestation.

In these unusual circumstances, the presumption of prejudice was rebutted. The trial court did not abuse its discretion in allowing the convictions to stand.

We reject Pena Fuentes' remaining arguments. The court erred in dismissing

the child rape conviction on double jeopardy grounds, and we remand for resentencing. Otherwise, we affirm.

BACKGROUND

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. The relevant facts are as follows.

J.B. was born in 1993 to Mirna Corona and her then husband, Brian Bean. After Bean and Corona separated, Corona began living with Pena Fuentes. Their daughter L.P. was born in 1998. Corona and Pena Fuentes were married the following year. But their relationship was volatile; they separated in 2004 and later divorced. J.B. and L.P. lived with Corona but Pena Fuentes continued to care for both girls after school. Pena Fuentes met his current wife, Mihaela Pena, in 2007.

In November 2008, when J.B. was in ninth grade, she disclosed to her school counselor that Pena Fuentes had sexually abused her from third through sixth grades. After talking to the school counselor, J.B. told her cousin that Pena Fuentes put his fingers in her vagina and engaged in oral sex.[1] She also told her best friend that Pena Fuentes "touched her with his fingers in a very inappropriate place."[2]

The counselor contacted the police, Child Protective Services, and Corona. Detective Casey Johnson was assigned to the case. Pena Fuentes admitted to Detective Johnson that he was physically playful with his children, frequently biting J.B.

[1] J.B. had made previous equivocal disclosures to the cousin.

[2] Report of Proceedings (RP) (Oct. 21, 2010) at 269.

in various places, including her bottom. He said he may have grabbed her breast unintentionally, but denied that he ever engaged in oral sex with J.B. or penetrated her with his fingers. Pena Fuentes was not immediately charged.

In October 2009, Child Protective Services removed L.P. from Corona's home and placed her with Mihaela Pena's parents.[3] On October 12, the prosecutor informed Pena Fuentes that charges had been filed. On October 21, L.P. sent a handwritten letter to the prosecutor's office, claiming she knew the abuse allegations were not true because she heard Corona tell J.B. "to lie and say that my dad sexually abused her."[4] This letter started the chain of events that concerns us here.

L.P. testified at trial. She was then 12 years old. She testified she did not remember whether J.B. ever told her the allegations were untrue. The defense offered her letter into evidence. The court admitted the letter as exhibit 2 and allowed counsel to read it to the jury.

On redirect, L.P. testified she wrote the letter because she was afraid for her father and wanted to help him. She admitted telling the prosecutor that her stepmother said she should write the letter and that her father, stepmother, and stepmother's parents were in the house when she wrote it. She could not recall who provided the prosecutor's address or the envelope on which to write it.

The court later instructed the jury that "[e]xhibit 2 may only be considered by you for any bearing it may have in assessing [L.P.'s] credibility. You may not consider [e]xhibit 2 for the truth of the matter asserted within it."[5] Pena Fuentes made no

[3] The reasons for this were apparently unrelated.

[4] RP (Oct. 21, 2010) at 296.

objection.

The jury convicted Pena Fuentes of one count of rape of a child in the first degree and two counts of first degree child molestation. It acquitted him of one count of first degree child molestation and did not reach a verdict on the second degree molestation counts.

Pena Fuentes moved for a new trial, alleging the convictions for both child rape and child molestation violated double jeopardy.

Meanwhile, Mihaela Pena and her brother confronted L.P. at her church. They were carrying video equipment, and they asked L.P. to record a statement reiterating that she knew the allegations against her father were false. She complied.

With the assistance of new counsel, Pena Fuentes submitted the video as additional grounds for a new trial. He argued the video constituted newly discovered evidence. He also argued that L.P.'s lack of recall at trial regarding the events described in her pretrial letter constituted "accident or surprise" for purposes of CrR 7.5(a)(4), and that a new trial was required because the court committed an error of law by admitting L.P.'s pretrial letter only for impeachment.

Concerned about the circumstances of the video, the prosecutor asked Detective Johnson to investigate possible witness tampering charges. Specifically, the prosecutor asked him to obtain the recordings of Pena Fuentes' phone calls from the jail. By great misfortune, the recordings provided by the jail to the detective included calls between Pena Fuentes and his attorney, Richard Hansen.

[5] RP (Oct. 26, 2010) at 533.

Two days later, L.P. signed a declaration prepared by the prosecutor in which she recanted her statements in the video: "[A]ll the things I had said in that video were lies."[6] She explained she "felt forced into making that video" and "was still scared that they might be able to find me anywhere I go."[7] She described similar pressure to write the pretrial letter: "I didn't really feel like I had a choice so I sat down and wrote saying I knew the accusations were not true like my stepmom said."[8]

Eleven days after receiving the recordings from the jail and nine days after L.P.'s declaration, Detective Johnson disclosed to the prosecutor that he had listened to calls between Pena Fuentes and attorney Hansen. He did not reveal the content of their conversations. The prosecutor instructed the detective not to listen to any further calls, not to tell anyone about the substance of the calls, and to withdraw immediately from the witness tampering investigation.

Informed by the prosecutor of the detective's actions, defense counsel swiftly filed a motion to dismiss for governmental misconduct under CrR 8.3. The prosecutor attested he had never listened to the recordings or been informed of their substance, and that he had "not relied on any information that may be contained in the calls between Mr. Hansen and the defendant for any purpose, including trial preparation or the [response to] defendant's motion for a new trial."[9]

After argument on the pending motions, the trial court denied both the motion for

[6] Clerk's Papers at 214.

[7] Id.

[8] Id.

[9] Clerk's Papers at 220.

a new trial based on newly discovered evidence and also denied the motion to dismiss for governmental misconduct.

Pena Fuentes appeals. The Washington Association of Criminal Defense Lawyers filed an amicus curiae brief in this appeal.[10]

DISCUSSION

Government Misconduct

Under CrR 8.3(b), a court may dismiss a prosecution when government misconduct causes "prejudice to the rights of the accused which materially affect the accused's right to a fair trial." Dismissal under CrR 8.3 is "an extraordinary remedy, one to which a trial court should turn only as a last resort."[11] To justify dismissal on this basis, "the defendant must show actual prejudice; the mere possibility of prejudice is insufficient."[12] We review the trial court's decision for manifest abuse of discretion.[13]

Pena Fuentes contends that prejudice must be presumed whenever police eavesdrop on attorney-client conversations, and that dismissal is the only appropriate remedy.[14] Where intrusion upon the attorney-client relationship is purposeful and

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[10] We discuss the State's cross appeal in the unpublished portion of this opinion.

[11] State v. Wilson, 149 Wn.2d 1, 12, 65 P.3d 657 (2003).

[12] State v. Krenik, 156 Wn. App. 314, 320, 231 P.3d 252 (2010).

[13] State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993).

[14] The United States Supreme Court rejects the premise 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.'" Weatherford v. Bursey, 429 U.S. 545, 549, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977) (quoting Bursey v. Weatherford, 528 F.2d 483 (4th Cir. 1975)). Bursey involved an undercover officer who was arrested with the defendant and later, still undercover, participated in discussions with Bursey and his counsel. He never disclosed these discussions to the prosecutor, but his role was later revealed. The court held that because there was "no tainted evidence . . ., no communication of defense strategy to

without justification, prejudice may be presumed.[15] Detective Johnson knowingly listened to six separate conversations between defendant and his counsel. He lacked any conceivable justification. This is egregious misconduct and gives rise to a presumption of prejudice.

Even where prejudice is presumed, however, dismissal is not automatic. In State v. Granacki, for example, a detective read some of defense counsel's notes during a trial recess.[16] The notes reflected trial strategy and confidential communications with the defendant. Although the detective did not tell the prosecutor what he had seen, the trial court dismissed the charges. We affirmed, noting that "dismissal not only affords the defendant an adequate remedy but discourages 'the odious practice of eavesdropping on privileged communication between attorney and client.'"[17] But we also observed that dismissal was not the only permissible remedy:

> Normally misconduct does not require dismissal absent actual prejudice to the defendant. Even then, the 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 discretion. But, based on the trial judge's evaluation of all the circumstances and Detective Kelly's credibility, the sanction he imposed was also within his discretion.[18]

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the prosecution, and no purposeful intrusion . . ., there was no violation of the Sixth Amendment." Id. at 558.

[15] See State v Garza, 99 Wn. App. 291, 300-01, 994 P.2d 868 (2000) (jail officers' search for, confiscation of, and perusal of inmates' legal documents justified a presumption of prejudice).

[16] 90 Wn. App. 598, 600, 959 P.2d 667 (1998).

[17] Id. at 603 (quoting State v. Cory, 62 Wn.2d 371, 378, 382 P.2d 1019 (1963)).

[18] Id. at 604 (citation omitted).

Pena Fuentes relies upon State v. Cory[19] and State v. Perrow.[20] Both cases involve situations in which the intrusion on the attorney-client relationship occurred before and/or during trial, leaving the court with no way to isolate the resulting prejudice.

In Cory, sheriff's officers used a microphone to eavesdrop on the defendant's conversations with counsel "from the time of his arrest throughout trial and thereafter."[21] Reasoning that "[t]here is no way to isolate the prejudice" from such eavesdropping, our Supreme Court held that the only adequate remedy was to vacate the convictions and dismiss the charges.[22]

In Perrow, a detective executing a search warrant seized the defendant's writings.[23] Despite knowing the documents were prepared for the defendant's attorney, the detective examined and copied the documents and delivered them to the prosecutor, who later filed charges.[24] Division Three of this court held that "[a]s in Cory, it is impossible to isolate the prejudice presumed from the attorney-client privilege violation," and the trial court did not abuse its discretion by dismissing the charges.[25]

In this case, however, it is possible to isolate the potential prejudice resulting

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[19] 62 Wn.2d 371, 382 P.2d 1019 (1963).

[20] 156 Wn. App. 322, 231 P.3d 853 (2010).

[21] Corey, 62 Wn.2d at 372.

[22] Id. at 377.

[23] Perrow, 156 Wn. App. at 325.

[24] Id. at 326.

[25] Id. at 332.

from the intrusion. The detective's odious conduct had no effect on the fairness of the trial itself because it occurred afterward. Any prejudice therefore occurred during the posttrial motions proceedings.

Three grounds were asserted for new trial. Two were strictly legal: the double jeopardy argument and the alleged evidentiary error. Johnson's misconduct could not have affected the rulings on those issues. The third ground, however, was premised on the videotape offered as newly discovered evidence. The State's response to that motion consisted of L.P.'s declaration disavowing the video, which Johnson apparently helped the prosecutor obtain and which was signed two days after Johnson received the recordings.[26] The content of the declaration is thus the only point of possible prejudice resulting from Johnson's misconduct.

The trial court found the videotape itself not credible, and disregarded L.P.'s declaration recanting it. The court therefore concluded that the detective's intrusion upon Pena Fuentes' right to counsel could not have caused prejudice to Pena Fuentes *on these charges*.[27] Under these circumstances, the presumption of prejudice was rebutted.

This is a very unusual situation. Deliberate intrusion upon the attorney-client relationship by a police officer cries out for a strong judicial response--such as dismissal of all charges--as a means of discouraging such "odious practices."[28] But it

[26] It is unclear exactly when Johnson listened to the tapes.

[27] Had the State pursued charges for witness tampering, it would be an entirely different matter.

[28] Granacki, 90 Wn. App. at 603.

is nonetheless true that by happenstance, Johnson's egregious misconduct did not actually cause prejudice to Pena Fuentes.

It is also true that the appropriate remedy is left to the court's discretion.[29] As offensive and unscrupulous as the detective's actions were, they occurred after the trial and did not affect the posttrial proceedings. The court did not abuse its discretion in refusing to dismiss the charges already tried.

Affirmed.

The balance of this opinion having no precedential value, the panel has determined it should not be published in accordance with RCW 2.06.040.

Discovery

Ten days after the court denied his motion to dismiss for government misconduct, Pena Fuentes renewed his motion and further moved for "discovery of all police reports and other evidence gathered in this case by Detective Cory Johnson and others, which has not previously been provided to the defense."[30] The court denied the motion. We review that decision for abuse of discretion.[31]

Relying on CrR 4.7 and Brady v. Maryland,[32] Pena Fuentes sought "all reports and other evidence collected by Detective Johnson and others following the [d]efendant's conviction, and particularly pertaining to the continuing investigation of alleged witness tampering in connection with witness L.P."[33]

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[29] Id. at 604.

[30] Clerk's Papers at 293.

[31] State v. Norby, 122 Wn.2d 258, 268, 858 P.2d 210 (1993).

[32] 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

[33] Clerk's Papers at 295-96.

Pena Fuentes does not allege the material would be exculpatory under Brady and does not identify any provision of CrR 4.7 that entitles him to the material. Further, he was requesting information beyond that which CrR 4.7 requires the State to disclose, so he had to show that the information sought was material and the discovery request was reasonable.[34] He makes no argument on either point.

Amicus curiae Washington Association of Criminal Defense Lawyers suggests that Pena Fuentes might have been able to show prejudice if the discovery had been allowed because it would reveal whether Johnson's eavesdropping "might have assisted [Johnson] in framing questions for L.P., in preparing her declaration, and in persuading her to sign it."[35] But "[t]he mere *possibility* that an item of undisclosed evidence *might* have affected the outcome of the trial . . . does not establish 'materiality' in the constitutional sense."[36] And in any event, the trial court disregarded the declaration entirely, for independent reasons.

Given these circumstances, the court was within its discretion to deny the discovery motion.

Newly Discovered Evidence

Pena Fuentes also contends he was entitled to a new trial because L.P.'s tape recorded statement constituted newly discovered evidence for purposes of CrR 7.4(a)(3). We review the decision to grant or deny a new trial for abuse of

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[34] CrR 4.7(e)(1); see also Norby, 122 Wn.2d at 266.

[35] Br. of Amicus Curiae at 15.

[36] Blackwell, 120 Wn.2d at 828 (internal quotation marks omitted) (quoting State v. Mak, 105 Wn.2d 692, 704-05, 718 P.2d 407 (1986)).

discretion.[37]

[37] State v. Carlson, 61 Wn. App. 865, 871, 812 P.2d 536 (1991).

To obtain a new trial based upon newly discovered evidence, a 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."[38] The absence of any one of these factors is grounds for denying a new trial.[39]

Pena Fuentes argues the evidence contained in the video could hot have been discovered sooner because the defense "had no way of knowing" that L.P. would claim no memory of her mother instructing her sister to lie.[40] But Pena Fuentes acknowledges that in a pretrial interview, L.P. indicated she was "not sure now" whether her mother asked her sister to lie about the sexual abuse.[41] Further, the video is substantively identical to L.P.'s written statement, which was presented to the jury. It was therefore both cumulative and unlikely to change the result of the trial. The court did not err by denying a new trial on this basis.

Error of Law

Pena Fuentes next contends the court should have granted him a new trial under CrR 7.5 because it made an error of law. He argues L.P.'s letter was admissible as a "recorded recollection" under ER 803(a)(5), and the court erred by limiting the jury's consideration of the letter to impeachment.

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[38] State v. Williams, 96 Wn.2d 215, 223, 634 P.2d 868 (1991) (emphasis omitted).

[39] Id.

[40] Br. of Appellant at 28.

[41] Br. of Appellant at 12 n.2 (quoting Clerk's Papers at 110).

But under CrR 7.5(a)(6), a court may grant a new trial only if the error of law occurred at the trial *and* was "objected to at the time by the defendant." Pena Fuentes did not object to the limiting instruction when it was given. Rather, he raised it for the first time in his motion for a new trial. The court did not err in denying the motion.[42]

Cross Appeal: Double Jeopardy

The trial court found that double jeopardy was violated because the jury may have relied upon the same act to convict Pena Fuentes of child rape in count 1 and child molestation in count 3 or 4. The court therefore dismissed the child rape count with prejudice. The State appeals, contending that convictions for first degree rape of a child and first degree child molestation do not violate double jeopardy. Our review is de novo.[43]

To determine whether multiple punishments for the same act violate the prohibition against double jeopardy, we first examine the language of the applicable statutes.[44] If the statutes do not expressly allow for multiple convictions arising from the same act, we next determine whether two statutory offenses are the same in law and in

[42] In a footnote in his opening brief, Pena Fuentes asserts, "To the extent that trial counsel may have waived this issue by failing to argue the admissibility of the letter as a recorded recollection, this failure would clearly constitute ineffective assistance of counsel because the failure to make a proper legal argument could never be deemed a legitimate tactical decision." Br. of Appellant at 5 n.1. But Pena Fuentes does not assign error based upon ineffective assistance of counsel and includes no other argument or analysis of that issue in his opening brief. In his reply brief, Pena Fuentes briefly asserts that this court should address the ineffectiveness issue. He does not provide argument on either prong of the long-standing test for ineffective assistance of counsel.

[43] State v. Hughes, 166 Wn.2d 675, 681, 212 P.3d 558 (2009).

[44] Id.

fact.[45] If each offense includes elements not included in the other, the offenses are different and a presumption arises that the legislature intended to allow multiple punishments for the same act.[46] This presumption may be overcome "only by clear evidence of contrary intent."[47]

Neither the first degree child rape statute nor the first degree child molestation statute expressly authorizes multiple convictions for offenses arising out of a single act.[48] But it has long been settled that a single incident of sexual contact may support convictions under both statutes.

In State v. Jones, the victim testified to sexual contact with the defendant on one occasion.[49] Based upon that single incident, the jury convicted Jones of both child rape and molestation.[50] We rejected Jones' double jeopardy claim, holding that rape of a child and child molestation are not the same offense for double jeopardy purposes: "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."[51] Many years later, our Supreme Court came to the same conclusion in State v. French, holding, "The two crimes are separate and can be charged and

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[45] State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995).

[46] Id.

[47] Id. at 780.

[48] See RCW 9A.44.073, .083.

[49] 71 Wn. App. 798, 822, 863 P.2d 85 (1993).

[50] Id. at 802.

[51] Id. at 825 (footnotes omitted).

punished separately."[52]

Pena Fuentes does not discuss or attempt to distinguish Jones or French. Instead, he contends the legislature did not intend to allow multiple punishments for the same act and that the two crimes "are both focused on the same legislative purpose of protecting children from sexual abuse, the elements are nearly identical, and both statutes are contained in the same chapter of the criminal code."[53]

But these are the arguments rejected in Jones and French. The legislature is deemed to acquiesce in the court's interpretation of a statute if no change is made for a substantial period following the court's decision.[54] The legislature has made no change. Both convictions may stand. The court therefore erred in dismissing count 1.[55]

Additional Grounds

In his pro se statement of additional grounds for review, Pena Fuentes asserts that trial counsel "didn't do his best," and that he is innocent.[56] To the extent Pena Fuentes is raising an ineffectiveness of counsel claim, his failure to identify any particular error makes the claim unreviewable.[57]

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[52] 157 Wn.2d 593, 610-11, 141 P.3d 54 (2006).

[53] Reply Br. of Appellant at 30.

[54] In re Pers. Restraint of Reed, 136 Wn. App. 352, 361, 149 P.3d 415 (2006).

[55] Given this disposition, we do not reach the State's alternative argument that the court erred in dismissing the greater offense when it concluded double jeopardy barred conviction for both.

[56] Statement of Additional Grounds For Review at 10.

[57] Further, his dissatisfaction is also inconsistent with his statement at sentencing that his attorney, "Mr. Anthony Savage, he did what he have to do . . . . He's one of the best lawyers in the history of Washington." RP (Jan. 14, 2011) at 613.

To the extent he challenges the sufficiency of the evidence, we reject his argument. A challenge to the sufficiency of the evidence admits the truth of the State's evidence, and all reasonable inferences therefrom must be drawn in favor of the State and interpreted most strongly against the accused.[58] Evidence is sufficient if, when viewed in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt.[59]

To convict Pena Fuentes of first degree rape of a child as charged in count 1, the jury had to find that between "January 1, 2003 through November 25, 2005, the defendant had sexual intercourse with J.B."[60] "Sexual intercourse" was defined, in part, as "any penetration of the vagina or anus however slight" or "any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another."[61]

To convict Pena Fuentes of child molestation in the first degree as charged in counts 3 and 4, the jury had to find that he had sexual contact with J.B. on at least two separate and distinct occasions between January 1, 2003 and November 25, 2005.[62] "Sexual contact" was defined 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

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[58] State v. Gentry, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995).

[59] Id. at 596-97.

[60] Clerk's Papers at 33. Other elements, including J.B.'s age during the charging period, the fact that she was not married to the defendant, and the location of the events in the state of Washington were not contested.

[61] Clerk's Papers at 34.

[62] Clerk's Papers at 38, 39.

[63] Clerk's Papers at 45.

party."[63]

J.B. testified that Pena Fuentes once licked her vagina and once put his fingers into her bottom while she lived in a condominium in Redmond. Her mother testified they lived in that condominium from April 2003 to August 2005. During that same period of time, J.B. testified that Pena Fuentes rubbed her chest and bottom over and under her clothes, kissed her neck and mouth, put his tongue in her mouth, and bit her bottom. More than twice, he would also "help [her] take a shower" by putting soap on her "[e]verywhere," including her chest, privates and bottom.[64] This evidence is sufficient to support convictions on counts 1, 3, and 4.[65]

Motion to Strike

Six weeks after Pena Fuentes filed his reply brief, he filed a supplemental designation of clerk's papers. These materials include attorney Hansen's formal complaint to the King County Sheriff's Department concerning Detective Johnson's conduct, a letter in response by King County Captain Tony Burtt, and "a number of appendices which are already exhibits which have been properly designated as Clerk's Papers in this action and are properly before this Court."[66]

We grant the State's motion to strike this material for two reasons. Pena Fuentes did not seek permission to file the supplemental designation after his last brief as required by RAP 9.6. More importantly, under RAP 9.11, we may allow additional

[63] Clerk's Papers at 45.

[64] RP (Oct. 21, 2010) at 329-30.

[65] The jury was also instructed that it must be unanimous as to which of the two acts of penetration had been proved to convict on count 1. Clerk's Papers at 35.

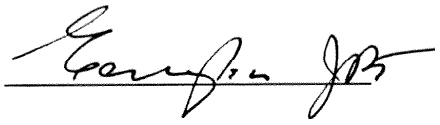
[66] Response to Motion to Strike at 2.

evidence on review only if:

> (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

Pena Fuentes does not address RAP 9.11, and it does not appear to us that the additional evidence he submitted would likely change the decision being reviewed or that it would be inequitable to decide the case on the existing record.

We reverse the court's dismissal of count 1 and remand for resentencing. In all other respects, we affirm.



WE CONCUR: