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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MILFORD L. BUTCHER,

Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The court erred by denying Milford L Butcher's *Batson* challenge during voir dire.

2. The State's evidence was insufficient to support the convictions.

3. The court erred by finding the offenses were not same criminal conduct and/or barred by double jeopardy.

Issues Pertaining to Assignments of Error

A. Did the court err by denying Mr. Butcher's *Batson* challenge during voir dire when the State used peremptory strikes to oust minority jurors? (Assignment of Error 1).

B. Was the State's evidence insufficient to support the convictions beyond a reasonable doubt? (Assignment of Error 2).

C. Did the court err by determining the convictions were not the same criminal conduct and/or barred by double jeopardy? (Assignment of Error 3).

II. STATEMENT OF THE CASE

Mr. Butcher was charged by second amended information with count I: first degree child rape of K.J.G. occurring between August 1, 2010, and July 2, 2014; count II: first degree child

molestation of K.J.G. occurring between August 1, 2010, and July 2, 2014; count III: first degree child molestation of E.M.H. occurring between July 23, 2010, and July 2, 2014; count IV: first degree child molestation of E.M.H. occurring between July 23, 2010, and July 2, 2014; count V: first degree child rape of E.M.H. occurring between July 23, 2010, and July 2, 2014; count VI: first degree child molestation of L.J.H. occurring between July 25, 2010, and July 2, 2014; count VII: first degree child molestation of L.J.H. occurring between July 25, 2010, and July 2, 2014; and count VIII: first degree molestation of L.J.H. occurring between July 25, 2010, and July 2, 2014. (CP 364-65). He pleaded not guilty to all charges. (RP 1081-87). From pretrial proceedings through trial, the defense argued the separate charges relating to each victim were the same course of conduct. (RP 7, 851-853, 1089, 1117). Although the argument was made, the court did not rule as it agreed with the State that same course of conduct was a sentencing, not a charging, issue. (*Id.*, RP 856).

A child hearsay hearing was held with the court finding all the *Ryan* factors were met. (RP 50-237, 252-57). In voir dire, the State used peremptory challenges to strike prospective jurors who were not white. They were Goua Xiong, Johnrey Hopa, and

Ricardo Manning. (1/3/18 RP 242, 245, 252). Finding the State had articulated neutral reasons for striking each juror, the court denied the *Batson* challenges. (*Id.* at 245, 250, 255).

Karen Winston, a forensic child interviewer, received a referral from Detective Brandon Armstrong. (RP 349, 367).. She interviewed L.J.H. and K.J.G. on August 5, 2014. (RP 367-68). K.J.G. was then 8 years old. (RP 368). Ms. Winston offered K.J.G. body diagrams whereupon the child indicated she had been touched in the crotch and buttocks area. (RP 375-76). K.J.G. did not say anything about being threatened by Mr. Butcher not to tell anyone. (RP 580).

She did a forensic interview with L.J.H. the same day as K.J.G.'s. (RP 569). L.J.H. said he had to touch Mr. Butcher's penis. (RP 573). L.J.H. mentioned no gun in the interview. (RP 577). He talked about going outside with no clothes on and playing. (RP 582). L.J.H. went into a crate to be safe from Mr. Butcher. (RP 584). He said the abuse happened in the Butcher's home, not in the truck. (RP 587).

Teresa Forshay, a nurse practitioner and child abuse expert, saw E.M.H. on August 13, 2014. (RP 384, 388, 391). She did physical and genital exams on E.M.H. Nothing was abnormal nor

did she expect to, as is the case 90% of the time. (RP 391-94).

Ms. Forshay also saw K.J.G. and went through the same routine as with E.M.H. (RP 397). She found nothing remarkable in her examination of K.J.G. (RP 407). Specifically, nothing was vaginally or anally unusual with both E.M.H. and K.J.G. (*Id.*).

Ryan Grant, father of K.J.G., had been a fifth-grade teacher since 2001 at Fairchild AFB. (RP 410, 412). He said Mr. Butcher was also known as Bear. (RP 413). The family moved into their house in 2001. (RP 413-14). The Butchers moved close by a couple of years later. His wife and Kathi, Mr. Butcher's wife, interacted and worked at the Grants' dairy together. (RP 414). They became friends. (*Id.*) The families got along very well. (RP 415). The Butchers were one of the first to babysit K.J.G., who was born in August 2008. (*Id.*) She was born deaf and had bilateral cochlear implants. (RP 415-16). K.J.G. was in the fifth grade at the time of trial. (RP 417).

The summer before second grade, K.J.G. began to help with the Butchers' dog operation of raising and transporting dogs. (RP 417). Her cousins had been going over, so she wanted to as well since she really liked dogs. (*Id.*) One of K.J.G.'s favorite things to do was to work with the dogs at the Butchers. (RP 418).

Mr. Grant became aware of problems at the Butcher home around the 4th of July of 2014 or 2015, before K.J.G. started second grade. (RP 418). She said Mr. Butcher's pants fell off while he was jumping on the bed, but she was not put out by it and thought it was funny at the time. (RP 419). K.J.G. was maybe 6 or 7 then. (*Id.*). She wanted to keep going to the Butchers. (RP 420). Mr. Grant discussed this incident with his sister-in-law, Desiree Heinemann. (RP 442). Wondering whether it was a concern or not, Mr. Grant felt nothing needed reporting. (RP 443). After the touching and bleeding, he changed his mind. (*Id.*). At this time, Mr. Grant was unaware of allegations by his sister-in-law's kids. (RP 450).

Mr. Grant's wife, Paula, talked with Kathi Butcher and the Grants were comfortable with what they were hearing from her so K.J.G. went back to the Butchers. (RP 420). K.J.G. was 6 years old. (*Id.*). Five or six months went by. (*Id.*). She had blood in her stool around then. (RP 420-21). K.J.G. did not say anything about what was happening to her. (RP 421). It was the 4th of July weekend when K.J.G. came out of the bathroom and said blood was down there because maybe Bear kept putting his finger there. (RP 422). She said this matter-of-factly to her parents. (*Id.*).

There was a moment of panic and Mr. Grant went to the

public safety building and made a report on June 30 or July 1. (RP 422). K.J.G. said it was Bear. (RP 423). He asked her no specific questions and left it to Detective Armstrong. (*Id.*) Mr. Grant harbored no ill will toward the Butchers before K.J.G.'s disclosures. (RP 425). K.J.G. did not dislike them and still wanted to go see the dogs with Kathi Butcher and not be around Bear. (*Id.*).

Bear allowed K.J.G. to steer one of his cars on the gravel road where they live. (RP 426). Mr. Grant saw it. (*Id.*) She said Bear touched her while she was driving the jeep. (*Id.*) But she did not say where she was touched. (RP 427). K.J.G. was not allowed to go back to the Butchers after the 4th of July weekend. (RP 428).

K.J.G. was born on August 14, 2008. (RP 456). She first met Mr. Butcher when she worked for him at the puppy boot camp. (RP 460). Her cousins, including E.M.H. and L.J.H., also worked there. (*Id.*) K.J.G. started working at the butchers when she was 4. (RP 462). Her cousins were already working at the puppy boot camp. (RP 463). K.J.G. liked going there, but mildly disliked it when Mr. Butcher drove the kids home. (RP 464-65). One would be in his lap helping drive and the person sitting in his lap would end up having their privates touched by Mr. Butcher. (RP 465, 468). This was what K.J.G. experienced. (RP 465). Mr. Butcher

would also do it when playing with him, like hide-and-seek. (*Id.*). He always touched the lower region, the vagina. (RP 466). And it happened to her. (*Id.*). Who drove the car always rotated. (RP 469).

K.J.G. said Mr. Butcher stuck his finger into her lower region and touched skin under the clothes. (RP 469-70). She said his finger seemed to go inside her body. (RP 470). It hurt if he went up far enough, but mostly it did not hurt. (RP 471). It happened every weekend when she was in the front seat driving. (*Id.*). It also took place in the Butcher home during games. (RP 472). K.J.G. said the touching happened perhaps once while playing games. (RP 473). She did not see Mr. Butcher touch other kids. (RP 473-74).

K.J.G. testified Mr. Butcher had a gun and said if she ever told anyone he was touching her, he shot up into the ceiling and said it will be your head. (RP 474). She was scared. RP 474-75). She did not tell her mom about the gun when it was supposed to have happened. (RP 486). K.J.G. did say there was no damage to the ceiling so she thought it was blanks. (RP 489-90). She also testified Mr. Butcher shot the gun while threatening the kids. (RP 491). K.J.G. was not locked in a kennel or crate, but would end up

there playing hide-and-seek. Some abuse occurred there when Mr. Butcher touched her lower region when playing the game. (RP 499). She was about 5 or 6. (RP 507). E.M.H. was also in the far back corner of the crate when it happened. (RP 508).

K.J.G. told her parents and later Ms. Winston what happened to her. (RP 475, 478). K.J.G. did not consent to it. (RP 477). She thought the blood in her stool came from sexual abuse, but it did not. (RP 478).

Paula Grant, K.J.G.'s mother and the sister of Janet Heinemann, had two kids, K.J.G. and C.G. (RP 517-19). Her brother Luke's wife was Desiree Heinemann. (RP 521). Ms. Grant met Ms. Butcher in 2002 and Mr. Butcher shortly thereafter. (RP 522). She hired Ms. Butcher as a milker at the dairy in February 2002. (RP 523). Ms. Grant thought they were very good friends. (RP 524). K.J.G. started working for the Butchers at their puppy boot camp around July 2011. (RP 525). Her cousins already worked there. (*Id.*). The puppy boot camp started in 2009 or 2010. (RP 526). K.J.G. worked three mornings a week in the summer and two hours on Saturday when school was in session. (*Id.*).

There arose a concern regarding the Butcher home about October 2011. (RP 528). Ms. Grant's niece and nephew said Bear

was touching them and pulling down their pants. (RP 529). The kids claimed his pants would fall off when he was jumping on the bed. (*Id.*) Ms. Grant's sister-in-law, Desiree, told her about it. (*Id.*) Ms. Grant did not approach K.J.G. about it as she was not communicating well at the time and decided to talk to Ms. Butcher first. (*Id.*) In the next day or two, she did talk with Ms. Butcher, who was upset and said nothing happened. (RP 530-31). Ms. Grant trusted her and thought it was a misunderstanding. (RP 531-32). She did not talk to Mr. Butcher. (RP 533). Ms. Grant decided to let K.J.G. go back to the Butchers. (*Id.*) Her daughter enjoyed going to the puppy boot camp because she loved the dogs. (RP 534).

The Grants discussed the accusations with the Heinemanns. (RP 534). Luke Heinemann was sure something was going on and their kids did not go back. (RP 534-35). But about three weeks to a month after the 2011 revelation, the Heinemann kids went back to the puppy boot camp. (RP 535-36). There were no concerns about K.J.G. at the time. (*Id.*).

Something again came up on June 30, 2014. (RP 536). Two of the Heinemann kids went over to the Butchers and Bear told them to pull their pants down. One refused; the other did. (*Id.*).

The Grants picked up K.J.G. at the dairy and, at home, asked her if anything made her feel uncomfortable at puppy boot camp. (RP 537). She told her parents she did not like it when Bear touched her and pointed to her crotch. (RP 538). Ms. Grant went to the Heinemann house and told them Mr. Butcher was touching K.J.G., too. (*Id.*). Mr. Grant went to the sheriff's office the next morning and reported it. (RP 539).

Forensic interviews were set up, followed by counseling. (RP 541). K.J.G. went to Lutheran Community Services from the end of August 2014 to the end of January 2015. The counseling helped her. (RP 541-42).

Ms. Butcher did not return to the dairy to milk. (RP 544). Ms. Grant said the gun incident happened at the Butchers' home. (RP 545). On cross examination, she acknowledged there was no indication of a gun going off in the home. (RP 550). There was nothing from K.J.G. about Mr. Butcher shooting a gun her first time there. (RP 551). None of the other kids said anything about a gun either. (*Id.*).

L.J.H. was 10 years old at the time of trial in January 2018. (RP 607). He had three sisters and they all worked for Bear. (RP 608, 612-13). He did not like the job because Mr. Butcher was

inappropriate. (RP 614). He touched their privates. (RP 615).
With his hands, Mr. Butcher touched L.J.H.'s penis underneath his clothes. (*Id.*). L.J.H. said Mr. Butcher locked the kids up in the dog cages. (RP 616). By cage, he meant the dog kennel. (*Id.*). He saw E.M.H. and K.J.G. in the cage. (RP 617). L.J.H. started going to the Butchers' puppy boot camp when 3 or 4 years old. (RP 618). Mr. Butcher told them not to tell anybody. (*Id.*). L.J.H. saw Mr. Butcher touch E.M.H. on her privates. (RP 619). He also saw him touch his sister, L.M.H., and K.J.G on their vaginas, a word that Mr. Butcher used. (*Id.*). He touched them under their clothes. (*Id.*).

L.J.H. said Ms. Butcher was not at the house when these things happened. (RP 620). Mr. Butcher told the children to take their clothes off. They were in the cages without clothes; he had his pants off. (*Id.*). L.J.H. saw Mr. Butcher's belly button and penis, which he had to touch. (RP 620-21). Mr. Butcher showed L.J.H. a pistol. (RP 622-23). He sat on Mr. Butcher's lap in the van. (RP 623). E.M.H. and K.J.G. also drove it. (RP 624). L.J.H. said he was touched by him over his clothes while driving and sitting on Mr. Butcher's lap. (*Id.*). Mr. Butcher tickled the privates of L.J.H., E.M.H., and K.J.G. (*Id.*).

The first person he told about these things was his mother. (RP 625). L.J.H. did go back to work at the puppy boot camp, but more inappropriate things happened. (*Id.*) He told his parents again what was happening and stopped going to the Butchers' place. (RP 626).

On cross examination, L.J.H. said he, E.M.H., and K.J.G. would also go into the dog crates for fun and act like dogs. (RP 627). The routine was to eat snacks after walking to the Butchers' house. (RP 629). Mr. Butcher would then play with their privates. (*Id.*) Ms. Butcher would be out on walks and her husband would give them snacks. (RP 630). In the bedroom with a train, Mr. Butcher's pants were down. (RP 631-34). L.J.H. did not tell Ms. Winston about a gun because he did not want to talk about it. (RP 639).

E.M.H. was 12 years old at trial. (RP 642). She, L.J.H., L.M.H., and K.J.G. worked for Mr. Butcher walking the dogs and picking up poop. (RP 644). E.M.H. testified Mr. Butcher touched them inappropriately. (RP 645). She saw him touch the other kids' privates, that is, the penis of L.J.H. and the vaginas of the girls. (RP 646, 647). Sometimes L.J.H.'s clothes were on and one time they were off. (RP 647). The same thing with the clothes

happened with K.J.G. (*Id.*). One time, Mr. Butcher had no clothes on at all. (*Id.*). She told her mom and dad, who did not think anything happened. (RP 648). The second time, they went to the police. (*Id.*). Janet, Luke Heinemann's sister, believed Kathi Butcher. (*Id.*). E.M.H. went back to work for Mr. Butcher after about a month and the other kids returned as well. (*Id.*). But inappropriate stuff kept happening. (RP 649).

Mr. Butcher touched E.M.H.'s vagina under her clothes. (RP 649). Other kids were in the room. (*Id.*). She said he touched all of them. (RP 650). They played in the dog crates when Mr. Butcher turned it into an inappropriate game. (*Id.*). He tickled their private parts. (RP 651). Mr. Butcher did not tell them to go inside. (*Id.*). E.M.H. did once, however, to hide. (*Id.*).

As for a gun, E.M.H. said she, L.J.H. and K.J.G. were going to run home and Mr. Butcher said if they did not come back, he would shoot them. (RP 651). He told them not to tell their parents or they would not be found. (RP 652).

Mr. Butcher drove the kids home from the puppy boot camp. (RP 653). One of them would be on his lap to steer when he touched that child's private parts. (*Id.*). His finger went inside

E.M.H. a little bit. (RP 654). It hurt when Mr. Butcher touched her and he went in E.M.H.'s vagina. (RP 671).

In the living room on another occasion, Mr. Butcher had his clothes off and had E.M.H, L.J.H., and K.J.G. touch his penis. (RP 659). He told them he would tell their moms they were very bad if they did not. (RP 660). One time, the kids' clothes were off in the bedroom with no train. (RP 661). Mr. Butcher told them If they did not take their clothes off, he would shoot them. (RP 663). In the train room, he also told the kids to take their clothes off and put a gun away when they did. (RP 667). E.M.H. said one time Mr. Butcher did shoot the gun. (RP 667-68). He pointed the gun at them when they were in the house. (RP 668). The gun incidents happened after she first told her parents. (RP 674). It was the second time when the gun went off. (*Id.*).

Desiree Heinemann said L.J.H. was born on April 10, 2007; L.M.H. on September 10, 2009; and E.M.H. on November 9, 2005. (RP 677-78). E.M.H. was in kindergarten when she and L.J.H. began socializing with the puppies at the Butchers' boot camp. (RP 679-80). They worked from 9 to 11 in the morning, two or three days a week. (RP 680, 682). L.M.H. later worked when she was 2½ or 3. (RP 681). Her kids did not want to go over to puppy boot

camp after a year or a year-and-a-half. (RP 683). It was a concern. (RP 684). Then L.J.H. said Mr. Butcher was touching their privates. (*Id.*) He pinched L.J.H.'s penis. (RP 685). E.M.H. was then asked if she was uncomfortable. She was crying and did not want to say. (RP 686). But she revealed Mr. Butcher was touching her vagina. (RP 687). Luke and Desiree Heinemann went to confront Mr. Butcher, but were told they were mistaken. (RP 688-89). K.J.G. did not work at the Butchers at the time. (RP 689). The Heinemanns did not tell the Grants about it (*Id.*).

Two months after, the kids went back to work at the puppy boot camp. (RP 690). There was a family disagreement about returning after Ms. Butcher asked if the kids could come back. (RP 691). She said the kids were mistaken. (*Id.*) The kids could go back as long as Ms. Butcher was there. (RP 693). E.M.H., L.J.H., and L.M.H. did go back to work. (*Id.*) Then they did not want to go back. (*Id.*) L.J.H. said Mr. Butcher was touching them a lot more, including in the car while they were sitting on his lap while steering. (RP 694). He told his mom that Mr. Butcher told them to take off their clothes in the jeep. They did. (RP 695). Mr. Butcher pinched his penis too hard and L.J.H. was very upset. (*Id.*).

When Ms. Heinemann asked E.M.H. what was happening, she became upset and told her Mr. Butcher told them to take their clothes off, whereupon he violated them with his tongue. (RP 696). The parents decided to go to the police. (RP 697). Sheriff Ozzie Knezovich lived a quarter-mile away, but was not home. (*Id.*). They waited until Monday when Luke Heinemann and Ryan Grant went to the sheriff's office. (*Id.*).

L.J.H.'s gun disclosure came after the second time. (RP 703). K.J.G. and her brother C.G. went back right away to the Butchers. (RP 706). K.J.G. went back in August 2011 and Ms. Heinemann's kids went back in December 2011. (RP 708). E.M.H. said the tongue incident happened in the play room. (RP 710-11).

Moira Schram worked at the Museum of Art and Culture. (RP 721-22). K.J.G. was in her art class for the summers of 2013 and 2014. (RP 724-25). In 2014, K.J.G. missed the morning half-day, which was very unusual. (RP 726). She was a lot quieter. (*Id.*). She drew a man behind bars. (RP 727). Later in the week, K.J.G. had a panic attack as she was afraid the man would find her. (*Id.*). She had been to the police that morning to report the incident. (RP 732).

Deputy Greg Chamberlain took the report from Mr. Grant on

July 2, 2014. (RP 741). It involved a child molestation accusation so he told Mr. Grant a sex crimes detective would be in touch in a day or two. (RP 748-49). Deputy Chamberlain spoke only to Mr. Grant. (RP 749). On July 3, he spoke with Desiree Heinemann, who said there were issues three years before with her kids. (RP 751). The additional accusations involved the same suspect. (RP 752). The occurrence was on July 1, 2014. (*Id.*). Mr. Grant said K.J.G. had fingers put in her and blood in her stool. (RP 753). No gun was mentioned. (RP 754).

Detective Brandon Armstrong of the sexual assault unit did one interview with E.M.H. on August 5, 2014. (RP 770-71, 775, 778). Karen Winston interviewed L.J.H. and K.J.G. (*Id.*). The detective recommended a medical exam of E.M.H. due to the description of vaginal touching and penetration. (RP 783). He made a referral of charges. (RP 797).

On cross examination, Detective Armstrong said he did not get a warrant to search for a gun. (RP 808-09). The gun was not mentioned until after the case had been referred for prosecution. (*Id.*). E.M.H. said she had not been touched on her bare skin, but then changed her mind. (RP 816). He did not interview the kids about the gun. (RP 825).

The defense made a motion to dismiss based primarily on counts I and II being the same course of conduct, counts III and IV being the same course of conduct, count V being part of the same course of conduct along with there being no evidence of rape, counts VI, VII, and VIII being the same course of conduct. (RP 851-52). Mr. Butcher asked the court to dismiss at least two counts of the last three and counts III and IV. (RP 852-53). The court ruled same course of conduct was a sentencing, not a charging, issue and all eight counts would remain. (RP 856-58). The State formally rested on the record. (RP 860).

The defense presented witnesses and called Lucinda Hancock. (RP 861). She raised labradoodles and used Kathi Butcher for puppy training. (RP 863). Ms. Butcher was pleasant to work with and gentle with the dogs. (RP 864).

Jury instructions were discussed and the court, agreeing with the defense, decided to give lesser-included offense instructions of 4th degree assault on all eight counts. (RP 928-38).

Kathi Butcher had a puppy boot camp. (RP 944). In the Butchers' home, there were no handguns and two long guns. (RP 948-50). Their house is a double-wide modular with a pod. (RP 950). She decided to have kids at the camp to social 10-week old

dogs. (RP 958). The routine was to walk with the dogs to the Heinemann house and pick up the kids at 9 a.m. (RP 960). If the Grant kids came, they would go there too. (RP 961). They would all get back to the Butchers' house at 9:15 to 9:30. (*Id.*). The puppies were leashed as part of the training. (*Id.*). If Bear was home, he would pick up the Grant kids. (*Id.*). There would be from 1 to 10 dogs at the puppy boot camp. (RP 962).

In the back, the kids would pick up the poop and play with the puppies in the yard. (RP 963). They would finish around 10 a.m. (*Id.*). Snack time followed in the pod. (RP 964). Mr. and Ms. Butcher and the kids set up the card table and chairs. (*Id.*). The kids' pay was \$5/day each. (RP 965). While they were having their snack, Ms. Butcher would go out and smoke. (RP 967). Mr. Butcher would be in a corner in the house eating a snack as well. (*Id.*). The kids would snack until 10:30 and then they would play. (RP 968). They left at 11 and Ms. Butcher drove them home. (RP 969). Sometimes Mr. Butcher would drive them back. (*Id.*). Ms. Butcher had the dairy job from 1 to 4:30 a.m. and worked at a hotel from 1 to 5 or 6 p.m. (RP 970-71). Mr. Butcher injured his back in 2014. (RP 971). She did not see Mr. Butcher without clothes when the kids were at their house. (RP 978). He was not alone with the

kids except when she was out smoking or when he drove them home. (RP 984, 1031).

The kids were always supervised because she did not want the puppies, costing \$1500 each, to get hurt. (RP 1005). It was not unusual for the kids to crawl on Mr. Butcher. (RP 1022).

Around October 2011, Ms. Butcher became aware of the accusations against her husband. (RP 1028-29). She was outraged and believed the kids were probably confused. (RP 1028). The Heinemann kids did not come over to the Butchers' for two months, but started again in January 2012. (RP 1029). K.J.G. did not stop coming over and continued to do so. (*Id.*).

On July 9, 2014, Ms. Butcher got a text from Janet Heinemann asking to come over that day, so she met with her and Nancy, her mother. (RP 1029-30, 1032). Janet said L.M.H. said Bear wanted to see her butt and L.J.H. showed him his. (RP 1030). Ms. Butcher left after seeing a phone video of K.J.G. and her mother talking. (RP 1030-31). The next day, July 10, 2014, she quit at the dairy. (RP 1031-32).

Ms. Butcher testified there was no indication a gun ever went off when the children were there. (RP 1033). After the initial allegations, she made sure Bear was not alone with the kids. (RP

1033). They were not fearful of him. (*Id.*). Ms. Butcher noticed no changes in the kids as they acted just like before. (*Id.*). She said E.M.H. started working on July 23, 2010 and L.J.H. in August 2010. (RP 1036). K.J.G. started in August 2010. (RP 1037). Mr. Butcher did not work outside the home and had back problems since 2008. (RP 1044). He got social security. (*Id.*).

Ms. Butcher approached the Heinemanns about having their kids work at the puppy boot camp. (RP 1045). The dogs needed to be socialized with children and they loved the dogs. (*Id.*). Ms. Butcher trusted Bear with the kids. (RP 1047). She was surprised by the 2011 allegations that Bear was exposing himself to the kids. (RP 1051-52). She did not believe the kids and felt they were confused. (*Id.*). They would be safe if they came back to her house. (RP 1052-53). Ms. Butcher reiterated there was no handgun in the house. (RP 1060). She did not believe the kids because Bear had no opportunity and would never do anything like that. (RP 1092).

The information was amended to conform to the evidence regarding the start date of the charges involving E.M.H. (RP 1081). The defense again argued same course of conduct. (RP 1089). It was put on the record there were no plea offers by the State. (RP 1090).

Mr. Butcher testified in his own behalf. (RP 1094). He was retired and helped with the puppy boot camp. (*Id.*). He was not in particularly good health. (RP 1095-06). He recalled one day alone with the kids in 2011. (1096-97). Mr. Butcher did not take his clothes off in front of the kids. (RP 1097). He did not have a handgun and did not shoot one off around the kids or threaten them with one or any other gun for that matter. (*Id.*). Mr. Butcher did not lock the kids up in kennels or molest them. (RP 1098). He did not molest anyone in the jeep, did not touch the kids' privates – neither on the penis nor any penetration of the butt or vagina. (*Id.*). He said the kids would get in the kennels, play “sale puppy,” and act like dogs. (RP 1099). Mr. Butcher had no sexual contact with the kids, did not rape or molest them, and did not digitally penetrate the anus or vagina of the kids. (RP 1100). He let the kids return to puppy boot camp because he did not do anything to them and they were confused, so it was no big deal for them to come back. (RP 1101). He was dumbfounded when he found out he was being charged. (*Id.*).

Mr. Butcher was born on January 11, 1950. (RP 1103). The kids worked at his home between 2010 and 2014. (*Id.*). He was glad the kids were around and loved them. (RP 1105). They

were mistaken in 2011 and 2014. (RP 1105-06). He did not ask them to remove their clothes and did not remove their clothes. (RP 1106). These were false allegations. (*Id.*).

The kids did sit on his lap in the jeep. (RP 1111). He had his hand around their waists to keep them from the steering wheel. (RP 1112). He did nothing to the children in the jeep. (*Id.*). After 2011, Ms. Butcher did not leave him alone with the kids. (RP1115).

In the jury instructions conference, the defense raised once more same criminal conduct. (RP 1117). The State again objected to the lesser included offense instructions. (*Id.*). There were no other objections. (RP 1120).

In the State's closing, it stated for the jury the particular incidents relating to each count. (RP 1167-72). Count I, first degree child rape, involved K.J.G. in the jeep. (RP 1167). Count II, first degree child molestation, involved K.J.G. in the jeep. (RP *Id.*). Count III, first degree child molestation, involved E.M.H. in the jeep. (RP 1171). Count IV, first degree child molestation, involved E.M.H. while playing tickle monster. (RP 1172). Count V, first degree child rape, involved E.M.H. in the jeep. (*Id.*). Count VI, first degree child molestation, involved Mr. Butcher forcing L.J.H. to touch his penis. (*Id.*). Count VII, first degree child molestation,

involved L.J.H. in the jeep. (*Id.*). Count VIII, first degree child molestation, involved L.J.H. being touched on the bottom. (*Id.*).

The jury returned guilty verdicts on each count. (RP 1205-06). At the original sentencing hearing, the State advised the court Mr. Butcher's offender score was 9+. (RP 1214). The court continued the hearing so the State and the defense could review opposing briefs and file replies. (RP 1225).

At the continued hearing, Mr. Butcher argued double jeopardy and same criminal conduct. (RP 1230). The defense noted the way the crimes were charged paved the way to enhancements to the sentence. (RP 1232). Moreover, the multipliers under the sentencing scheme constituted double jeopardy because it permitted further punishment on top of the original punishment for the crime. (RP 1333). Mr. Butcher also argued the enhancements were not found by a jury so they were improper. (*Id.*). The State countered there was no same criminal conduct because of different times and different places and no double jeopardy. (RP 1234-1238).

The court decided same criminal conduct did not apply as each crime did not involve the same victim, same time, same place,

and same criminal intent. (RP 1239). It also determined there was no double jeopardy. (RP 1240).

The State advised the court the first degree child rape carried a 240-318 month minimum. (RP 1241). There were also no exceptions to the PSI. (*Id.*). Restitution was \$2920.23 for counseling services. (RP 1242).

The court sentenced Mr. Butcher to 198 months on first degree child molestation in counts II, III, IV, VI, VII, and VIII. (RP 1268). It sentenced him to a minimum 318 months on counts I and V, with a maximum of life. (*Id.*). The court imposed legal financial obligations of \$500 victim assessment, \$200 filing fee, \$100 DNA, and restitution of \$2,290.23. (*Id.*). Mr. Butcher signed off on restitution as to form. (RP 1273). This appeal follows. (CP 548).

III. ARGUMENT

A. The court erred by denying Mr. Butcher's *Batson* challenge when the State peremptorily struck three minority jurors.

Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed.2d 69 (1986), guarantees a jury selection process free from racial animus. Here, the State struck the only three minority jurors in the box, thus making a prima facie showing of racial discrimination requiring a full *Batson* analysis by the trial court. *City*

of Seattle v. Erickson, 188 Wn.2d 721, 724, 398 P.3d 1124 (2017).

But the judge did not do so after finding there were race-neutral reasons for removing these jurors. (1/3/18 RP 245, 250, 255).

Batson has a three-part test when attempting to prove a racially motivated strike. First, the defendant must establish a prima facie case giving rise to an inference of discriminatory purpose. 476 U.S. at 94. Second, if a prima facie case is made, the burden shifts to the prosecutor to provide an adequate, race-neutral reason for the strike. (*Id.*). Third, if a race-neutral explanation is provided, the court must weigh all relevant circumstances and decide if the strike was motivated by racial animus. *Johnson v. California*, 545 U.S. 162, 168, 125 S. Ct. 2410, 162 L. Ed.2d 129 (2005). Our Supreme Court has great discretion, however, to amend or replace the *Batson* requirements if circumstances so require. *Erickson*, 188 Wn.2d 727; *State v. Jefferson*, 192 Wn.2d 225, 242, 429 P.3d 467 (2018).

In *Erickson*, the court adopted a bright-line rule that the striking of the sole member of a particular race is a per se prima facie showing of discrimination. 188 Wn.2d 732. As reflected in the record, Mr. Xiong, Mr. Hopa, and Mr. Manning were each the sole member of a particular race and were struck. Like the sole

black juror in *Erickson*, the striking of these jurors constituted a prima facie showing of racial discrimination. Indeed, the defense demonstrated a pattern of striking minority jurors. *Snyder v. Louisiana*, 552 U.S. 472, 478, 128 S. Ct. 1203, 170 L. Ed.2d 175 (2008); *Erickson*, 188 Wn.2d at 734.

What happened in this case with the State's striking the only minority jurors fits squarely within the remedy fashioned in

Erickson:

Traditionally, the remedy for this error [that no prima case of discrimination was made] would be to remand to the trial court for a complete three-part analysis as the United States Supreme Court did in *Batson* itself. . . . But *Erickson* urges that if we adopt a new bright-line rule and find a prima facie case of discrimination, we should remand for a new trial. We agree. 188 Wn.2d at 735.

The trial court did not address the pattern of discrimination and focused only on each individual minority juror. Although the reasons cited by the State for these strikes were on their surface neutral, the pattern of striking minority jurors belies those explanations. In these circumstances, the passage of time and different analysis required for analyzing this pattern of discrimination calls for the remedy of remand for new trial as in *Erickson. Id.*

B. The State's evidence was insufficient to support the convictions beyond a reasonable doubt.

The State must prove beyond a reasonable doubt every element of a charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970). In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A claim of insufficient evidence admits the truth of the State's evidence and all reasonable inferences from it. *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010). Although credibility issues are for the finder of fact to decide, the existence of facts cannot be based on guess, speculation, or conjecture. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972).

Resolution of the case depends on whom the jury believes. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). But the existence of facts cannot be founded on guess, speculation, or conjecture and that is what happened here. The testimony of the children, although deemed to be true as is required in a challenge

to the sufficiency of the evidence, was full of inconsistencies and certain allegations (e.g., the gun) were not borne out. (See Statement of the Case). Even if the State's evidence is taken as true, the issue still remains whether the elements of all the crimes were proven beyond a reasonable doubt. *Green, supra*. The State's evidence still fell short of proving Mr. Butcher committed first degree child rape and first degree child molestation. To find evidence sufficient to convict on all the crimes, the jury had to guess and speculate whether Mr. Butcher was guilty. That is insufficient evidence and the verdicts cannot stand. *Hutton, supra*. The convictions must be reversed and the charges dismissed.

C. The court erred by finding the offenses relating respectively to K.J.G. and E.M.H. were not same criminal conduct and/or barred by double jeopardy.

The defense argued the State's charging Mr. Butcher with first degree child rape as well as first degree molestation in the counts involving K.J.G. and E.M.H. constituted double jeopardy.

The counts involving K.J.G. were one in fact and law as they were acts done to the same victim during the same course of conduct. The same is true for the counts involving E.M.H. The rape and molestation charges merge into one crime when the

molestation occurs during the commission of rape. *State v. Calle*, 125 Wn.2d 769, 888 P.2d 155 (1995). Before committing rape, molestation occurred first under the facts here. To punish him twice for a single criminal offense is barred by double jeopardy. Fifth Amend.; *Brown v. Ohio*, 432 U.S. 161, 165, 97 S. Ct. 2221, 53 L. Ed.2d 187 (1977). The Washington Constitution has the same protection. Wash. Const. art. 1, § 9; *State v. Tvedt*, 153 Wn.2d 705, 710, 107 P.3d 728 (2009). Because the child molestation and rape merged and were one offense, sentencing Mr. Butcher for each offense separately with respect to K.J.G. and E.M.H. violated double jeopardy. He is entitled to resentencing.

The severe effects of stacking the offenses resulted in an offender score of 9+ for Mr. Butcher when he had no prior criminal history. Each separate conviction resulted in a multiplier of three. RCW 9.94A.525(17). Mr. Butcher received multiple punishments for the same crimes, thus resulting in a double jeopardy violation. *Tvedt, supra*.

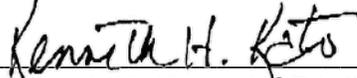
As for same criminal conduct, the defense argued double jeopardy was also implicated. See *State v. Hughes*, 166 Wn.2d 675, 681, 212 P.3d 558 (2009). Moreover, the molestation and rape involved a single criminal act. *Calle, supra*; *State v. Adel*, 136

Wn.2d 629, 634, 965 P.2d 1072 (1998). As in the double jeopardy argument, the crimes merged into a single offense and the same in fact and law so they must be counted as one for sentencing purposes. RCW 9.94A.525(5). Thus, the multiple charges involving K.J.G. should have been counted as one and the same goes for the charges involving E.M.H. *State v. Pena Fuentes*, 179 Wn.2d 808, 824, 318 P.3d 257 (2014). So counted, the multipliers should not have been used and the offender score was incorrect. Remand for resentencing is the remedy.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Butcher respectfully urges this Court to reverse his convictions and dismiss the charges or, alternatively, remand for new trial or resentencing.

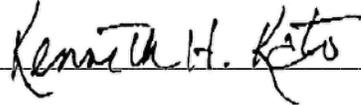
DATED this 11th day of October, 2019.



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CERTIFICATE OF SERVICE

I certify that on October 11, 2019, I served a copy of the brief of appellant by USPS on Milford Butcher, # 405098, PO Box 769, Connell, WA 99326; and by the eFiling portal Spokane County Prosecutor's Office at its email address.



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