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STATE OF WASHINGTON

No. 39956-3-II  
COURT OF APPEALS, DIVISION II BY cm  
DEPUTY

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STATE OF WASHINGTON,

Respondent

vs.

JIMMY D. WITMER,

Appellant.

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BRIEF OF APPELLANT

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APPEAL FROM THE SUPERIOR COURT FOR  
THURSTON COUNTY  
The Honorable Christine A. Pomeroy and Carol Murphy, Judges  
Cause No. 09-1-00132-8

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in not dismissing Witmer's conviction for incest in the first degree (Count II) where the incest was incidental to, a part of, or coexistent with his conviction for rape of a child in the first degree (Count I).
2. The trial court erred in failing to instruct the jury that it had to be unanimous as to which act constituted incest where the evidence presented indicated that there were multiple acts that could have formed the basis for the single charge.
3. The trial court erred in admitting T.A.W.'s child hearsay statements to Beuttner, Ecklebarger, Winslow, Olson, and Kolb under RCW 9A.44.120 and the Ryan factors on the charges of rape of a child in the first degree (Count I), incest in the first degree (Count II), and child molestation in the first degree (Count III) where the record of the child hearsay hearing does not establish the reliability of those statements as T.A.W. was never asked about her statements to Beuttner, Ecklebarger, Winslow, and Kolb; and Olson, and Kolb were not called to testify at the child hearsay hearing.
4. The trial court erred in entering Findings Nos. 2, 3, 4, 5, 6, 7, 8, and 9; and Conclusions No. 1, 2, and 3 regarding the admissibility of T.A.W.'s child hearsay statements. [CP 337-339; Appendix "A"].
5. The trial court erred in not taking the case from the jury on the charges of rape of a child in the first degree (Count I), incest in the first degree (Count II), and child molestation in the first degree (Count III) for lack of sufficient evidence to sustain these charges.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in not dismissing Witmer's conviction for incest in the first degree (Count II) where the incest was incidental to, a part of, or coexistent with his conviction for rape of a child in the first degree (Count I)? [Assignment of Error No. 1].
2. Whether the trial court erred in failing to instruct the jury that it had to be unanimous as to which act constituted incest where the evidence presented indicated that there were multiple acts that could have formed the basis for the single charge? [Assignment of Errors No. 2].
3. Whether the trial court erred in admitting T.A.W.'s child hearsay statements to Beuttner, Ecklebarger, Winslow, Olson, and Kolb under RCW 9A.44.120 and the Ryan factors on the charges of rape of a child in the first degree (Count I), incest in the first degree (Count II), and child molestation in the first degree (Count III) where the record of the child hearsay hearing does not establish the reliability of those statements as T.A.W. was never asked about her statements to Beuttner, Ecklebarger, Winslow, and Kolb; and Olson, and Kolb were not called to testify at the child hearsay hearing? [Assignments of Error Nos. 3 and 4].
4. Whether the trial court erred in not taking the case from the jury on the charges of rape of a child in the first degree (Count I), incest in the first degree (Count II), and child molestation in the first degree (Count III) for lack of sufficient evidence to sustain these charges? [Assignment of Error No. 5].

C. STATEMENT OF THE CASE

1. Procedure

Jimmy D. Witmer (Witmer) was charged by first amended information filed in Thurston County Superior Court with one count of

rape of a child in the first degree/DV (Count I), incest in the first degree/DV (Count II), and child molestation in the first degree/DV (Count III). [CP 114-115].

No pretrial motions regarding CrR 3.5 or 3.6 were made or heard. However, prior to trial a hearing regarding child hearsay pursuant to RCW 9A.44.120 was heard before the Honorable Christine A. Pomeroy. [CP 95-106; 8-3-09 RP 5-143]. After hearing the testimony of T.A.W.<sup>1</sup>, Deborah Beuttner (T.A.W.'s grandmother), Kae Ecklebarger (Beuttner's best friend and T.A.W.'s honorary "aunt"), and Gina Winslow (Witmer's former fiancée), but without hearing testimony from Linley Olson (a counselor from T.A.W.'s school to whom T.A.W. had written an incriminating note after her disclosure to her grandmother), Nancy Young (a medical professional conducting a sexual assault evaluation on T.A.W.), and Detective Eric Kolb; the court ruled that all of T.A.W.'s hearsay statements were reliable and therefore admissible at trial noting that the only impediment to the admissibility of T.A.W.'s note to Linley Olson was chain of custody. [8-3-09 RP 140-143]. The court then entered required written findings of fact and conclusions of law reflecting the court's ruling. [CP 337-339; Appendix "A"].

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<sup>1</sup> This court should note that the instant case involves sexual offenses in which the victim is a juvenile. As such, throughout this brief, the victim will be referred to by her initials, T.A.W..

Witmer was tried by a jury, the Honorable Carol Murphy presiding. No objections or exceptions to the court's instructions by Witmer were made on the record. [Vol. II RP 333-334]. The jury found Witmer guilty as charged on all three counts. [CP 143, 144, 145; Vol. II RP 382-386].

Prior to sentencing, the court denied Witmer's pro se motion for new trial, after which the court sentenced Witmer to a standard range sentences of 216-months on Count I (rape of a child in the first degree), 61-months on Count II (incest in the first degree), and 170-months on Count III (child molestation in the first degree) based on an offender score of six (given that Witmer had no prior convictions but his "other current offenses"—being two for each count—counted as three points) with the sentences running concurrently for a total sentence of 216-months. [CP 146-147, 162-301, 302-305, 322-326; 11-6-09 RP 3, 46-48].

A timely notice of appeal was filed on November 6, 2009. [CP 306-320]. This appeal follows.

2. Facts

On the first Friday in January of 2009, Deborah Beuttner (Beuttner) picked up her unmarried granddaughter, T.A.W. date of birth March 24, 2000, for a weekend at her home. [Vol. I RP 83-84, 88, 142]. During the ride to Beuttner's home T.A.W. disclosed that her father,

Witmer 35 years old, had been checking her privates. [Vol. I RP 83, 88-90]. Beuttner took T.A.W. to her friend and T.A.W.'s honorary "Aunt," Kae Ecklebarger (Ecklebarger), a former social worker in Colorado, and told her about what T.A.W. had disclosed to her. [Vol. I RP 90-94, 116-119, 121-123]. Ecklebarger went to Witmer's apartment and got his fiancée, Gina Winslow (Winslow). [Vol. I RP 96-97, 183-194]. T.A.W. then told the women that her daddy (Witmer) had her touch his privates with his mouth and that it tasted "yuk." [Vol. I RP 94-95, 124-128]. After T.A.W.'s disclosure, none of the women called CPS or the police. [Vol. I RP 96-97, 127-130, 192, 196]. Winslow revealed that she had seen Witmer kissing T.A.W. on the mouth with his hand down her pants one time when she had sent him into T.A.W.'s bedroom to help with T.A.W.'s homework and another time she came into the room and Witmer was standing in front of T.A.W. and when he turned around his fly was open. [Vol. I RP 92-93, 130, 183-184, 188-189].

On Monday, Beuttner met Witmer at the court has and had Witmer assign custody of T.A.W. to her. [Vol. I RP 96-98]. On Tuesday morning, January 7, 2009, T.A.W. went to school; saw her counselor, Linley Olson (Olson). [Vol. I RP 44-46, 68-69]. T.A.W. told Olson that she was living with her grandmother and wrote a note to Olson saying that he father (Witmer) put his privates in her bottom. [Vol. I RP 69-71].

Based on T.A.W.'s disclosure, Olson contacted the authorities. [Vol. I RP 72].

Detective Kolb (Kolb) interviewed T.A.W. and she made further disclosures about sexual contact and intercourse involving Witmer. [Vol. II RP 250-256; Exhibit No. 10]. Kolb also interviewed Witmer. [Vol. II RP 260-267]. Nancy Young, a medical professional who conducted a sexual assault exam of T.A.W., testified that T.A.W.'s exam was normal (no signs of sexual abuse). [Vol. II RP 236-237].

T.A.W. testified at trial but when confronted about any specifics regarding the allegations or her disclosures she was vague or said, "I don't know." [Vol. I RP 142-177]. She did testify that that her father (Witmer) touched her "upper front private part" and her "back bottom part," [Vol. I RP 155, 156]. T.A.W. also testified admitting that she got rashes and her father would check her for the same. [Vol. I RP 155-156, 173-174].

Witmer testified in his own defense. [Vol. II RP 278-332]. He denied all of T.A.W.'s allegations. [Vol. II RP 309-310]. He admitted that he had a bad relationship with this mother, Beuttner, and that he agreed to assign custody of T.A.W. to Beuttner only because he felt threatened when she accused him of abusing T.A.W.. [Vol. II RP 283-285, 296-297]. Witmer testified that Winslow was financially dependent upon him and that he had broken their engagement just prior to T.A.W.'s

disclosures. [Vol. II RP 285-290]. Regarding, Winslow's observations, Witmer testified that T.A.W. suffered from yeast infections and what Winslow had observed was him merely giving T.A.W. a fatherly kiss after checking T.A.W. for a yeast infection. [Vol. II RP 287-292]. Finally, regarding his statement to Kolb, Witmer explained that he was very intimidated by the detective, but he denied any wrongdoing explaining the problems with his mother (Beuttner) trying to get custody of T.A.W., and that any questionable responses he might have made were due to his post-traumatic stress disorder having been abused by his mother. [Vol. II RP 304-310].

D. ARGUMENT

- (1) WITMER MAY NOT BE CONVICTED OF INCEST IN THE FIRST DEGREE (COUNT II) WHERE THE INCEST WAS INCIDENTAL TO, A PART OF, OR COEXISTENT WITH HIS CONVICTION FOR RAPE OF A CHILD IN THE FIRST DEGREE (COUNT I).

Article 1, section 9 of the Washington State Constitution and the Fifth Amendment to the United States Constitution provide that no person should twice be put in jeopardy for the same offense. Double jeopardy may be violated by multiple convictions even if the sentences are concurrent. State v. Calle, 125 Wn.2d 769, 775, 888 P.2d 155 (1995). A double jeopardy argument may be raised for the first time on appeal because it is a manifest error affecting a constitutional right. State v. Turner, 102

Wn. App. 202, 206, 6 P.3d 1226, *reviewed denied*, 143 Wn.2d 1009 (2001) (*citing* RAP 2.5(a) and State v. Adel, 136 Wn.2d 629, 631, 965 P.2d 1072 (1998)). The issue is whether the Legislature intended to authorize multiple punishments for criminal conduct that violates more than one criminal statute. State v. Calle, 125 Wn.2d at 772.

A three-prong test is applied to determine legislative intent. First, multiple convictions constitute double jeopardy even if the offenses “clearly involve different legal elements, if there is clear evidence that the Legislature intended to impose only a single punishment.” In the Matter of Personal Restraint of Anthony C. Burchfield, 111 Wn. App. 892, 897, 46 P.3d 840 (2002) (*citing* State v. Calle, 125 Wn.2d at 780). Because the Legislature is free to define crimes and fix punishments as it will, “the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.” Brown v. Ohio, 432 U.S. 161, 165, 53 L. Ed. 2d 187, 97 S. Ct. 2221 (1977).

Here, neither the rape of a child in the first degree nor the incest in the first degree statutes contains specific language authorizing separate punishments for the same conduct. RCW 9A.44.073; RCW 9A.64.020. The offenses at issue here are thus not automatically immune from double jeopardy analysis. In re Burchfield, 111 Wn. App. at 896.

Second, when, as here, the Legislature has not expressly authorized multiple punishments for the same act, this court applies the “same evidence test,” which asks “whether each offense has an element not contained in the other.” *Id.* The statute under which Witmer was convicted of rape of a child in the first degree requires sexual intercourse involving a child under 12. RCW 9A.44.073. The incest in the first degree statute requires sexual intercourse between people who are related. RCW 9A.64.020. The two offenses therefore can be said to contain different elements and, thus, are not established by a strict review of the “same evidence” test. Thus the prohibition against double jeopardy is not violated here by applying the same evidence test in its strictest interpretation.

The “same evidence” test, however, is not always dispositive. In re Burchfield, 111 Wn. App. at 897; In re Personal Restraint of Percer, 150 Wn.2d 41, 50-51, 75 P.3d 488 (2003). This court must also determine whether there is evidence that the Legislature intended to treat conduct as a single offense for double jeopardy purposes. Id. This merger doctrine is simply another way, in addition to the “same evidence” test, by which this court may determine whether the Legislature has authorized multiple punishments. State v. Frohs, 83 Wn. App. 803, 811, 924 P.2d 384 (1996). “Thus, the merger doctrine is simply another means by which a court may determine whether the imposition of multiple punishments violates the Fifth Amendment guarantee against double jeopardy....” Id. The question is whether there is clear evidence that the Legislature intended not to punish the conduct at issue with two separate convictions. State v. Calle, 125 Wn.2d at 778. If a defendant is convicted of two crimes, his or her second conviction will stand if that conviction is based on “some injury to the person or property of the victim or others, *which is separate and distinct from and not merely incidental to the crime of which it forms the element.* [Emphasis Added]. State v. Johnson, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979).

Here, Witmer was found guilty of having sexual intercourse with T.A.W., his daughter who was less than 12 years old. This court should construe this as evidence that the first crime (rape of child in the first degree) was not completed as the second crime (incest in the first degree) was in progress—in fact the very act of having sexual intercourse with this particular victim constituted both crimes, then the incest *was incidental to, a part of, or coexistent with the rape of a child in the first degree*, with the result that the second conviction (incest in the first degree (Count II)) will not stand under the reasoning in State v. Johnson, *supra*; *see also* State v. Hughes, 166 Wn.2d 675, 683-84, 212 P.3d 558 (2009) (convictions for two different sex offenses based on a single sexual act violate double jeopardy principles).

The Washington Supreme Court has observed that “[t]he United States Supreme Court has been especially vigilant of overzealous prosecutors seeking multiple convictions based upon spurious distinctions between the charges.” State v. Adel, 136 Wn.2d at 635. Accordingly, if this court determines that the incest in the first degree (Count II) “was incidental to, a part of, or coexistent” with the rape of a child in the first degree (Count I), then Witmer’s conviction in Count II cannot be sustained on these facts and must, therefore, be reversed.

Recent caselaw from our State Supreme Court supports this conclusion. Formerly, as set forth in State v. Wanrow, 91 Wn.2d 301, 588 P.2d 1320 (1978), the State Supreme Court rejected an argument that a defendant cannot be convicted of both felony murder and the underlying felony. The court upheld both convictions by considering statutory merger and due process finding neither was principle violated. However, recently in State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007), the State Supreme Court apparently reversed this decision by analyzing the issue in terms of double jeopardy.

In Womac, the defendant was charged in three separate counts and convicted of homicide by abuse, felony murder based on criminal mistreatment, and assault. The trial court accepted all three convictions, but imposed sentence only on the homicide by abuse. On appeal, the appellate court remanded the case for resentencing on the homicide by abuse and conditionally dismissed the felony murder and assault convictions so long as the homicide by abuse conviction withstood further appeal. The State Supreme Court vacated the felony murder and assault convictions on double jeopardy grounds holding Womac had in actuality committed a single offense against a single victim yet was held accountable for three crimes in violation of double jeopardy prohibition against multiple punishments for a single offense. In doing so, the State

Supreme Court engaged in the three-part analysis set forth above. The State Supreme Court determined that double jeopardy was violated even though Womac received no sentence on the felony murder and assault convictions as “conviction” in itself, even without imposition of sentence, carries an unmistakable onus which has a punitive effect. In sum, the court held:

As this court noted in Calle, “[i]t is important to distinguish between charges and convictions—the State may properly file an information charging multiple counts under various statutory provisions where evidence supports the charges, *even though convictions may not stand* for all offenses where double jeopardy protections are violated.

[Citations omitted]. State v. Womac, 160 Wn.2d at 657-58.

That is what exactly what has happened here. The State properly filed an information charging multiple counts (the rape of a child in the first degree charge as well as an incest in the first degree charge), obtained convictions on these multiple counts and even obtained a sentence on both convictions, but all the convictions cannot stand given double jeopardy principles for the reasons set forth above. This court should reverse Witmer's conviction on Count II.

- (2) IT WAS CONSTITUTIONAL ERROR FOR THE COURT TO FAIL TO INSTRUCT THE JURY THAT IT HAD TO BE UNANIMOUS AS TO WHICH ACT CONSTITUTED THE INCEST WHERE THE EVIDENCE PRESENTED INDICATED THERE WERE MULTIPLE ACTS THAT COULD HAVE FORMED THE BASIS FOR THE SINGLE CHARGE.

If the prosecution submits evidence and testimony of multiple acts, any one of which could support the count charged, the State must either elect one incident to rely on for the conviction or the jury must be instructed that it must unanimously agree on a specific criminal act. State v. Jones, 71 Wn. App. 798, 821, 863 P.2d 85 (1993); State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). The issue is one of constitutional magnitude because it impinges upon the defendant's right to trial by jury. State v. Jones, 71 Wn. App. at 821. The failure to give a unanimity instruction is presumed prejudicial and is not harmless unless a rational trier of fact could not have a reasonable doubt as to whether the evidence of each incident establishes the commission of the crime. State v. Jones, 71 Wn. App. at 822. The error stems from the possibility that some of the jurors may have relied on one act or incident and some on another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction. State v. Kitchen, 110 Wn.2d at 411.

Here, there was no instruction that the jury must be unanimous as to which act constituted the incest (Count II)—whether it was T.A.W.’s allegation in the note to Olson that Witmer put his private in her bottom, or T.A.W.’s disclosure to “Auntie Kae” that Witmer put his private in her mouth, or T.A.W.’s vague disclosures regarding another act of sexual intercourse. The State charged Witmer with a single count of incest in the first degree, and Wanner was convicted of a single count of incest in the first degree. [CP 114-115, 144]. The evidence at trial as argued by the State established that there were three incidents that could have formed the basis for the conviction. [Vol. II RP 354-355]. Since any of these incidents could establish the single crime for which Witmer was convicted, it was incumbent upon the court to give the jury a unanimity instruction regarding this count, and it was error for having failed to do so.

The error must be presumed prejudicial here since a rational trier of fact could have a reasonable doubt as to whether the evidence of each incident establishes the commission of the crime. State v. Jones, 71 Wn. App. at 822. In short, there is no way of knowing whether some of the jurors found guilt based on the incident related in T.A.W.’s note to Olson, whether some of the jurors found guilt based on the incident T.A.W. related to “Auntie Kae,” and some jurors found guilt based on the vague incident T.A.W. testified about. The prejudice evidenced by the absence

of a unanimity instruction regarding Count II (incest in the first degree) is glaring when this court considers the fact that the trial court did give a unanimity instruction (Instruction No. 10 [CP133]) regarding Count I (rape of child in the first degree), which crime was based on the same three acts for which Witmer was accused of having committed the incest charged in Count II. Witmer's conviction for incest in the first degree must be reversed.

- (3) T.A.W.'S HEARSAY STATEMENTS TO BEUTTNER, ECKLEBARGER, WINSLOW, OLSON, AND KOLB SHOULD NOT HAVE BEEN ADMITTED AT TRIAL.

In Washington, RCW 9A.44.120 governs the admissibility of the child victim's hearsay statements in cases involving sexual abuse and provides in pertinent part:

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another...not otherwise admissible by statute or court rule, is admissible in evidence in...criminal proceedings in the courts of the state of Washington if:

- (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
- (2) The child either:
  - (a) Testifies at the proceedings; or
  - (b) Is unavailable as a witness: PROVIDED, that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his or her intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

The State Supreme Court has established nine factors to determine whether the child's hearsay statements are reliable and thus satisfy the mandates of RCW 9A.44.120. These factors are as follows:

- (1) Whether there is an apparent motive to lie;
- (2) The general character of the declarant;
- (3) Whether more than one person heard the statements;
- (4) Whether the statements were made spontaneously;
- (5) The timing of the declaration and the relationship between the declarant and the witness;
- (6) The statement contains no express assertions about past facts;
- (7) Cross-examination could not show the declarant's lack of knowledge;
- (8) The possibility of the declarant's faulty recollection is remote; and
- (9) The circumstances surrounding the statement are such that there is no reason to suppose the declarant misrepresented defendant's involvement.

State v. Ryan, 103 Wn.2d 165, 175-176, 691 P.2d 197 (1984).

Here, the court conducted an extensive hearing on the admissibility of child hearsay statements, as proffered by the State, made by T.A.W. to Beuttner (T.A.W.'s grandmother), Ecklebarger (T.A.W.'s honorary "Auntie Kae"), Winslow (Witmer's former fiancée) with the State failing to call Olson (T.A.W.'s school counselor to whom T.A.W. wrote a note stating that Witmer had put his privates in her bottom), and Detective Kolb (who interviewed T.A.W.).<sup>2</sup> [8-3-09 RP 14-130]. What is most significant is that at the hearing, T.A.W. was only questioned by the State about writing a note to Olson and never questioned about her disclosures to Beuttner, Ecklebarger ("Auntie Kae"), nor Winslow all of whom testified at the hearing and whose testimony regarding T.A.W.'s disclosures and the admissibility of the same were the very subject of the hearing. [8-3-09 RP 42-54]. While defense counsel for Witmer did ask T.A.W. if she talked to her grandmother (Beuttner), Ecklebarger ("Auntie Kae"), and Winslow, T.A.W. was never asked about the subject matter of the conversation (her disclosures) and T.A.W.'s responses of "can't remember" having ever had a conversation at all provided nothing to verify the reliability of her hearsay statements to them that would allow for their admissibility. [8-3-09 RP 54-66].

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<sup>2</sup> This court should note that T.A.W. did testify at trial and Witmer's confrontation rights were satisfied under current caselaw as she was questioned both on direct and cross about all her disclosures to various people even though her response were largely "I can't remember." [Vol. I RP 142-177].

Given the State's own presentation at the child hearsay hearing specifically the fact that the State never questioned T.A.W. regarding her statements to Beuttner, Ecklebarger, and Winslow, there was no basis upon which the trial court could have found that these statements satisfied the Ryan factors. The trial court's Findings of Fact and Conclusions of Law Re: Child Hearsay Hearing Findings Nos., 2, 3, 4, 5, 6, 7, 8, and 9 are not supported by the record as T.A.W. was never questioned about pertinent facts that would establish the reliability of her statements (she wasn't even questioned as to whether she had ever even made any statements to Beuttner, Ecklebarger, Winslow, and Kolb, nor was Olson called at the hearing to verify T.A.W.'s disclosure to her) with the result that the trial court's Findings of Fact and Conclusions of Law Re: Child Hearsay Hearing Conclusions Nos. 1, 2, and 3 are not supported by the findings and the trial court's ruling on admissibility was error.

The court's admission of these child hearsay statements (Beuttner's, Ecklebarger's, and Winslow's) was error. Moreover, as the State did not see fit to present the testimony of Olson, or Kolb at the hearing let alone question T.A.W. about her disclosures to Kolb (T.A.W. was questioned about her written disclosure to Olson—the only disclosure she was questioned about), they should not have been allowed to testify at trial regarding the hearsay statements made to them by T.A.W. because

there was no basis upon which the trial court could determine the reliability of these hearsay statements. The trial court erred in admitting the child hearsay statements of T.A.W. and Witmer's convictions should be reversed as he was convicted of rape of a child in the first degree (Count I), incest in the first degree (Count II) and child molestation in the first degree (Count III) largely based on hearsay statements made by T.A.W. to others.

- (4) ABSENT THE INADMISSIBLE CHILD HEARSAY STATEMENTS OF T.A.W., THERE WAS INSUFFICIENT EVIDENCE FROM WHICH A RATIONAL TRIER OF FACT COULD HAVE FOUND WITMER GUILTY OF RAPE OF A CHILD IN THE FIRST DEGREE (COUNT I), INCEST IN THE FIRST DEGREE (COUNT II), AND CHILD MOLESTATION IN THE FIRST DEGREE (COUNT III) BEYOND A REASONABLE DOUBT.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence,

and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Here, Witmer was charged and convicted of rape of a child in the first degree (Count I), incest in the first degree (Count II), and child molestation in the first degree (Count III). [CP 114-115, 143, 144, 145]. Absent the inadmissible child hearsay statements of T.A.W., the sum of the State’s evidence to establish beyond a reasonable doubt that Witmer committed these crimes was the testimony of Nancy Young, a medical professional, who conducted a sexual assault evaluation of T.A.W. finding T.A.W.’s exam to be normal (no signs of sexual abuse), [Vol. II RP 236-237], a note written by T.A.W. to Olson (Exhibit No. 5) stating that Witmer put his privates in her (T.A.W.’s) bottom contradicting Young’s physical examination, [Vol. I RP 70], T.A.W.’s trial testimony that her father (Witmer) touched her “upper front private part” and her “back bottom part,” [Vol. I RP 155, 156], and Winslow’s testimony that she saw Witmer kissing T.A.W. on the mouth with his hand down the front of T.A.W.’s pants. [Vol. I RP 183].

Given this evidence, there is nothing that supports a finding beyond a reasonable doubt that Witmer engaged in sexual intercourse with T.A.W. (forming the basis for rape of a child in the first degree (Count I) and the basis for incest in the first degree (Count II)) as the only evidence of sexual intercourse is T.A.W.'s note saying that Witmer put his private in her bottom, which is contradicted by T.A.W.'s physical examination according to Young's testimony.

With regard to Count III (child molestation in the first degree), Winslow's testimony that she saw Witmer kissing T.A.W. with his hand in her pants does not establish sexual contact, an essential element of the crime, as defined in Instruction No. 15, [CP 138], where Witmer testified that T.A.W. suffered from yeast infections and what Winslow had observed was him merely giving T.A.W. a fatherly kiss after checking T.A.W. for a yeast infection. [Vol. II RP 287-288]. This version of the events is not only reasonable but logical given the fact that Winslow testified that she had told Witmer to go into T.A.W.'s bedroom to help her with her homework [Vol. II RP 208-209]—in other words is it logical for Witmer to have sexual contact with T.A.W. when he knew that Winslow would be there to witness the act? T.A.W. confirmed in her testimony that she got rashes and her father would check her for the same. [Vol. I RP 155-156, 173-174]. Nor does T.A.W.'s testimony establish that Witmer

had sexual contact as defined in Instruction No. 15, [CP 138], with T.A.W. as her testimony was contradictory and vague at best and she admitted that her father spanked her. [Vol. I RP 174].

The State has failed to elicit sufficient evidence to establish beyond a reasonable doubt any of the three crimes for which Witmer was convicted absent T.A.W.'s inadmissible hearsay statements. This court should reverse and dismiss his convictions.

Finally, should this court consider T.A.W.'s inadmissible hearsay statements in determining whether the State has satisfied its burden of proof on each of the crimes for which Witmer was convicted, this court should give these statements little weight considering the biases involved. Beuttner, T.A.W.'s grandmother and Witmer's mother, wanted and obtained custody of T.A.W. from Witmer. Beuttner did not contact CPS or the police after T.A.W. made her disclosure instead she sought a court order from Witmer granting her custody, which according to Witmer he agreed to because Beuttner had threatened him. Ecklebarger, Beuttner's best friend and a former Colorado social worker, abandoned her professional training upon learning of T.A.W.'s disclosure and did not call the police or CPS, but sought more disclosures from T.A.W.. Winslow, Witmer's former fiancée, was financially dependent upon Witmer and he had ended their engagement just before T.A.W. made her disclosure and

Winslow observed what she deemed to be Witmer's inappropriate actions towards T.A.W.. T.A.W.'s disclosure to Olson (the note) was made just after Beuttner had sought custody of T.A.W. from Witmer and the statement to Detective Kolb followed thereafter. Couple these biases with Witmer's denial of any inappropriate actions towards his daughter, T.A.W., and with T.A.W.'s testimony of "I don't remember" which fails to establish any act that would support the crimes charged; the State has failed to satisfy its burden of proof regarding Witmer's three convictions. This court should reverse and dismiss Witmer's convictions for rape of a child in the first degree (Count I), incest in the first degree (Count II), and child molestation in the first degree (Count III).

E. CONCLUSION

Based on the above, Witmer respectfully requests this court to reverse and dismiss his convictions.

DATED this 14<sup>th</sup> day of May 2010

*Patricia A. Pethick*  
PATRICIA A. PETHICK  
Attorney for Appellant  
WSBA NO. 21324

CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 14<sup>th</sup> day of May 2010, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Jimmy D. Witmer  
DOC# 334856  
Airway Heights Corrections Center  
P.O. Box 2049  
Airway Heights, WA 99001-2049

Carol La Verne  
Thurston County Dep. Pros. Atty.  
2000 Lakeridge Drive SW  
Olympia, WA 98502  
(and the transcript)

FILED  
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10 MAY 17 AM 10:21  
STATE OF WASHINGTON  
BY me  
SERVING

Signed at Tacoma, Washington this 14<sup>th</sup> day of May 2010.

Patricia A. Pethick  
Patricia A. Pethick

APPENDIX "A"

Findings of Fact and Conclusions of Law  
Re: Child Hearsay Hearing

[CP 337-339]

Filed December 7, 2009

FILED  
SUPERIOR COURT  
THURSTON COUNTY WA

'09 DEC -7 P3:08

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BY \_\_\_\_\_ DEPUTY

**IN THE SUPERIOR COURT OF WASHINGTON  
IN AND FOR THURSTON COUNTY**

STATE OF WASHINGTON,

Plaintiff,

vs.

JIMMY DALE WITMER

Defendant.

NO. 09-1-00132-8

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW RE:  
CHILD HEARSAY HEARING**

On September 10, 2009, on the above titled matter, a hearing was held before the Honorable CHRISTINE A. POMEROY, judge of Thurston County Superior Court, Olympia, Washington. The court heard the testimony of Toriana Witmer, Debbie Buettner, Gina Winslow, and Kae Ecklebarger. as well as arguments from both, the State, represented by Dominique' L. Jinhong, and the defense, represented by Larry Jefferson. The court considered the testimony and the arguments and finds the following facts:

**I. FINDINGS OF FACT**

1. TW is the minor child of Jimmy Witmer. Until the time of disclosure, she lived mostly with her grandmother, Debbie Buettner and visited her father the defendant on the weekends. TW went to live with the defendant full time when he moved his then fiancée, Gina Winslow into his home from California. TW's mother was absent from her life.
2. On January 2, 2009, while driving in the car, TW spontaneously disclosed to her grandmother, comments to the effect that Gina was going to go to jail because she was "blackmailing" TW's father after seeing him kiss her and put his hands down her pants. TW made the same disclosure again later to Debbie, Gina, and a family friend, Kae Ecklebarger. TW also disclosed to Gina that the defendant had done other things but that he had not touched her in this manner before she moved in around July 2008. TW made further disclosures to her elementary school counselor, Linley Olson, and

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW – CHILD HEARSAY HEARING

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1 Detective Eric Kolb of the Thurston County Sheriff's Office. The court found TW had  
2 no apparent motive to lie about the incident.

3 3. Gina admitted she never called the police, despite witnessing the defendant's actions  
4 just before Christmas 2008. The court found she also had no apparent motive to lie  
5 about the incident.

6 4. TW's statements to Debbie, were spontaneous, but the statements to the three women  
7 together were the result of Kae asking general questions regarding the previous  
8 disclosure made to Debbie and Gina. The questioning was found to be non-suggestive  
9 and consistent with "spontaneity" as required by case law.

10 5. The statements were made within three to four weeks of the incident, around  
11 Christmastime when TW knew she was leaving her grandmother's house to go back to  
12 her father's home.

13 6. Although only eight or nine-years old at the time, TW used the words "puss" and  
14 "cock" to describe the male and female genitalia as she described hearing them called  
15 by the defendant.

16 7. The court found that TW did not want her father to get in trouble, thus there was no  
17 reason to believe she was misrepresenting the defendant's involvement.

18 8. TW stated she did not use to feel safe, but now that she is living with her grandmother  
19 she does.

20 9. There were several instances of disclosures, TW, the declarant, had no apparent motive  
21 to lie, the general character of TW is trustworthy, at least six, if not seven people heard  
22 TW give an account of the incident, the statements were spontaneous, the timing of the  
23 statements and the relationship between TW and her father suggest trustworthiness, the  
24 statements contained express assertions of past facts, cross examination would not  
inherently show TW's lack of knowledge, the possibility of TW's recollection being  
faulty is remote, and there is no reason to believe TW is misrepresenting her father's  
involvement.

## 25 II. CONCLUSIONS OF LAW

26 1. The *Ryan* factors are established by clear, cogent, and convincing evidence.

27 2. TW's hearsay statements will be allowed at trial.

28 3. The admissibility of a note given to the counselor, Ms. Olson, by TW is an issue for the  
29 trial court to decide based on whether there has been a sufficient chain of custody.

30 FINDINGS OF FACT AND  
31 CONCLUSIONS OF LAW – CHILD HEARSAY HEARING

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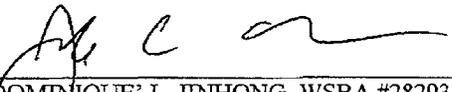
Based on the foregoing, it is hereby ORDERED, ADJUDGED, AND DECREED that:

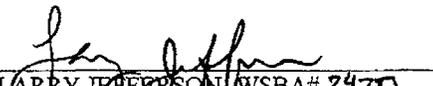
The STATE's motion to admit child hearsay statements is granted.

ORDERED THIS 7<sup>th</sup> day of December, 2009.

  
\_\_\_\_\_  
JUDGE CHRISTINE POMEROY  
APPROVED FOR ENTRY:

PRESENTED BY:

  
\_\_\_\_\_  
DOMINIQUE' L. JINHONG, WSBA #28293  
Deputy Prosecuting Attorney

  
\_\_\_\_\_  
LARRY JEFFERSON, WSBA# 24700  
Attorney for Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW – CHILD HEARSAY HEARING

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