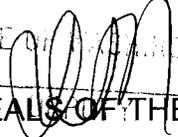


COURT OF APPEALS
DIVISION II

11 MAY 16 AM 9:56

No. 41179-2-II

STATE OF WASHINGTON
BY 

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ZACHARY V. S. COLLINS,

Appellant.

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

The Honorable Thomas McPhee, Judge
Cause No. 09-1-01264-8

BRIEF OF RESPONDENT

Carol La Verne
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

TABLE OF CONTENTS

A. <u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	2
1. Reversal and/or dismissal of a conviction are not the remedies for tardy entry of findings of fact and conclusions of law.....	2
2. The question of whether the trial court erred in denying Collins’s motion to suppress the recording of the telephone conversation between himself and Andrea Arthur is not properly before this court because the record is incomplete. However, based upon the information that is contained in the record, the trial court correctly denied Collins’s motion to suppress.....	6
3. The prosecutor did not vouch for the credibility of the ten-year-old victim when she said in rebuttal argument that the victim had done a good job when she testified.	9
4. The convictions for first degree child rape and first degree child molestation do not violate double jeopardy principles, nor do they merge	12
5. Collins did not raise the issue of same criminal conduct for purposes of calculating his offender score in the trial court and cannot raise it for the first time on appeal. Even if he could, the two convictions do not constitute the same criminal conduct because the intent element for the two crimes is different.....	19

6. There was sufficient evidence produced at trial to prove beyond a reasonable doubt that Collins was guilty of both first degree rape of a child and first degree child molestation. 27

D. CONCLUSION..... 29

TABLE OF AUTHORITIES

Federal Court Decisions

<u>Harrell v. Israel,</u> 478 F. Supp. 752, 754 (E.D. Wis. 1979)	18
---	----

Washington Supreme Court Decisions

<u>In re Goodwin,</u> 146 Wn.2d 861, 50 P.3d 618 (2002)	21
<u>In re Pers. Restraint of Percer,</u> 150 Wn.2d 41, 75 P.3d 488 (2003)	13
<u>State v. Barber,</u> 118 Wn.2d 335, 823 P.2d 1068 (1992)	5
<u>State v. Blight,</u> 89 Wn.2d 38, 569 P.2d 1129 (1997)	7
<u>State v. Bobic,</u> 140 Wn.2d 250, 996 P.2d 610 (2000)	13
<u>State v. Brett,</u> 126 Wn.2d 136, 892 P.2d 29 (1995)	12
<u>State v. Brown,</u> 132 Wn.2d. 529. 940 P.2d 546 (1997)	12
<u>State v. Calle,</u> 125 Wn.2d 769, 888 P.2d 155 (1995)	14
<u>State v. Camarillo,</u> 115 Wn.2d 60, 794 P.2d 850 (1990)	28
<u>State v. Delmarter,</u> 94 Wn.2d 634, 618 P.2d 99 (1980)	27

<u>State v. Dhaliwal,</u> 150 Wn.2d 559, 79 P.3d 432 (2003)	10
<u>State v. Finch,</u> 137 Wn.2d 792, 975 P.2d 967 (1999)	10
<u>State v. French,</u> 157 Wn.2d 593, 141 P.3d 54 (2006)	15
<u>State v. Gocken,</u> 127 Wn.2d 95, 896 P.2d 1267 (1995)	13
<u>State v. Head,</u> 136 Wn.2d 619, 964 P.2d 1187 (1998)	3
<u>State v. Hughes,</u> 166 Wn.2d 675, 212 P.3d 558 (2009)	16
<u>State v. Jackman,</u> 156 Wn.2d 736, 132 P.3d 136 (2006)	17
<u>State v. Johnson,</u> 92 Wn.2d 671, 600 P.2d 1249 (1979)	16
<u>State v. Pirtle,</u> 127 Wn.2d 628, 904 P.2d 245 (1995)	10
<u>State v. Russell,</u> 125 Wn.2d 24, 882 P.2d 747 (1994)	10
<u>State v. Salinas,</u> 119 Wn.2d 192, 829 P.2d 1068 (1992)	27
<u>State v. Smith,</u> 117 Wn.2d 263, 814 P.2d 652 (1991)	17
<u>State v. Tili,</u> 139 Wn.2d 107, 985 P.2d 365 (1999)	17-18
<u>State v. Tracy,</u> 158 Wn.2d 683, 147 P.3d 559 (2006)	7

<u>State v. Vladovic,</u> 99 Wn.2d 413, 662 P.2d 853 (1983)	16
--	----

Decisions Of The Court Of Appeals

<u>State v. Byrd,</u> 83 Wn. App. 509, 922 P.2d 168 (1996)	4
---	---

<u>State v. Dykstra,</u> 127 Wn. App. 1, 110 P.3d 758 (2005).....	11
--	----

<u>State v. Frohs,</u> 83 Wn. App. 803, 924 P.2d 384 (1996).....	16
---	----

<u>State v. Gaddy,</u> 114 Wn. App. 702, 60 P.3d 116 (2002), <i>affirmed on separate grounds at</i> 152 Wn.2d 64, 93 P.3d 872 (2004)	2
---	---

<u>State v. Galisia,</u> 63 Wn. App. 833, 822 P.2d 303 (1992).....	27
---	----

<u>State v. Hernandez,</u> 95 Wn. App. 480, 976 P.2d 165 (1999).....	25-26
---	-------

<u>State v. James,</u> 104 Wn. App. 25, 15 P.3d 1041 (2000).....	11
---	----

<u>State v. Jones,</u> 71 Wn. App. 798, 863 P.2d 85 (1993).....	15-16
--	-------

<u>State v. Manning,</u> 81 Wn. App. 714, 915 P.2d 1162 (1996).....	6, 8
--	------

<u>State v. Millante,</u> 80 Wn. App. 237, 908 P.2d 374 (1995).....	12
--	----

<u>State v. Nelson,</u> 74 Wn. App. 380, 874 P.2d 170 (1994).....	4
--	---

<u>State v. Nitsch,</u> 100 Wn. App. 512, 997 P.2d 1000 (2000).....	21-23
<u>State v. Porter,</u> 98 Wn. App. 631, 990 P.2d 460 (1999).....	8
<u>State v. Sargent,</u> 140 Wn. App. 340, 698 P.2d 598 (1985).....	12
<u>State v. Smith,</u> 67 Wn. App. 81, 834 P.2d 26 (1992).....	4
<u>State v. Stock,</u> 44 Wn. App. 467, 722 P.2d 1330(1986).....	4
<u>State v. Trujillo,</u> 112 Wn. App. 390, 49 P.3d 935 (2002).....	14
<u>State v. Walton,</u> 64 Wn. App. 410, 824 P.2d 533 (1992).....	28
<u>State v. Witherspoon,</u> 60 Wn. App. 569, 805 P.2d 248 (1991).....	3-4

Statutes and Rules

CrR 3.6.....	2
CrR 3.6(b)	2
RAP 9.2(b)	7
RCW 9.73.040.....	6
RCW 9.73.030	7
RCW 9.73.090.....	7
RCW 9.73.130.....	7
RCW 9.73.130(3)(f).....	8

RCW 9.94A.530(2).....	24
RCW 9.94A.589(1)(a)	20, 24
RCW 9A.44.010(1).....	14
RCW 9A.44.010(2).....	14
RCW 9A.44.073	14
RCW 9A.44.083	14

Other Authorities

Article I, section 9 of the Washington Constitution	13
Fifth Amendment to the United States Constitution.....	13
5 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, Criminal Procedure § 25.1(b), at 630 (2d ed. 1999).....	13

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Collins's convictions should be reversed because of the tardy entry of findings of fact and conclusions of law pertaining to the court's ruling that the evidence of a recorded phone call between the defendant and the victim's mother should not be suppressed.

2. Whether the court was correct in denying Collins's motion to suppress the recording of the telephone conversation between himself and the victim's mother.

3. Whether the prosecutor vouched for the credibility of a witness when she said in rebuttal argument that the ten-year-old victim had done a good job when she testified.

4. Whether Collins's conviction for first degree child molestation merges into his conviction for first degree rape of a child.

5. Whether Collins can raise for the first time on appeal an argument that his convictions for first degree rape of a child and first degree child molestation constitute the same criminal conduct for purposes of calculating his offender score. If he can, whether the two convictions in fact constitute the same criminal conduct.

6. Whether sufficient evidence was elicited at trial to prove beyond a reasonable doubt that Collins was guilty of rape of a child in the first degree and child molestation in the first degree.

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the substantive and procedural facts. Any additional facts relevant to the State's argument will be included in the argument portion of this brief.

C. ARGUMENT.

1. Reversal and/or dismissal of a conviction are not the remedies for tardy entry of findings of fact and conclusions of law.

The State concedes that the findings of fact and conclusions of law pertaining to the court's ruling denying Collins's motion to suppress the recorded telephone conversation between himself and Andrea Arthur, the victim's mother, were tardily filed. They were filed, however, on March 2, 2011. [CP 113-14] Tardiness in filing findings of fact and conclusions of law will not result in reversal unless the defendant can establish either that he was prejudiced by the delay or that the findings and conclusions were tailored to meet issues presented in the appellant's brief. State v. Gaddy, 114 Wn. App. 702, 704-05, 60 P.3d 116 (2002), *affirmed on separate grounds at* 152 Wn.2d 64, 93 P.3d 872 (2004). In this case, the written findings of fact and conclusions of law mirror the oral findings and conclusions. Everything that the court said in making its ruling is included in the verbatim report of proceedings. [Vol. 1 RP 52-54].

CrR 3.6 concerns duties of the court regarding suppression hearings; CrR 3.6(b) provides, "If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of

fact and conclusions of law.” Collins cites to State v. Head, 136 Wn.2d 619, 964 P.2d 1187 (1998), for the proposition that a court’s oral opinion is insufficient for an appellate court to review. However, the remedy in Head was not reversal and dismissal, but remand for the entry of written findings and conclusions. Id., at 624. Reversal is appropriate only when a defendant can show prejudice from the absence of findings and conclusions or from remand, such as an indication that the findings had been “tailored” to address the issues on appeal. It is the defendant’s burden to prove prejudice. Id., at 524-25. The defendant did establish prejudice in State v. Witherspoon, 60 Wn. App. 569, 805 P.2d 248 (1991), a juvenile case in which findings and conclusions had not been entered following a fact finding hearing in juvenile court. In Witherspoon, the respondent would continue to serve his sentence while the case was remanded for the entry of findings and conclusions, the respondent given a chance for further briefing, and the court of appeals reviewed it. By that time, if he prevailed, the court could not grant the same relief. Id., at 572. The same reasoning does not necessarily apply to adult defendants.

Although it is error for the court to fail to enter written Findings of Fact and Conclusions of Law, it is harmless error when

the oral findings of the court are sufficient to permit appellate review. State v. Smith, 67 Wn. App. 81, 87, 834 P.2d 26 (1992). In Witherspoon the oral findings and conclusions were incomplete because the judge did not discuss some of the evidence. Witherspoon, 60 Wn. App. at 572. In Collins's case, everything the court had to say is in the record. Similarly, in State v. Stock, 44 Wn. App. 467, 722 P.2d 1330(1986), the court of appeals found that Stock was not prejudiced by the lack of findings and conclusions because no testimony was taken and there were no disputed issues of fact. That case involved a search warrant and the only evidence was the officer's affidavit. Id., at 477. Here there was no testimony taken and the only evidence was the detective's application for the order to record.

In State v. Byrd, 83 Wn. App. 509, 922 168 (1996), Division I of the court of appeals refused to reverse where the delay in entering findings and conclusions did not prejudice the defendant, even when the findings and conclusions were not entered until after the appellant's opening brief was filed. Id., at 512. A similar result was reached in State v. Nelson, 74 Wn. App. 380, 393, 874 P.2d 170 (1994) ("[B]ecause there is no fixed time limit for the entry of

findings and conclusions and because Nelson has made no claim of prejudice or tailoring, we can find no error on this basis.”)

Even where there are written findings and conclusions, if a reviewing court determines that the findings of fact are insufficiently specific, the remedy is not reversal but remand for entry of more specific findings. State v. Barber, 118 Wn.2d 335, 345, 823 P.2d 1068 (1992).

Collins does not identify any prejudice he suffers other than he can't respond to written findings and conclusions because there are none. He does not explain why he cannot respond to the court's oral findings. A review of the written findings of facts and conclusions of law shows that they were drafted straight from the transcript; Collins cannot be prejudiced by any new information in the findings and conclusions. The only difference is that they are now in a document called "Findings of Fact and Conclusions of Law" rather than solely in the transcript. Nor did the tardy entry of the findings and conclusions prevent him from identifying and arguing five other actions of the court to which he assigns error. Collins has not been prejudiced and his convictions should not be reversed.

2. The question of whether the trial court erred in denying Collins's motion to suppress the recording of the telephone conversation between himself and Andrea Arthur is not properly before this court because the record is incomplete. However, based upon the information that is contained in the record, the trial court correctly denied Collins's motion to suppress

Collins sought to suppress a telephone conversation between himself and Andrea Arthur, the mother of the victim, a conversation that was recorded pursuant to RCW 9.73.040. However, the record on appeal does not contain the application for the order to record or the order itself. Nor does it contain the brief that defense counsel wrote in support of his motion. [CP 1-111] The Verbatim Report of Proceedings indicates that both parties, and presumably the trial court judge, had the application and order. [Vol. 1 RP 41-46] The court did not have the defendant's written motion; defense counsel indicated he thought he e-mailed it but he may have been mistaken. [Vol. 1 RP 41, 46] A copy of the motion had been handed to the prosecutor the morning it was argued. [Vol. 1 RP 42] However, none of these documents are before this court. Before an appellate court can decide whether the "facts set forth in the application were minimally adequate to support the determination that was made," State v. Manning, 81 Wn. App. 714,

718, 915 P.2d 1162 (1996), that court must know what those facts are.

Collins brought the motion in the trial court and it was his burden to ensure that the documents he challenged were filed with the court and made part of the record. It is an appellant's responsibility to provide an adequate record for the court to review. RAP 9.2(b); State v. Tracy, 158 Wn.2d 683, 691, 147 P.3d 559 (2006); see also State v. Blight, 89 Wn.2d 38, 46-47, 569 P.2d 1129 (1997). This court should decline to review this assignment of error.

However, if this court chooses to review the trial court's refusal to suppress the recorded telephone conversation, that ruling should be affirmed.

It is clear from the argument on the motion to suppress that Detective Ivanovitch of the Thurston County Sheriff's Department did obtain a court order, pursuant to RCW 9.73.030 and 090, permitting the telephone conversation between Collins and Andrea Arthur to be recorded. [Vol. I RP 41-54] RCW 9.73.130 sets forth the procedure to be followed when law enforcement seeks an order to record. The only requirement which Collins asserts was not met,

and which he challenges on appeal, is contained in RCW 9.73.130(3)(f), which requires the application to include:

A particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ.

An appellate court does not review the sufficiency of an application to record de novo. Rather, the question is whether the facts set forth in the application are “minimally adequate” to support the authorization. State v. Porter, 98 Wn. App. 631, 634, 990 P.2d 460 (1999); State v. Manning, 81 Wn. App. 714, 718, 915 P.2d 1162 (1996). Here the only evidence in the record to support Collins’s argument that the application for recording contained only boilerplate language¹ is defense counsel’s argument. [Vol. I RP 41-45] In response, the prosecutor asserted that there was more than boilerplate in the application. [Vol. I RP 51] The court found that the police officer must establish only one of the three elements of RCW 9.73.130(3)(f), and that there was sufficient evidence in the record to support the first and second elements. [Vol. 1 RP 53, CP

¹ Boilerplate: Language which is used commonly in documents having a definite meaning in the same context without variation; used to describe standard language in a legal document that is identical in instruments of like nature. BLACK’S LAW DICTIONARY 159 (5th ed. 1979)

114] Based on the record before this court, the issuance of the order to record was justified.

3. The prosecutor did not vouch for the credibility of the ten-year-old victim when she said in rebuttal argument that the victim had done a good job when she testified.

Collins argues that the prosecutor vouched for the credibility of the ten-year-old victim when she said, in rebuttal argument, that the victim had done a good job. It is not apparent that such a remark would be considered an assertion of the girl's truthfulness.

In context, the remark occurred in this portion of rebuttal:

What inconsistencies? Well, do any of these claims negate these defendant's (sic) guilt? Well, the first one was that [the victim] told the detective that he, this defendant, licked her breasts. She didn't tell her mom that. She didn't tell Kelly that. Well, did she tell anybody anything else that would make that improbable or inconsistent? She said that he touched me with his hand and with his tongue, right?

She's clearly very uncomfortable talking about the subjects. She didn't want to say the words. She showed me her hands when I asked her what he touched you with. And not all parts of the story fell out conveniently in order. That's the way of nature and the way people, as human beings, tell stories. At this time, this was a nine-year-old girl and now a ten-year-old girl recounting what she told people a year ago. *She did a really good job.* But you get to decide

...

(Defense objection overruled.)

You get to decide her credibility, folks. You got to see her testifying.

[Vol. 3 RP 416-17]

An appellate court reviews the trial court rulings regarding prosecutorial misconduct for abuse of discretion. State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). A defendant who claims prosecutorial misconduct must first establish the misconduct, and then its prejudicial effect. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing to State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). "Any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." Dhaliwal, 150 Wn.2d at 578. Prejudice will be found only when there is a "substantial likelihood the instances of misconduct affected the jury's verdict." Id.

Rebuttal argument is treated slightly differently than the initial closing argument. Even if improper, a prosecutor's remarks are not grounds for reversal when invited or provoked by defense counsel unless they were not a pertinent reply or were so prejudicial that a curative instruction would be ineffective. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) While it is true

that a prosecutor must act in a manner worthy of his office, a prosecutor is an advocate and entitled to make a fair response to a defense counsel's arguments. Id., at 87. See also State v. Dykstra, 127 Wn. App. 1, 8, 110 P.3d 758 (2005). A prosecutor has a duty to advocate the State's case against an individual. State v. James, 104 Wn. App. 25, 34, 15 P.3d 1041 (2000).

Collins maintains that the challenged statement was an assertion by the prosecutor that she believed the victim. That is not apparent from the context of the argument, particularly when her next remark was to remind the jury that it decides credibility. She had been talking about how difficult it is for a child to recount this sort of event, and particularly to remember what she told people a year before. The most obvious meaning of the statement "She did a really good job" is that the victim had taken the stand and answered questions that would have been difficult for an adult. It was not a vouching for her truthfulness. Much of the argument focused on the reasons why the jury should believe the victim, but none of them included the prosecutor's personal belief in the victim's veracity.

A prosecutor cannot express a personal belief as to the credibility of witnesses. But a prosecutor has considerable latitude

in closing argument to draw inferences from the evidence, including commenting on the credibility of witnesses and arguing inferences about credibility based on evidence in the record. A reviewing court will consider the context in which alleged improper statements are made. State v. Millante, 80 Wn. App. 237, 250-51, 908 P.2d 374 (1995). In addition to context, a reviewing court must consider the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). There is no prejudicial error unless it is “clear and unmistakable” that counsel is expressing a personal opinion. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (quoting State v. Sargent, 140 Wn. App. 340, 344, 698 P.2d 598 (1985)).

Collins argues that the State’s case was weak, relying solely on whether the jury believed the victim or himself. There was another piece of very powerful evidence, however—the recording of Collins’s admissions to Andrea Arthur. The State’s case was not as weak as Collins now maintains. There was no need for the prosecutor to improperly bolster the credibility of the victim.

4. The convictions for first degree child rape and first degree child molestation do not violate double jeopardy principles, nor do they merge.

The double jeopardy doctrine protects defendants against “prosecution oppression.” 5 Wayne R. LaFare, Jerold H. Israel & Nancy J. King, *Criminal Procedure* § 25.1(b), at 630 (2d ed. 1999). The Fifth Amendment to the United States Constitution provides “[n]o person shall ... be subject for the same offense to be twice put in jeopardy of life or limb” Article I, section 9 of the Washington Constitution mirrors the federal constitution stating “[n]o person shall be ... twice put in jeopardy for the same offense.” “Washington’s double jeopardy clause offers the same scope of protection as the federal double jeopardy clause.” In re Pers. Restraint of Percer, 150 Wn.2d 41, 49, 75 P.3d 488 (2003) (citing State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995)). Both prohibit “(1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense imposed in the same proceeding.” Percer, 150 Wn.2d at 48-49 (citing State v. Bobic, 140 Wn.2d 250, 260, 996 P.2d 610 (2000); Gocken, 127 Wn.2d at 100).

“[O]ffenses are not constitutionally the same if there is any element in one offense not included in the other and proof of one

offense would not necessarily prove the other.” State v. Trujillo, 112 Wn. App. 390, 410, 49 P.3d 935 (2002) (citing State v. Calle, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995)). Driving

As Collins recognizes, first degree child molestation and first degree child rape contain different elements and thus are not the same in law. The elements of first degree child rape, RCW 9A.44.073, are (1) sexual intercourse (2) with a person less than twelve years old (3) who is not married to the perpetrator and (4) is at least twenty-four months older than the perpetrator. The elements of first degree child molestation, RCW 9A.44.083, are, as applicable to this case, (1) sexual contact (2) with a person less than twelve years old (3) who is not married to the perpetrator and (4) the perpetrator is at least thirty-six months older than the victim.

“Sexual contact” is defined in RCW 9A.44.010(2) as:

[A]ny 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.

“Sexual intercourse” is defined in RCW 9A.44.010(1):

“Sexual intercourse” (a) has its ordinary meaning and occurs upon any penetration, however slight, and

(b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such

penetration is accomplished for medically recognized treatment or diagnostic purposes, and

(c) Also means 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.

To prove child molestation, the State must prove that the defendant acted for purposes of sexual gratification, which is not an element of first degree rape of a child. First degree rape of a child requires that the State prove either penetration or oral-genital contact, which child molestation does not. State v. Jones, 71 Wn. App. 798, 825, 863 P.2d 85 (1993); State v. French, 157 Wn.2d 593, 611, 141 P.3d 54 (2006). They are not the same offense and convictions for both do not violate double jeopardy.

Collins further argues that the two offenses merge because the Legislature did not intend that both be punished separately. The merger doctrine does not apply in this instance because neither offense requires proof of the other.

The merger doctrine is a rule of statutory construction which our Supreme Court has ruled only applies where the Legislature has clearly indicated that in order to prove a particular degree of crime the State must prove not only that the defendant committed that crime but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes.

State v. Frohs, 83 Wn. App. 803, 806, 924 P.2d 384 (1996) (citing to State v. Vladovic, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983)). For example, the crime of rape has been divided into three degrees. In order to prove first degree rape, the State must prove not only the rape but that it was accompanied by another act defined as a crime—assault or kidnapping. A defendant cannot be convicted of the “included” crime unless it involved some separate and distinct injury and was not merely incidental to the rape. Frohs, 83 Wn. App. at 807. Collins cites to State v. Johnson, 92 Wn.2d 671, 600 P.2d 1249 (1979), to support his argument, but that case involved the rape/kidnapping/assault fact pattern described above.

That is not the situation here. The State did not have to prove first degree child molestation in order to prove first degree child rape, or vice versa. Child molestation is not a lesser included offense of child rape. Jones, 71 Wn. App. at 825.

In State v. Hughes, 166 Wn.2d 675, 212 P.3d 558 (2009), the court set forth the analysis to be followed in determining whether two convictions violate double jeopardy. First, the court examines the statutes to see if they expressly permit multiple punishments for the same act. Id., at 681. If the statutes are silent on that question, the court next looks at the “same evidence”

inquiry. Id., at 682. If the statutes do not require the same evidence, “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., citing to State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006).

In Collins’s case, we do not have to go beyond the first test. The statutes at issue do expressly permit multiple punishments. Rape of a child in the first degree requires proof of sexual intercourse. Sexual intercourse, as set forth in the jury instruction, is defined as “*any act* of sexual contact involving the sex organs of one person and the mouth or anus of another.” [CP 34] First degree child molestation requires proof of sexual contact, which was defined for the jury as “*any touching* of the sexual or other intimate parts of a person for the purpose of gratifying sexual desires of either party.” [CP36]

Although the word “any” is not defined by the statute, “Washington courts have repeatedly construed the word ‘any’ to mean ‘every’ and ‘all’.

State v. Tili, 139 Wn.2d 107, 115, 985 P.2d 365 (1999) (citing to State v. Smith, 117 Wn.2d 263, 271, 814 P.2d 652 (1991) and other cases). In Tili, the defendant was convicted of three counts of first degree rape. He had broken into the victim’s home and penetrated

her three times in a period of approximately two minutes. He argued that he should be convicted of only one count because there had been just one criminal act, or one “unit of prosecution.” Tili, 139 Wn.2d at 112-13. In Tili the court was considering multiple counts of the same crime, but its analysis is instructive in Collins’s case.

The Tili court reasoned that because sexual intercourse means *any penetration or any act of sexual contact*, each penetration was a completed crime which the Legislature intended to punish. Id., at 116-17. Citing to Harrell v. Israel, 478 F. Supp. 752, 754 (E.D. Wis. 1979), the court said, “[I]f the statute prohibits individual acts and not simply a course of conduct, then each offense is not continuous and several convictions do not violate double jeopardy.” Tili, 139 Wn.2d at 117.

One should not be allowed to take advantage of the fact that he has already committed one sexual assault on the victim and thereby be permitted to commit further assaults on the same person with no risk of further punishment for each assault committed.

Id.

In the present case, as in Tili, the Legislature used the term “any” to define each of the crimes. It therefore follows that the legislative intent is that each be punished separately even if they

happen to the same victim in the same place in a short span of time. This was not simply a “course of conduct.” The prosecutor argued to the jury that it could choose between three different kinds of touching to establish the molestation—touching the breasts with his hands, licking the breasts, and placing his hands on her vaginal area. [Vol. 2 RP 390-91] The jury was given a unanimity instruction. [CP 37] There was only one act that supported the rape of a child charge—putting his mouth on her genitals. [Vol. 2 RP 388]. He could have stopped after the touching and not committed rape of a child. He could have stopped after the first touching and not licked the victim’s breasts or touched her genitals with his hands. The molestations were not incidental to, a part of, or coexistent with the first degree rape of a child. [Appellant’s Opening Brief at 27] The unit of prosecution for each of these offenses is *any touching* or *any contact*; the legislature intended to punish these two crimes separately. There is no double jeopardy.

5. Collins did not raise the issue of same criminal conduct for purposes of calculating his offender score in the trial court and cannot raise it for the first time on appeal. Even if he could, the two convictions do not constitute the same criminal conduct because the intent element for the two crimes is different.

Collins assigns error to the failure of the trial court to find that his convictions for first degree rape of a child and first degree child molestation constituted the same criminal conduct for purposes of calculating his offender score pursuant to RCW 9.94A.589(1)(a). In pertinent part, that statute reads:

[I]f 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. . . . "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 involve the same victim.

Collins did not challenge the calculation of his offender score in the trial court, nor ask the court to find that the two convictions constituted the same criminal conduct. His attorney did not dispute the factual allegations that supported the recommendation in the presentence investigation report. [09/08/10 RP 5-5] He did not challenge the score sheets presented by the State, listing his offender score as "6." [CP 51-52] The presentence investigation report included a calculation of an offender score of six, and made a recommendation based on that score, which Collins did not challenge. [CP 57]

The Washington Supreme Court has held that while *some* offender score calculation errors may be raised for the first time on

appeal, others may be waived. In re Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). In that case, the court said:

[W]e hold that in general a defendant cannot waive a challenge to a miscalculated offender score. There are limitations on this holding. While waiver does not apply where the alleged sentencing error is a legal error leading to an excessive sentence, waiver can be found where the alleged error involves an agreement to facts, later disputed, or *where the alleged error involves a matter of trial court discretion*

Id., at 874 (emphasis added). The court went on to say that waiver can be found in a case like State v. Nitsch, 100 Wn. App. 512, 997 P.2d 1000 (2000). Goodwin, 146 Wn.2d at 875. In Nitsch, the defendant explicitly agreed to a particular offender score, but later attempted to challenge it on appeal, asserting that the lower court should have, sua sponte, found the two crimes for which he was convicted to be the same criminal conduct. Nitsch, 100 Wn. App. at 520. The Court of Appeals distinguished that case from those in which the offender score miscalculation was based on a “pure calculation error” or a case of “mutual mistake regarding calculation mathematics”, stating:

Rather, it is a failure to identify a factual dispute for the court's resolution and a failure to request an exercise of the court's discretion. A defendant's current offenses must be counted separately in calculating the offender score unless the trial court

enters a finding that they encompass the same criminal conduct. Offenses encompass the same criminal conduct when they are committed against the same victim, in the same time and place, and involve the same objective criminal intent. The trial court's determination on the issue is reviewed for abuse of discretion.

Id., at 520-21 (citations omitted). The Nitsch court further commented on the appropriateness of permitting review of such cases for the first time on appeal:

Only an illegal or erroneous sentence is reviewable for the first time on appeal. Application of the same criminal conduct statute involves both factual determinations and the exercise of discretion. It is not merely a calculation problem, or a question of whether the record contains sufficient evidence to support the inclusion of out-of-state convictions in the offender score. We therefore see a fundamental difference between this case and Ford² and McCorkle.³ Unlike the out-of-state conviction provision, the same criminal conduct statute is not mandatory, and sound reasons exist for the implicit grant of discretion contained in the legislative language ("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").

Id., at 523 (citations omitted). Thus, the Nitsch court recognized that the determination as to whether offenses constitute the same

² State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999).

³ State v. McCorkle, 137 Wn.2d 490, 973 P.2d 461 (1999).

criminal conduct is discretionary with the trial court, requiring some factual basis on which to make such a determination.

The Nitsch court further discussed reasons for not permitting this issue to be raised for the first time on appeal. First, a defendant could make arguments on appeal inconsistent with arguments he made in the trial court. Second, and more germane to this case, allowing review for the first time on appeal would require sentencing courts to search the record to be sure they had not missed an issue. The court concluded this is not what the Legislature directed, and a trial court's failure to raise and review an issue sua sponte "cannot result in a sentence that is illegal." Id., at 524-25.

This court should find that Collins waived his right to challenge his offender score for the first time on appeal. During the colloquy at the sentencing hearing, defense counsel denied any dispute about the factual allegations in the presentence investigation report. [09/08/10 RP 5] Counsel recommended a sentence of 162 months, the bottom of the standard range, without challenging that range. [09/08/10 RP 13-14] The presentence investigation report included an offender score calculation of 6 for each count, a standard range of 162 to 216 months to life for Count

I, and a standard range of 98 to 130 months for Count II. [CP 57] By not challenging the presentence investigation report, Collins acknowledged that offender score and those standard ranges.

RCW 9.94A.530(2) provides, in relevant part:

In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. *Acknowledgement includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing. . . .* (Emphasis added.)

Collins signed the judgment and sentence, which included the calculation of his offender score of 6. [CP 65, 72] He acknowledged his offender score, failed to challenge it in the trial court, and thus waived it. He cannot now challenge it on appeal.

Even if he could raise the same criminal conduct issue on appeal, he still cannot establish that the two convictions constituted the same criminal conduct. As noted above, RCW 9.94A.589(1)(a) defines the term "same criminal conduct" to mean that the crimes were committed at the same time and place, involved the same victim, and had the same criminal intent. The State does not dispute that the crimes occurred at the same time in the same

place to the same victim. However, the two crimes do not have the same criminal intent.

Intent is evaluated objectively, not subjectively. State v. Hernandez, 95 Wn. App. 480, 484, 976 P.2d 165 (1999).

First, we must “objectively view” each underlying statute and determine whether the required intents are the same or different for each count. If the intents are different, the offenses will count as separate crimes. If they are the same, we next “objectively view” the facts usable at sentencing to determine whether a defendant’s intent was the same or different with respect to each count.

Id., (citations omitted).

In this case there is no need to go beyond the first half of the test. The two statutes involved here require different intents. First degree child molestation requires sexual contact. Sexual contact requires that the touching of sexual or other intimate parts of the body be done for the purpose (*i.e.*, the intent) of sexual gratification. [CP 36] First degree rape of a child requires no intent at all. [CP 34] There is no defense to rape of a child based on lack of intent. In Hernandez, the court held that:

Where one crime has a statutory intent element and the other does not, the two crimes, as a matter of law, cannot constitute the same criminal conduct. The term “same criminal conduct” is to be construed narrowly. That one crime has a statutory intent

element, which the other crime lacks, is tantamount to the two crimes having different statutory intents; therefore, the two crimes cannot constitute the same criminal conduct.

Hernandez, 95 Wn. App. at 485-86.

In Hernandez, the defendant was convicted of possession of cocaine with intent to deliver, and simple possession of methamphetamine. Both charges arose from a single search of his residence in which both drugs were found. Hernandez argued that the two constituted the same criminal conduct. After analyzing the two statutes, the court concluded that specific intent to deliver is an element of the cocaine charge while the simple possession charge carried no statutory intent element, and that except for an unwitting possession defense it is a strict liability crime. Id., at 484. The court found that the two did not constitute the same criminal conduct. It did not particularly like that result; because of a sentencing anomaly, Hernandez faced a higher offender score than if he had been convicted of two counts of possession with intent to deliver, which would have constituted the same criminal conduct and lowered his offender score. Nevertheless, the court said:

But Washington's sentencing scheme is a statutory creation. Unambiguous plain language is not subject to construction. We can neither modify a statute by

construction nor read into it things that we suspect the Legislature unintentionally omitted.

Id., at 485, (citations omitted).

The two offenses here do not constitute the same criminal conduct.

6. There was sufficient evidence produced at trial to prove beyond a reasonable doubt that Collins was guilty of both first degree rape of a child and first degree child molestation.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 p.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Id. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303 (1992). Credibility determinations are for the trier of fact and are not subject to review.

State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). A reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

Collins argues that there was insufficient evidence to support his convictions, but actually it amounts to an argument that the victim should not be believed. It is true that the evidence consisted of the victim's testimony and the defendant's testimony. The jury determines credibility and the jurors believe whom they believe. That is not a determination that is reviewable by an appellate court. The victim testified to acts that constitute the crimes of both offenses. The jury was aware of all the factors which Collins claims undermine her credibility. It was not error to admit the recording of the phone call between Collins and Andrea Arthur, but even without that recording there was sufficient evidence to support the convictions. The recording was merely Collins's acknowledgment that the victim was telling the truth, it didn't add to the facts which supported the elements of the crime. The evidence was sufficient.

D. CONCLUSION.

Based upon the foregoing argument and authorities, the State respectfully asks this court to affirm Collins's convictions.

Respectfully submitted this 13th day of May, 2011.



Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by

TO: DAVID C. PONZOHA, CLERK
COURT OF APPEALS, DIVISION II
950 BROADWAY, SUITE 300
MS-TB-06
TACOMA, WA 98402-4454

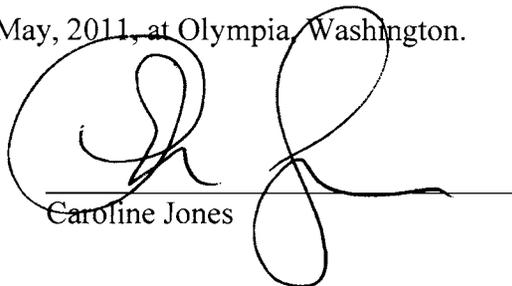
--AND--

PATRICIA A. PETHICK
ATTORNEY AT LAW
PO BOX 7269
TACOMA, WA 98417

11 MAY 16 AM 9:56
STATE OF WASHINGTON
BY _____
DEPT. OF _____

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 13 day of May, 2011, at Olympia, Washington.



Caroline Jones