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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MILFORD LEE BUTCHER, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S 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.

II. ISSUES PRESENTED

1. Did the court err in permitting the State to exercise peremptory strikes against three minority jurors where an objective observer would not conclude that race factored into the exercise of those strikes because (1) two other minority jurors were empaneled; and (2) the State presented valid, race-neutral reasons for the exercise of those strikes?
2. Did the State present sufficient evidence of every element of each crime charged, and is the credibility of any victim subject to review on appeal?
3. Did the court err in its determination that the defendant's eight separate acts of first degree child rape and first degree child molestation were not the "same criminal conduct" for purpose of sentencing and did the entry of separate convictions for each act of

first degree child rape and first degree child molestation violate double jeopardy?

III. STATEMENT OF THE CASE

The defendant, Milford Lee “Bear” Butcher, was charged by second amended information in the Spokane County Superior Court on January 16, 2018, as follows: Count 1: first degree rape of a child, victim K.J.G.; Count 2: first degree child molestation, victim K.J.G.; Count 3 and 4: first degree child molestation, victim E.M.H.; Count 5: first degree rape of a child, victim E.M.H.; Count 6 through 8: first degree child molestation, victim L.J.H. CP 364-65. The jury convicted the defendant on all counts. CP 432-39. The defendant timely appealed.

Substantive Facts.

Ryan and Paula Grant lived with their children on a ten-acre plot of land in rural Spokane, Washington. RP 411. K.J.G. was born August 14, 2006.¹ RP 457. Across the street from the Grants, Paula Grant’s brother, Luke Heinemann, and his wife, Desiree, lived with their children, including E.M.H. and L.J.H. RP 412. E.M.H. was born on November 9, 2005, and

¹ K.J.G. was born completely deaf in her right ear and severely, profoundly deaf in her left ear. RP 520. At two and a half months, she was fitted with a hearing aid, and at three and a half years, had a cochlear implant. RP 520. When it was apparent that she had lost her hearing in her left ear, she had a second cochlear implant in 2010 and then another in 2015. RP 521.

L.J.H. was born on April 10, 2007. RP 677-78. Milford “Bear” Butcher and his wife, Kathi were neighbors to the Grants and Heinemanns. RP 413. Paula Grant and her family operated a dairy where Kathi Butcher also worked. RP 414, 418, 519, 524. The Grants developed a friendship with the Butchers. RP 415.

The Butchers had a “Puppy Boot Camp” business, and raised and trained dogs; K.J.G., E.M.H., and L.J.H. would help socialize the dogs around children, and walk, feed and clean up after them. RP 417, 460, 464, 526. The children were paid for the time they spent with the dogs. RP 554.

K.J.G.

K.J.G. started to work for the Butchers when she was four years old,² and went to the Butcher home at least once a week. RP 461, 464. However, K.J.G. began to dislike going to the Butcher residence. RP 465. Butcher would allow the children to take turns driving his Jeep on a gravel road near the residences. RP 426, 465. While doing so, he would have one child sit on his lap³ to “help him drive” while the other children sat in the back seat. RP 465. While K.J.G. sat on Butcher’s lap while driving the jeep, he

² K.J.G. testified that she began to go to the Butcher residence in October of 2010. RP 483. Ms. Grant testified that in July 2011, after K.J.G. had become aware that her cousins worked for the Butchers, K.J.G. began to go to the Butcher residence as well. RP 526.

³ This was observed by an independent witness. RP 603.

touched her vagina with his finger by reaching his hand into her pants. RP 466, 469. On some occasions, Butcher would touch K.J.G.'s vagina over her clothes, and sometimes he would touch her underneath her clothes. RP 470. K.J.G. explained that on some occasions, Butcher's finger went inside her body – "it felt like there was a mass inside...it would kind of hurt sometimes if he ended up going far enough." RP 471. K.J.G. recalled that this occurred "every weekend I would happen to be sitting in the front seat." RP 471.

K.J.G. also recalled that Butcher touched her while they were inside his residence. RP 472. She stated that they would play games like hide and seek, and during one such game, she was in one of the dog kennels when he ran his hand over her "private region" on top of her clothes. RP 472. Butcher threatened to shoot K.J.G. if she told anyone that he had touched her. RP 474.

In October 2011, Ms. Grant became concerned about K.J.G. continuing to go to the Butcher residence. RP 530. The Heinemann children stated that Butcher had been jumping on the bed with them and his pants came off. RP 530. Ms. Grant expressed her concerns to Ms. Butcher, who assured her that "nothing like the touching of the kids the cousins were claiming...would ever, ever happen at their house." RP 532. Trusting and believing Ms. Butcher, Ms. Grant thought that there must have been a

misunderstanding, and permitted K.J.G. to return to the Butcher house. RP 533-34.

On June 30, 2014, Luke Heinemann called Ms. Grant and advised her that his children had reported that Butcher had told them to pull their pants down – one had refused and one had complied. RP 537. Ms. Grant asked K.J.G. whether anything at the Butcher household made her uncomfortable; K.J.G. then disclosed that “she didn’t like it when Bear touched her and she pointed to her crotch.” RP 539. Mr. Grant also recalled that K.J.G. remarked to her parents that she might have blood in her stool⁴ because “Bear keeps putting his fingers down there.” RP 422. Mr. Grant then made a report to law enforcement.⁵ RP 422, 540. Mr. Grant, who was an educator, knew not to press K.J.G. for details, so as not to taint the investigation. RP 424. K.J.G. subsequently disclosed to her father that Butcher would touch her while she was driving the jeep. RP 427. Once K.J.G. told her parents that Butcher had been touching her, she did not return to the Butcher residence. RP 510.

⁴ In 2014, K.J.G. began to have blood in her stool; this was not determined to be related to Butcher’s abuse. RP 420.

⁵ Mr. Grant testified that he made the report on June 30 or July 1, but also testified that the disclosure was made on the Fourth of July weekend. RP 422.

Forensic child interviewer, Karen Winston, conducted an interview with K.J.G. on August 5, 2014, when she was eight years old.⁶ RP 368-69. The interview was recorded and admitted at trial. Ex. P-8. Ms. Winston offered K.J.G. body-diagrams, and asked K.J.G. to mark the areas where Butcher had touched her – K.J.G. circled the crotch area, calling it a “private” and the buttocks, calling it the “bottom.” Ex. P-10, P-11; RP 375-76. During the interview, K.J.G. told Ms. Winston that Butcher had touched her privates “many many times” and every time she drove the jeep. Ex. P-8 at 10:17.⁷ She stated that he would sneak into her pants, which would make her a “crazy driver.” Ex. P-8 at 10:19. She described that he used his finger to do so, that it went “in the inside” and hurt her. Ex. P-8 at 10:22-10:23.

Nurse practitioner Teresa Forshag examined K.J.G., finding no physical evidence of abuse. RP 397-99. The nurse noted that K.J.G. had some history of having blood in her stool, but that symptom could be consistent with either abuse or constipation causing anal fissures. RP 399.

L.J.H. and E.M.H.

L.J.H. also worked at the Butcher residence, raking and picking up after the dogs. RP 612. He began going there when he was three or four

⁶ K.J.G. was approximately 11 ½ years old at the time of trial, which occurred in January 2018.

⁷ The respondent refers to the digital clock found at the bottom of each forensic video rather than the time elapsed of the recording.

years old. RP 619. However, he did not like working for Butcher because “he was inappropriate.” RP 614. L.J.H. recalled Butcher touching his penis, under his clothes, using his hand, more than one time. RP 615. At times, Butcher would make L.J.H. take his clothes off. RP 621. Butcher would also touch L.J.H.’s privates on top of his clothes while L.J.H. sat on his lap driving the car. RP 624. Butcher also tickled L.J.H. which L.J.H. did not enjoy because Butcher also tickled his privates. RP 624. At trial, L.J.H. could not recall whether Butcher had touched any of L.J.H.’s private areas other than his penis. RP 616. L.J.H. did recall that Ms. Butcher was out of the house when Butcher touched L.J.H. RP 617. Butcher told L.J.H. he should not tell anyone about the touching. RP 619. Butcher also showed L.J.H. his gun. RP 623. L.J.H. told his mother about the touching, but she disbelieved him and he got in trouble. RP 625. He returned to Butcher’s home, where the abuse continued, until he and his sister again disclosed to their mother that the abuse was ongoing. RP 625, 694-96.

Ms. Winston also conducted a forensic interview with L.J.H.; he was seven years old at the time of the interview and the interview was admitted at trial. Ex. P-3. During the interview, L.J.H. told her that the first time Butcher touched him, when he was three years old, Butcher began with tickling, and then Butcher’s hand moved down to L.J.H.’s privates – his “penis and butt.” Ex. P-3 at 25:34. He also stated that on one occasion,

Butcher made L.J.H. “punch his privates,” while Butcher controlled L.J.H.’s hands; Butcher did it gently so that it would not hurt. Ex. P-3 at 9:48-9:49:30. He also disclosed that Butcher had touched his buttocks on the outside. Ex. P-3 at 9:57. Winston presented L.J.H. with body-diagrams, and he marked that he had been touched on his penis and buttocks. RP 573; Ex. P-5, P-6. On an adult body-diagram, L.J.H. marked that he had to touch the defendant’s penis. RP 574; Ex. P-7.

L.J.H.’s older sister, E.M.H., also worked for Butcher, walking his dogs and cleaning up after them. RP 645. E.M.H. observed Butcher touch her brother’s penis – sometimes with L.J.H.’s clothing on, and at least once with it off. RP 647. She also observed Butcher touch K.J.G.’s privates – once while her clothes were off and other times when her clothes were on. RP 647. E.M.H. also observed Butcher without his clothing on; while he was naked, he had E.M.H., L.J.H. and K.J.G. touch his penis. RP 647, 659. Butcher also touched E.M.H.’s vagina, under her clothes. RP 650. On one occasion, Butcher told E.M.H. to take her clothing off, and she complied so as not to misbehave; he then touched her private parts. RP 649. E.M.H. also recalled playing in the dog crates with her siblings, when Butcher “turned it into an inappropriate game,” by tickling them on their private parts. RP 652. E.M.H. stated that Butcher would drive the children home in his jeep, and she would sit on his lap and steer. RP 653. Although she enjoyed

this at first, Butcher then began to “tickle our privates while we were trying to drive the car.” RP 653, 673. On at least one occasion, E.M.H. recalled that Butcher’s finger penetrated her vagina; “it was like a little bit inside,” and it hurt her. RP 655, 672.

Once, E.M.H. recalled seeing Butcher with a gun – the children attempted to leave the residence to escape the touching, but Butcher told them that if they did not come back, he would shoot them. RP 651, 664-65. He told her not to tell her parents. RP 652. However, E.M.H. told her parents about the touching, but was not believed and she went back to Butcher’s house to continue to work. RP 649.

Ms. Heinemann stated after going to the Butcher residence for a year and a half or more, her children began to make excuses so as not to be sent there. RP 683. L.J.H. told his mother that “Bear had been touching their privates,” or “pinching his penis.” RP 684-85. When Ms. Heinemann asked E.M.H. about whether anything at the Butcher house made her uncomfortable, E.M.H. cried and, after calming down, told her mother that Bear was touching her privates and she did not like it. RP 686-87. The Heinemanns confronted Butcher, who denied the allegations, stating the children were mistaken. RP 689. After Ms. Butcher told the Heinemanns that the children must be mistaken, and specifically told the Heinemanns she would not allow the children to be alone with Butcher, the Heinemann

children returned to the Butcher house; although the children did not like Butcher, they missed working with the dogs. RP 690, 692-93.

Later, L.J.H. and a younger Heinemann child told Ms. Heinemann that Butcher was “touching them again a lot more and started to do that to them in the car.” RP 694. Upset, L.J.H. disclosed that Butcher had pinched his penis in the car. RP 695. Separately, Ms. Heinemann questioned E.M.H.; E.M.H. was afraid, but told her mother that the children would be forced to take their clothing off and that Bear “would violate⁸ them with his tongue.” RP 696. After seeing a counselor, the children began to disclose new details pertaining to the abuse. RP 700. L.J.H. told his mother that Butcher had produced a gun on one occasion and told them that if they told on him again or tried to run home that he would shoot them. RP 700, 718. E.M.H. also confirmed to her mother that Butcher threatened to shoot them if they told about the abuse again. RP 700-01, 704.

After law enforcement became involved, Detective Brandon Armstrong conducted a child forensic interview with E.M.H. on August 5, 2014. RP 775, 778. At the time of the interview, E.M.H. was nearly nine years old. RP 776. The interview was recorded and admitted at trial. Ex. P-1. During that interview, E.M.H. described Butcher “poking” her

⁸ Ms. Heinemann’s word, not E.M.H.’s. RP 710.

privates with his finger while he let her drive the jeep.⁹ Ex. P-1 at 13:18-13:19:33. She described that, sometimes this occurred outside of her clothing, and she also stated that he would poke “inside” the girls and sometimes outside in the “front” not the back; E.M.H. could not remember how it felt other than to say it did not make her feel good when he went inside because it was “so long ago.” Ex. P-1 at 13:18-13:20, 13:32:45-13:36:45. She also stated that the defendant would also corner the children in the home and remove their clothing; Butcher also played “tickle monster,” with her in the house – she would hide and he would find her and then tickled her belly, but moved down to her privates. Ex. P-1 at 13:20-13:21, 13:30:45-13:31:43.

Nurse practitioner Teresa Forshag examined E.M.H. on August 13, 2014, finding nothing remarkable. RP 394. Forshag testified it is not uncommon that child sexual abuse victims do not evidence any physical findings associated with abuse. RP 394.

Butcher was born January 11, 1950. RP 1103. Butcher denied the allegations, claiming the children were confused or mistaken. RP 1100, 1105. Butcher claimed that even after the first allegations surfaced in 2011,

⁹ E.M.H. said that Butcher tickled the children in the jeep and then they went in the ditch. Ex. P-1 at 13:32:50. It was “basically like tickle-monster” where the defendant would start up high and move down to her privates. Ex. P-1 at 13:33:20.

he allowed the children back in his home because “it wasn’t that big of a deal.” RP 1106.

Procedural History.

During jury selection, the state struck Venireperson 11 (Mr. Xiong), Venireperson 19 (Mr. Hapa) and Venireperson 32 (Mr. Manning), all of whom were of minority ethnicity.¹⁰ The State also struck Venireperson 21 (Mr. Westerman) and Venireperson 26 (Mr. Hunter) who were not of a cognizable racial minority. After the State exercised the peremptory strikes against Venirepersons 11, 19, and 32, the defendant objected, claiming *Batson* violations. The State provided race neutral reasons for striking those members of the venire¹¹ and the court granted the strikes, finding those reasons sufficient. After the jury was empaneled, the prosecutor further observed that Juror 1 (Mr. Valenzuela) was of Hispanic descent and Juror 3 (Mr. Everett) was of Asian descent. The prosecutor’s assessment was confirmed by the trial court.

At sentencing, the defendant argued that the defendant’s convictions were the same criminal conduct and violated double jeopardy. *See e.g.* CP 474. The court disagreed finding that the evidence presented to the jury

¹⁰ Respondent further elaborates upon the facts relevant to the *Batson* claim, below, including citations to the record.

¹¹ The State’s reasons are further discussed below.

showed that the crimes did not occur at the same time and place, and therefore, were not the same criminal conduct. RP 1239. Regarding the defendant's double jeopardy claim, the court found the acts to be separate crimes that did not merge. RP 1240.

The court sentenced the defendant with an offender score of "9+" and imposed a minimum sentence of 318 months to life for the two counts of first degree child rape and a minimum sentence of 198 months to life for the remaining counts of first degree child molestation. CP 528.

IV. ARGUMENT

A. THE DEFENDANT'S *BATSON*¹² CHALLENGES FAIL; THE STATE DID NOT STRIKE THE SOLE MEMBERS OF A RACIAL CLASS. AN OBJECTIVE OBSERVER WOULD NOT CONCLUDE THAT RACE WAS A FACTOR IN THE EXERCISE OF THE STRIKES; THE STATE'S RACE-NEUTRAL REASONS FOR EXERCISING THE STRIKES WERE SUFFICIENT.

1. The State did not strike the sole members of a racially cognizable class.

The defendant's *Batson* analysis begins with the claim that "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 Court." Br. at 25 (emphasis added). This statement is demonstrably unsupported by the record.

¹² *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

After the jury was empaneled,¹³ the trial court confirmed, as the prosecutor noted, that the three minority jurors who were struck from the venire were not the sole members¹⁴ of a racially cognizable group within the venire, and, in fact, minority jurors were ultimately empaneled:

[PROSECUTOR] I don't like to talk about a person based just on what they look like, but as the jury panel was seated, I looked at Juror Number 3, Mr. [Steven Arai] Everett, and if I had to guess Mr. Everett's ethnicity, he appears to me to be an Asian man even though his last name is obviously not Asian. I don't know if he's of mixed race or if he's Caucasian and he just looks Asian to me, which is again why I'm hesitant to bring it up in the first place.

I do want the record to be clear there's at least one ethnic minority that seems easy to identify, and I believe Mr. Everett may be, too. So as distasteful as the conversation is, I think it's important to point out for the record.

1/3/18 RP 261.

THE COURT: I'll note it for the record that it's hard anymore to look at people and guess what ethnicity they are. Obviously, Number 1, Eugene Valenzuela,¹⁵ just by the

¹³ The State also noted during the *Batson* hearing that Venireperson 13, Mr. Valenzuela, "who appears Hispanic" was not stricken by the State. RP 248-49.

¹⁴ In addition to Jurors 1 and 3, Venireperson 40, Robert Law, was African American. 1/3/18 RP 254. However, no venireperson with a number higher than 32 was seated on Butcher's jury. 1/3/18 RP 254; CP 367, 371.

¹⁵ The last name "Valenzuela" is a surname of Spanish origin. The 2000 census claimed that 89.18% of individuals with this surname identified as of Hispanic ethnic origin. <http://www.americanlastnames.us/V/VALENZUELA.html> (last accessed 1/7/19).

name seems to have some kind of ethnic background. I do note Number 3 appeared to be of some Asian de[s]cent.¹⁶

1/3/18 RP 262; *see also* CP 366, 368, 370.

2. Washington State’s *Batson* analysis has evolved since Butcher’s trial.

Washington cases have historically applied the three-part *Batson* test to determine whether a peremptory strike was impermissibly racially motivated.

Under *Batson*, the defendant must first establish a prima facie case that “gives rise to an inference of discriminatory purpose.” *Batson*, 476 U.S. at 94, 106 S.Ct. 1712 (citing *Washington v. Davis*, 426 U.S. 229, 239-42, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976)). As of 2017, in Washington, this first step of the *Batson* test also includes a bright-line rule that the trial court *must* recognize a prima facie case of discriminatory purpose when a party strikes the last member of a racially cognizable group. [*City of Seattle v. Erickson*, 188 Wn.2d at 734, 398 P.3d 1124. Second, “the burden shifts to the State to come forward with a [race-]neutral explanation for [the challenge]” *Batson*, 476 U.S. at 97, 106 S.Ct. 1712. If the State meets its burden at step two, then third, “the trial court then [has] the duty to determine if the defendant has established purposeful discrimination.” *Id.* at 98, 106 S.Ct. 1712.

State v. Jefferson, 192 Wn.2d 225, 231-32, 429 P.3d 467 (2018).

¹⁶ The name “Arai” is generally a Japanese surname, [https://en.wikipedia.org/wiki/Arai_\(surname\)](https://en.wikipedia.org/wiki/Arai_(surname)) (last accessed 1/7/2019), or may be of Indian, French or Pakistani origin, <http://www.indiachildnames.com/surname.aspx?surname=Arai> (last accessed 1/7/2019).

Generally speaking, the Court has historically reviewed *Batson* challenges for clear error, deferring to the trial court to the extent that its rulings are factual. *Id.* (citing *State v. Saintcalle*, 178 Wn.2d 34, 43-44, 309 P.3d 326 (2013)). However, *Jefferson*, further discussed below, also changed the standard of review, such that the trial court’s record and conclusions of law on the *third Batson* step are reviewed de novo, altering “*Batson*’s deferential, ‘clearly erroneous’ standard of review of the purely factual determination about ‘purposeful discrimination.’” 192 Wn.2d at 250. The trial court’s findings that Jurors 1 and 3 (Valenzuela and Everett) were of a racially cognizable class is a determination of fact, separate and apart from the court’s conclusions pertaining to purposeful discrimination; that finding should be given deference on review.

Since the defendant’s trial, occurring in January 2018, the Supreme Court adopted GR 37 on April 5, 2018, in order to address the problems it saw inherent in the *Batson* test; however, in *Jefferson*, the Supreme Court observed that GR 37, promulgated after *Jefferson*’s jury selection, did not apply to his case. 192 Wn.2d at 243-49.

In *Jefferson*, decided on November 1, 2018, the Supreme Court adopted a new element to the *Batson* test to be used in Washington State. Now, according to *Jefferson*, the third step of a *Batson* inquiry asks not whether the defendant has established purposeful discrimination, but rather,

“whether an objective observer could view race or ethnicity as a factor in the use of the peremptory strike.” *Jefferson*, 192 Wn.2d at 249.

Other than to cite *Jefferson* in support of his claim that “[o]ur Supreme Court has great discretion, however, to amend or replace the *Batson* requirements if circumstances so require,” Br. at 26, the defendant makes no attempt to analyze whether, under the circumstances presented in this case, a neutral observer could view race or ethnicity as a factor in the use of the peremptory strike, or whether the rule in *Jefferson* has any bearing, whatsoever on his case. Br. at *passim*. “Passing treatment of an issue, or lack of reasoned argument is insufficient to merit judicial consideration.” *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998), *as amended* (May 22, 1998).

After the defendant filed his opening brief to this Court, but before the State’s brief was completed, the Supreme Court decided *State v. Pierce*, No. 96344-4, on January 9, 2020. 2020 WL 103341. Three Justices in this plurality opinion applied *Jefferson* (and the factors listed in GR 37) to a pre-GR 37 case. 2020 WL 103341, at *6 (González, J., Lead Opinion). A two-Justice concurrence found it “unnecessary to consider how to apply the analysis of GR 37 to [that] 2015 trial.” *Id.* at *7 (Stephens, C.J., concurring). Lastly, the four-Justice dissent argued that the lead opinion improperly applied GR 37 and *Jefferson* to a jury trial which had occurred prior to the

promulgation of the new court rule. *Id.* at *11 (Madsen, J., dissenting). Further, the dissent would have held that, even if GR 37 and *Jefferson* applied to the defendants' trial, an objective observer would conclude that, under the circumstances, race was not a factor in the State's peremptory challenge. *Id.*

Pierce gives little guidance for this Court's resolution of Butcher's *Batson* claim. Our Supreme Court has repeatedly held that plurality opinions are not binding and have little precedential value. *State v. Johnson*, 173 Wn.2d 895, 904, 270 P.3d 591 (2012); *Lauer v. Pierce County*, 173 Wn.2d 242, 258, 267 P.3d 988 (2011). In *Pierce*, three justices held that GR 37 and *Jefferson* were applicable, at least in part, to the defendant's pre-2018 case, four justices would have held the rule and opinion inapplicable, and two did not reach or answer the question. Thus, there was no majority on whether the rules announced in *Jefferson* or GR 37 apply in some fashion to a pre-2018 case. As *Jefferson* held, therefore, GR 37 does not apply to Butcher's case, where his jury selection occurred before the promulgation of the rule. *Jefferson*, 192 Wn.2d at 243-49. *Jefferson*, however, was decided while Butcher's case was pending appeal; that decision, as a new rule of criminal procedure, applies retroactively to all cases pending on direct review or not yet final. *See e.g., In re Haghighi*, 178 Wn.2d 435, 443, 309 P.3d 459 (2013).

Yet, defendant makes no attempt to argue that *Jefferson*'s "objective observer" analysis (which replaced the third step of the traditional *Batson* analysis) applies to his case. Instead, the defendant concentrates his argument on the claim that the State struck the "only" members of a racially cognizable class, thus attempting to bring his case within the ambit of the rule in *Erickson*.¹⁷ As above, that claim is belied by the record. Thus, the bright line rule of *Erickson*, that the trial court *must* recognize a prima facie case of discriminatory purpose when a party strikes the last member of a racially cognizable group, does not apply. Two individuals of a cognizable minority group were seated on the jury – Juror 1 and Juror 3. CP 366. The defendant fails to address how the inclusion of two minority jurors in the jury affects his claim that the State engaged in purposeful (or even unconscious) racial bias in jury selection. It is dubious whether the defendant has even established the first element of a *Batson* claim – a prima facie showing of discriminatory purpose – when two individuals of two racially cognizable classes were *not* challenged by the State and were ultimately seated on the jury.

¹⁷ *City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017).

As a new rule of criminal procedure, *Jefferson* applies to Butcher’s case. Under the new third step of the *Batson* analysis,¹⁸ as amended by *Jefferson*, the defendant cannot demonstrate, even if he had attempted to do so, that an objective observer could perceive that race factored into the exercise of the State’s peremptory strikes. Because Jurors 1 and 3 were of a recognized¹⁹ minority – Juror 1 was Hispanic and Juror 3 was Asian, an objective observer would conclude that, *had* the State sought to eliminate individuals of a racial minority from the jury, the State would have sought to strike those jurors as well.

Furthermore, the timing of the exercise of the State’s strikes also indicates that race was not a factor. The individuals the State struck were Venireperson 11 (Mr. Xiong) who was of Asian descent; Venireperson 32 (Mr. Manning) who was likely of Hispanic descent; and Venireperson 19 (Mr. Hapa) may have been of Asian descent.²⁰ The fact that the State did not exercise a peremptory challenge to a person of Hispanic descent until after allowing Venireperson 13 (Juror 1, Mr. Valenzuela) to remain

¹⁸ The second step of the *Batson* analysis is further discussed below because, despite recent evolutions in the law in this area, that inquiry has been unaltered.

¹⁹ This case evidences the difficulty with the term “recognized” racial class. As further explained herein, the parties (and court) were not sure of the race of at least two of the prospective jurors, but rather, made an educated guess based upon their appearance and name.

²⁰ See 1/3/18 RP 245 (“Your Honor, Johnrey Hapa is another *Batson* challenge. I think he’s of Asian de[s]cent”).

unchallenged when he replaced the original Venireperson 1, cuts against any argument that the State sought to exclude Hispanic jurors. *See* CP 370. Similarly, the fact that the State did not challenge Venireperson 3 (Juror 3, Mr. Everett), before challenging Venireperson 11 or 19, undermines any argument that the State sought to exclude Asian jurors. *See* CP 370. And, the fact that two minority jurors remained on the jury panel undercuts any argument that the State engaged in a “pattern” of striking minority jurors. *See* Br. at 27. For the same reason, an objective observer could not perceive that race factored into the State’s exercise of its peremptory challenges against Venirepersons 11, 19 or 32; the State left unchallenged other minority jurors (of the same minority groups as those who *were* challenged) and those unchallenged individuals were seated on the jury.

3. The State presented valid, race-neutral reasons for the exercise of its peremptory challenges against Venirepersons 11, 19 and 32.

After not exercising peremptory challenges to either Mr. Valenzuela or Mr. Everett, the State ultimately exercised its first peremptory challenge on Venireperson 11 (Mr. Xiong). *See* CP 370 (reflecting the State used its first challenge on Mr. Xiong). The defense alleged a *Batson* violation by the exercise of this strike. 1/3/18 RP 242. The State explained that it sought to strike Mr. Xiong because:

[H]e indicated awareness of a friend who had been accused of child molestation, and he indicated that he had real

concerns about whether those accusations were true, and that he had a real problem with delayed disclosure...it has nothing to do with race. The defendant is Caucasian. I think every person who's either a witness or a victim in this case is Caucasian. There is just no racial basis for me to strike that juror.

1/3/18 RP 242-43.

In finding the State had a race neutral basis for the exercise of the peremptory challenge, the court stated,

One of [Mr. Xiong's] answers to the question was he did have a very close friend who had been accused and that it did have some effect on him. He still said he could be fair and impartial, but that he did have a concern about that. So with that, the State could not challenge him for cause, but they could challenge him at this point for a peremptory challenge.

1/3/18 RP 244-45.²¹

Then, the defendant challenged the State's exercise of another peremptory challenge against Venireperson 19 (Mr. Hapa).²²

1/3/18 RP 245. The State responded:

Judge, it's very difficult for me under these circumstances because I was not aware of nor did I make any notes regarding the juror's race, and for the record, none of the jurors are in the courtroom right now. We're doing this while the jury is on a recess.

So I don't know, or didn't notice any. He was of some recognized ethnic minority. My basis for striking him was; A, I have almost no information on him. It didn't appear that

²¹ See 1/3/18 RP 24-28 for Mr. Xiong's answers during individual voir dire.

²² At the time, Venireperson Hapa was tentatively seated as Juror 12. CP 370.

he spoke up on any of the questions. The detective didn't have any notes about him from any of the questions that I'd asked or that Mr. Phelps had asked, and he has no children, and my preference in a case like this when I'm dealing with younger jurors [sic] is to at least have somebody who has experience either working with or having children of their own to help them understand.

1/3/18 RP 245-46.

Even defense counsel acknowledged that "I think I asked him a question, and he was unable to – he didn't respond to it, and he shook his head and made some noises, but I'm not sure exactly what they meant."²³

1/3/18 RP 246.

The court agreed that Mr. Hapa hardly spoke during jury selection, and that his biography indicated he was single with no children. 1/3/18 RP 247; Ex. C-1 at 10. The Court ruled that the State's explanations were "reasonable reasons for striking the juror other than race." 1/3/18 RP 249-50.

Lastly, the State sought to exercise a peremptory strike for Venireperson 32 (Mr. Manning). 1/3/18 RP 252. At the time, Mr. Manning

²³ For this reason, even if GR 37 applied, or its rationale applied to this case via *Jefferson*, this would not be an impermissible basis upon which to exercise a peremptory strike. Under GR 37(i), if a party relies upon conduct to form the basis for a peremptory challenge, that conduct must be corroborated by either opposing counsel or the court. Here, defense counsel, and the court both corroborated Mr. Hapa's conduct during voir dire.

was tentatively seated as the second alternate juror.²⁴ 1/3/18 RP 252; CP 370. Defense counsel stated, “I don’t know if he’s Hispanic or Asian, but he’s not lily white like the rest of the jury,²⁵ Judge.” 1/3/18 RP 252. The State responded:

Well, Judge, I didn’t notice Mr. Manning being of another race frankly. He didn’t strike me as being a member of an ethnic minority group, His first name is Ricardo, which could mean that it’s a name of Hispanic de[s]cent, could be Spanish, Latin American, Mexican.

The reason I chose to remove him was I wasn’t very happy with either 30²⁶ or 32 because neither of them have children as I’ve discussed before. However, Mr. Manning was the older of the two, and I feel like if I end up having to use one of the alternates because of the delayed disclosure and maybe some new thoughts or more recent thoughts about protecting children from child sexual abuse that I would be better off with a slightly younger juror.

Also, [Juror 30’s] wife is in the medical field; whereas, Mr. Manning’s wife was in manufacturing. I’m hoping that contact with the medical field may make him more sympathetic to the victims in this case.

²⁴ The record is somewhat unclear on this point. The court indicated that defense counsel struck alternate two, Mr. Manning, but stated that “Number 32 will take his spot.” 1/3/18 RP 252. Number 32 was Mr. Manning. CP 368. Then, the State indicated it would use its “reserve [strike] on 32,” which then drew the *Batson* challenge from defense counsel. 1/3/18 RP 252.

²⁵ Defense counsel must not have realized at this point in time that both Juror 1 and Juror 3 were also of a minority group. Regarding Mr. Manning, the Court noted that she did not believe him to be of Asian descent, but that he might be Hispanic. 1/3/18 RP 255.

²⁶ At the time of the exercise of the strike, Number 30 was tentatively seated as the first alternate juror. CP 370.

Those are the reasons that I struck Mr. Manning, who, again,
I did not notice as being of a different race.

1/3/18 RP 252-53 (footnote added).

Indicating that the court had reviewed *Erickson*, the Court concluded that the State's explanation for striking Mr. Manning was "a good enough reason." 1/3/18 RP 255.

Here, there is no record supporting an inference that any of the State's reasons for striking Venirepersons 11, 19 or 32 was pretextual for purposeful discrimination or indicative of either implicit or unconscious bias. It is entirely reasonable that the State would seek to empanel jurors with children or with experience with children²⁷ to hear a case involving three small children, who all delayed in disclosing their abuse and whose allegations varied. A person without children might not have experience

²⁷ The State designated the juror biographies concurrently with the filing of its brief. As seen in those biographies, none of the five individuals the State struck, including two (apparently) Caucasian men, had children. *See* Ex. C-1; CP 370 (State exercised first strike on Mr. Xiong, who had no children, Ex. C-1 at 6; State exercised second strike on Mr. Hunter (Venireperson 26) who had no children, Ex. C-1 at 13; State exercised third strike on Mr. Hapa, who had no children, Ex. C-1 at 10; State exercised fourth strike on Mr. Westerman (Venireperson 21, referred to on "Record of Jurors" chart as "Kendrick Langdon") who had no children, Ex. C-1 at 11, and the State exercised one alternate strike to Mr. Manning, who had no children, Ex. C-1 at 16). It is of note, however, that the State did not seek to strike *female* jurors without children. *See* CP 370; Ex. C-1 at 5 (Piper), 9 (May), 14 (Parsons). All other remaining jurors had children, except for Mr. Horning, a retired widower. Ex. C-1 at 7 (Valenzula), 1 (Dill), 2 (Everett), 7 (Werner), 8 (Sampson), 13 (Kranz), 12 (Lonam), 15 (Mollette) 17 (Alternate 1 – Brock), 17 (Alternate 2 – Peck).

with or an understanding that this is how a child may react to trauma, or that they may have difficulty articulating what occurred.²⁸ Defense counsel made no record that the State sought to excuse *only* minority jurors without

²⁸ See testimony of Karen Winston:

So adults will capture the primary situation very well, and that will go into memory. They'll encode that. Kids will encode the primary pretty well, but not as many as the peripheral details as adults. Adults just have the ability to capture those peripheral details, put them into memory and code them well enough that they can retrieve them pretty well. Kids don't have the ability to do that on top of which they might be playing. They might be doing something else, and they just don't catch all of those details as well. So the number of times -- no, the other thing is if something is happening that's pretty traumatic, you're not there with a clicker keeping track of how many times it happened. So even adults at that point don't recall how many times, as well.

RP 373.

Kids are very good at remembering some things. Even preschoolers are good at remembering some things, and particularly the primary issue, they can remember those very well. It's just those details, and the other thing is that even the best kid is not going to be able to give you the whole story with all the details the very first time. They may think of something later. They may, you know, remember something that they left out, that kind of thing.

RP 374.

I don't think that they go through them and, you know, catalog how many times it happens, and the other thing is kids will -- they'll put these incidents together very often and not always keep track of them.

RP 375.

Children don't make disclosures all wrapped up in a nice little package. They make them in bits and starts as they remember things as they feel more comfortable talking about things...those peripheral details will often come out later...

RP 592.

children, but allowed nonminority jurors without children to remain on the jury. Similarly, there is no evidence that, with regard to Mr. Xiong, the State's exercise of a peremptory strike based upon the juror's experience with a friend who had been accused of sexual assault and concerns about delayed reporting was a pretextual excuse or otherwise indicative of implicit bias.²⁹ This reason was supported by the record, and, there is no indication that the State failed to challenge similarly situated venirepersons who were not minorities. In the absence of any record that the State used its race neutral reasons as a pretext to strike minority jurors or that its use of the strikes was the result of implicit bias,³⁰ and considering the fact that two jurors belonging to a cognizable group were not challenged, and ultimately were seated on the jury, this Court should affirm the trial court's findings that the State presented sufficient race neutral reasons to strike Mr. Xiong,

²⁹ Under GR 37(h)(iii), it is presumptively invalid to challenge a juror based upon his or her close relationship with people who have been stopped, arrested or convicted of a crime. Even if this presumption applied to Butcher's case, via *Jefferson*, the State's reason for striking Mr. Xiong was his concern with delayed reporting of child sexual abuse, and the veracity of those allegations; he was not struck simply because he had an acquaintance who had been accused or charged with a crime.

³⁰ Although GR 37 does not apply to the defendant's case as explained above, none of the presumptively invalid reasons for exercising a peremptory strike were used by the prosecutor in this case. *See* GR 37(h). No record was made that would support any findings under GR 37(g) that the prospective jurors were questioned disproportionately, that nonminority jurors who provided similar answers were not stricken, that the reasons proffered for the exercise of the strikes would disproportionately affect minority jurors, or that this prosecutor has a history of disproportionate exercise of peremptories against minority jurors.

Mr. Hapa and Mr. Manning. For all of these reasons, the *Jefferson* “objective observer” test is not satisfied because it cannot be said that an objective observer would conclude that race was a factor in the exercise of any of the State’s peremptory strikes. This claim fails.

B. THE DEFENDANT’S SUFFICIENCY OF THE EVIDENCE CHALLENGE FAILS.

1. Standard of review for sufficiency of the evidence claims.

In reviewing a challenge to the sufficiency of the evidence, the test is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be interpreted most strongly against the defendant. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

Circumstantial evidence carries the same weight, and is as reliable as direct evidence. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). “[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation.” *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). “[A] verdict does not rest on speculation or conjecture when founded on reasonable inferences drawn from circumstantial facts.” *State v. Jameison*, 4 Wn. App. 2d 184, 197-98, 421 P.3d 463 (2018).

In a sufficiency of the evidence challenge, the court is highly deferential to the decision of the jury. *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014). In that regard, our Supreme Court has stated:

It is the province of the jury to weigh the evidence, under proper instructions, and determine the facts. It is the province of the jury to believe, or disbelieve, any witness whose testimony it is called upon to consider. If there is substantial evidence (as distinguished from a scintilla) on both sides of an issue, what the trial court believes after hearing the testimony, and what this court believes after reading the record, is immaterial. The finding of the jury, upon substantial, conflicting evidence properly submitted to it, is final.

State v. Williams, 96 Wn.2d 215, 222, 634 P.2d 868 (1981). Similarly expressed:

The fact that a trial or appellate court may conclude the evidence is not convincing, or may find the evidence hard to reconcile in some of its aspects, or may think some evidence

appears to refute or negative guilt, or to cast doubt thereon, does not justify the court's setting aside the jury's verdict.

State v. Randecker, 79 Wn.2d 512, 517-18, 487 P.2d 1295 (1971).

2. Counts alleging first degree child rape.

A person is guilty of rape of a child in the first degree “when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.” RCW 9A.44.073(1). As defined by statute, “sexual intercourse,” in pertinent part, “*has its ordinary meaning* and occurs upon any penetration, however slight.” RCW 9A.44.010(1)(a), (b)³¹ (emphasis added); *see* WPIC 45.01.

³¹ In full, RCW 9A.44.010(1) and (2) state:

(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.

(2) “Sexual contact” means any 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.

Count 1 – First Degree Rape of a Child, K.J.G.

The State's theory was that Butcher penetrated K.J.G.'s vagina with his finger while riding in the Jeep. RP 1167-68. This theory was supported by sufficient evidence. During trial, K.J.G. testified, with regard to the defendant penetrating her vagina while she rode on his lap in the jeep, that "it felt like there was a mass inside...it would kind of hurt sometimes if he ended up going far enough." RP 471. K.J.G. recalled that this occurred "every weekend I would happen to be sitting in the front seat." RP 471. This trial testimony is supported by her statement three and one-half years earlier during the forensic interview that Butcher used his finger play with her privates, that it went "in the inside," and hurt her. Ex. P-10 at 14:25-14:50. Sufficient evidence exists by which a rational jury could determine that Butcher raped K.J.G.

Count 5 – First Degree Rape of a Child, E.M.H.

The State's theory with regard to this count was that Butcher "poked inside" of E.M.H. RP 1167-69. This theory was supported by sufficient evidence. During trial, E.M.H. testified that while riding on Butcher's lap in the jeep, he would "tickle our privates while we were trying to drive the car." RP 653, 673. On at least one occasion, E.M.H. recalled that Butcher's finger penetrated her vagina; "it was like a little bit inside," and it hurt her.

RP 655, 672. Sufficient evidence existed that penetration, however slight, occurred.

3. Counts alleging first degree child molestation.

A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim. RCW 9A.44.083. “Sexual contact” means any 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. RCW 9A.44.010(2).

Count 2 – First Degree Child Molestation, K.J.G.

The State’s theory was that K.J.G. not only described a specific act of child rape occurring within the Jeep, but also described a separate act of child molestation also occurring in the jeep – touching of K.J.G.’s private area without penetration. RP 1169, 1171. During trial, K.J.G. testified that on some occasions, Butcher would touch K.J.G.’s vagina *over* her clothes, and sometimes he would touch her underneath her clothes. RP 470. This testimony was corroborated by the child’s forensic interview three years earlier in which she stated Butcher had touched her privates “many, many times” and every time she was driving the jeep. Ex. P-10 at 9:00. She stated

that he would sneak into her pants, which would make her a “crazy driver.” Ex. P-10 at 10:27-10:37. Sufficient evidence existed that Butcher had sexual contact with K.J.G.’s intimate areas without penetration on one of the numerous occasions she rode in the jeep on his lap.

Counts 3 and 4 – First Degree Child Molestation, E.M.H.

The State alleged two specific instances of first degree child molestation involving victim E.M.H.: (1) Butcher touched E.M.H.’s privates while they were in the jeep, and no penetration occurred; and (2) Butcher touched E.M.H.’s privates while playing “tickle monster” in the house. RP 1172.

As with K.J.G., E.M.H. described multiple acts of child molestation occurring in the jeep, with at least one concluding with penetration, thus making it a rape. In her forensic interview, E.M.H. recounted that sometimes the touching occurred on the outside of her clothing, which would be more consistent with a molestation, than with a rape. Separately, in her forensic interview, E.M.H. described Butcher playing “tickle monster” in the house – she would hide, and he would find her and tickle her, starting with her stomach, but would then move to her privates. The evidence was sufficient to support separate convictions for two additional counts of child molestation.

Counts 6, 7, and 8 – First Degree Child Molestation, L.J.H.

The State alleged three specific instances of first degree child molestation involving L.J.H.: (1) Butcher forced L.J.H. to touch his (Butcher's) penis; (2) Butcher touched L.J.H.'s privates while L.J.H. was driving the jeep; (3) Butcher touched L.J.H.'s bottom. RP 1172.

Regarding Count 6, L.J.H. told the forensic interviewer that Butcher made L.J.H. "punch his privates," while Butcher controlled L.J.H.'s hands; Butcher did it gently so that it would not hurt. Ex. P-3 at 14:36-15:08. On an adult body-diagram, L.J.H. marked that he had to touch the defendant's penis. RP 574; Ex. P-7. This was sufficient evidence to sustain Butcher's conviction for one count of child molestation pertaining to L.J.H. Although L.J.H. did not testify to this act of molestation at trial, it was up to the jury to determine if his earlier interview was credible.

Regarding Count 7, L.J.H. testified at trial that he recalled Butcher touching his penis, under his clothes, using his hand, more than one time. RP 615. At times, he would make L.J.H. take his clothes off. RP 621. Butcher would also touch L.J.H.'s privates on top of his clothes while L.J.H. sat on his lap driving the car. RP 624. Butcher also tickled L.J.H. which L.J.H. did not enjoy because Butcher tickled his privates. RP 624. This evidence is sufficient to support a conviction for count 7.

Regarding Count 8, the State alleged that the defendant had touched L.J.H.'s buttocks. At trial, L.J.H. could not recall whether Butcher had touched any of L.J.H.'s private areas other than his penis. RP 616. However, L.J.H.'s forensic interview, occurring three and one-half years before trial demonstrated that L.J.H. recalled, at that time, that Butcher had touched his buttocks on the outside. Ex. P-3 at 23:00-23:08. Winston presented L.J.H. with body-diagrams, and he marked that he had been touched on his penis and buttocks. RP 573; Ex. P-5, P-6. The jury considered L.J.H.'s age, ability to recall facts, and overall demeanor, both in court, and on video, and determined that his statements during the forensic interview were credible. This evidence is sufficient to sustain a separate conviction for child molestation.

All three children involved in this case testified and stated during their forensic interviews that Butcher repeatedly touched their intimate areas, whether their vagina, penis or buttocks. This abuse occurred over many years. Any inconsistencies arising in the children's testimony were for the jury to consider during deliberations.³² In this case, the jury

³² The defendant alleges that the facts pertaining to the defendant's use of a firearm to threaten the children into compliance was "not borne out." Br. at 29. The defendant was not charged with the use of a firearm to commit the crimes, and so, the use was not an element of any of the crimes charged. The use of the firearm was only relevant insofar as it established a reason why the children would

necessarily considered those inconsistencies, weighed the evidence, and must have determined that the inconsistencies were attributable to the memories of child victims. As stated above, Ms. Winston discussed that child victims do not always present what happened to them “all wrapped up in a nice little package.” RP 592. The jury considered that testimony, and the testimony of the children, and found the children’s testimony (and their interviews) proved the charges beyond a reasonable doubt. The children’s credibility is not subject to review on appeal. Therefore, this claim fails.

C. THE TRIAL COURT DID NOT ERR IN DETERMINING THE OFFENSES WERE NOT THE SAME COURSE OF CONDUCT.

The defendant claims that the acts alleged and proven were either the same course of conduct and/or multiple punishments for those acts violated double jeopardy. This claim has no merit.

At sentencing, the trial court found that the evidence presented at trial showed that the crimes did not occur at the same time and place, and therefore, were not the same criminal conduct. RP 1239. Regarding the defendant’s double jeopardy claim, the court found the acts to be separate crimes that did not merge. RP 1240.

continue to go to and/or remain at the Butcher residence (in addition to the children’s love of dogs), despite Butcher’s conduct.

1. Same course of conduct.

A trial court's determination of what constitutes the same criminal conduct for purposes of calculating an offender score will not be reversed absent an abuse of discretion or misapplication of the law. *State v. Walden*, 69 Wn. App. 183, 188, 847 P.2d 956 (1993). The defendant has the burden of proving that current offenses constitute the same criminal conduct. *State v. Graciano*, 176 Wn.2d 531, 539-40, 295 P.3d 219 (2013). Because this finding favors the defendant by lowering his offender score, it is the defendant who must convince the sentencing court to exercise its discretion in his favor. *Id.*

The scheme - and the burden - could not be more straightforward: each of a defendant's convictions counts towards his offender score *unless* he convinces the court that they involved the same criminal intent, time, place, and victim. The decision to grant or deny this modification is within the sound discretion of the trial court and, like other circumstances in which the movant invokes the discretion of the court, the defendant bears the burden of production and persuasion.

Id. at 540 (emphasis in original).

Offenses are the same criminal conduct if they require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a). In this context, "intent" does not mean the particular statutory mens rea required for the crime. *State v. Davis*, 174 Wn. App. 623, 642, 300 P.3d 465, *review denied*, 178 Wn.2d 1012

(2013). Rather, it means the defendant’s “objective criminal purpose in committing the crime.” *Id.* at 642 (quoting *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144, *review denied*, 114 Wn.2d 1030 (1990) (“[F]or example, the intent of robbery is to acquire property, and the intent of attempted murder is to kill someone”). As part of this analysis, courts also look to whether one crime furthered another. *Graciano*, 176 Wn.2d at 540.

Courts narrowly construe the same criminal conduct rule and if any of the three elements is missing, each conviction must count separately in the calculation of the defendant’s offender score. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). This narrow construction disallows most claims that multiple offenses constitute the same criminal act. *Graciano*, 176 Wn.2d at 540.

Here the defendant’s acts do not constitute the same criminal conduct for purposes of sentencing because each act against each child occurred at a different time (and sometimes, place). The children testified the abuse occurred over many years. During the school year, the abuse occurred on weekends when the children would travel to the Butcher home. During the summer break, the children would be at the Butcher residence more frequently. The female victims described acts of molestation, separate and apart from the acts of rape that occurred. The trial court did not abuse

its discretion in determining that these separate acts were not the same course of conduct such that offenses should be scored as one point for the defendant's criminal history.

2. Double jeopardy.

Whether convictions violate double jeopardy is a question of law that an appellate court reviews de novo. *State v. Jackman*, 156 Wn.2d 736, 746, 132 P.3d 136 (2006), *as corrected* (Feb. 14, 2007). Washington courts apply two different tests for assessing whether double jeopardy precludes two convictions. The first test involves the situation where a defendant suffers multiple convictions for violating several and distinct statutory provisions; in this type of case, the courts apply the "same evidence" test. *State v. Adel*, 136 Wn.2d 629, 632-35, 965 P.2d 1072 (1998). The second circumstance is when a defendant has multiple convictions for violating the *same statute*; for such a claim, the courts implement the "unit of prosecution" test. *Adel*, 136 Wn.2d at 634. Here, the defendant only alleges that the convictions for rape and molestation pertaining to K.J.G. and E.M.H. violate double jeopardy – thus, the question is governed by the "same evidence test."

Under the same evidence test, double jeopardy is violated if a defendant is convicted of offenses that are the same in law and in fact. *Id.* at 632-33. Under this test, if the crimes charged and proved are the same in

law and in fact, they may not be punished separately absent clear and contrary legislative intent. *State v. Freeman*, 153 Wn.2d 765, 776-77, 108 P.3d 753 (2005). “If each crime contains an element that the other does not, [an appellate court] presume[s] that the crimes are not the same offense for double jeopardy purposes.” *Id.* at 772. In doing so, an appellate court considers the elements as the State charged and proved the offenses. *Id.* at 777. However, if each of a defendant’s convictions “arises from a separate and distinct act,” the offenses are factually different and there is no double jeopardy violation. *State v. Fuentes*, 179 Wn.2d 808, 824, 318 P.3d 257 (2014). “If one crime is over before another charged crime is committed, and different evidence is used to prove the second crime, then the two crimes are not the ‘same offense’ and a perpetrator may be punished separately for each crime without violating a defendant’s double jeopardy rights.” *State v. Noltie*, 116 Wn.2d 831, 848, 809 P.2d 190 (1991).

Here, the defendant argues that he was convicted of child molestation by virtue of the fact that child molestation occurred immediately preceding or during the commission of the rape. Br. at 29-30. In support, he cites *State v. Calle*, 125 Wn.2d 769, 888 P.2d 155 (1995). *Calle* is inapplicable to this case because, in *Calle*, the defendant’s convictions for incest and rape “arose from a single act of intercourse.” *Id.* at 771. Here, the defendant molested the children over a number of years,

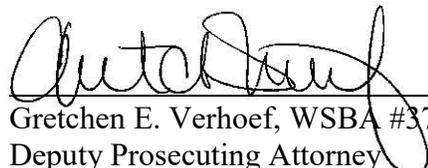
and, with regard to the girls, during at least one instance, penetration occurred, turning the act into a rape. As discussed above, the State specifically elected the acts supporting each crime, and each of those acts was distinct. Thus, because there was not a single act of molestation and rape, occurring at the same time similar to *Calle*, this claim fails.

V. CONCLUSION

The State respectfully requests this Court affirm the jury verdicts and the judgment. No *Batson* error occurred – minority jurors were seated on the defendant’s jury, contrary to his claim, and there is no evidence that race factored into any of the State’s peremptory strikes. Sufficient evidence exists to support each of the defendant’s convictions – credibility issues are not subject to review on appeal. Lastly, the trial court did not err in determining that the defendant’s criminal acts were not the same course of conduct for purposes of sentencing and did not otherwise violate double jeopardy.

Dated this 17 day of January, 2020.

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

STATE OF WASHINGTON,

Respondent,

v.

MILFORD BUTCHER,

Appellant.

NO. 36087-3-III

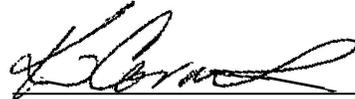
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SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on January 17, 2020, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Ken Kato
khkato@comcast.net

1/17/2020
(Date)

Spokane, WA
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(Signature)

SPOKANE COUNTY PROSECUTOR

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