NO. 47835-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

EDWARD JAMES WILKINS,

Appellant.

SUPPLEMENTAL RESPONDENT'S BRIEF

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HALL OF JUSTICE
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I. ISSUES PRESENTED

Was the State estopped from responding to Wilkins' argument on appeal that his rape of a child in the first degree and child molestation in the first degree convictions violated double jeopardy?

II. STATEMENT OF THE CASE

Wilkins was charged with rape of a child in the first degree for having sexual intercourse with three-and-a-half-year-old N.H. RP at 347-350, 366, 415, 421-24. As a result of their genital-to-genital contact, N.H. acquired genital herpes. RP at 459, 465-66, 469. Prior to trial the State moved to amend the information, adding a count of child molestation in the first degree. RP at 232; CP at 9-10. Wilkins' attorney acknowledged that the amendment would not change the evidence, but objected to form, maintaining the counts should be charged in the alternative. RP at 232.

The following exchange then took place between the prosecutor and the court:

> Court: Mr. Bentson, is it – is it a – is it a separate and distinct act or is it an alt –
>
> Prosecutor: Well, it's the same –
>
> Court: -- alternate?
>
> Prosecutor: -- act, Your Honor. Your – you don't have to charge them as alternatives. I mean, that's really the State's option, whether we charge two things. If you had penetration, you have Rape of a Child 1. If you had a child molest, you have Rape Child 2. And –

> Court: Is there any con – any – any concern that the jury could make a determination of guilty on both counts?
>
> Prosecutor: I think if the jury were to find him guilty of both counts, then the Court would then throw out the lower count. I think that's how it's done.
>
> Court: So the rule of lenity doesn't apply?
>
> Prosecutor: No, not the rule of lenity, Your Honor. I think that would be for statutory interpretation.
>
> Court: Okay.
>
> Prosecutor: But I think if you have two and you have a – merger issue, then the lesser one goes away. So we do that with the understanding that if they find him guilty of both, the Court would be dismissing the child molest in the first degree at some point, or –
>
> Court: I mean, is it akin to charging someone with residential burglary or burglary in the second degree, and just kind of depending on how the jury interprets the evidence? Is that kind of the approach?
>
> Prosecutor: Right, Your Honor, I think child molest in the first degree is not a lesser-included of rape of a child in the first degree, and the reason for that is rape of a child in the first degree requires penetration, whereas child molest in the first degree requires sexual contact with – for the purpose of sexual gratification....
>
> RP at 233-34.

Wilkins' attorney agreed the evidence would permit the jury to find both crimes, but again objected, maintaining the two crimes should be charged in the alternative. RP at 234-35. The court granted the motion to amend. RP at 235. Wilkins was convicted of both crimes. RP at 618.

convictions violated double jeopardy.[1] *Appellant's Opening Brief* at 7-11. The State opposed this argument. *Respondent's Brief* at 8-11.

III. ARGUMENT

A. THE STATE WAS NOT ESTOPPED FROM OPPOSING WILKINS' DOUBLE JEOPARDY ARGUMENT.

If the State's representation at trial was a legal concession on the issue of double jeopardy, this did not estop the State from arguing double jeopardy was not violated on appeal. "[I]t is well established that *a party concession or admission concerning a question of law* or the legal effect of a statute as opposed to a statement of fact *is not binding on the court.*" *State v. Knighten*, 109 Wn.2d 896, 902, 748 P.2d 1118 (1988) (emphasis in original) (quoting *Dettore v. Brighton TP., Etc.*, 91 Mich.App. 526, 534, 284 N.W.2d 148 (1979)). At the time of the amended information, the prosecutor indicated that because the two crimes were based on a single act, he thought the court would dismiss the lesser charge if Wilkins was convicted of both. Later, at sentencing, both the State and Wilkins agreed that the crimes should be treated as same criminal conduct, thus it was

[1] Wilkins did not argue for estoppel in his brief. In his double jeopardy argument he stated: "Initially the prosecutor acknowledged the child molestation charge would be dismissed if the jury convicted Mr. Wilkins of both child molestation and rape of a child. The state agreed that a single act supported both charges. Still, the court entered convictions and sentences against Mr. Wilkins for both charges." *Appellant's Opening Brief* at 7-8. Because the estoppel issue was not argued, the State's brief did not discuss these facts in detail. Now that the Court had ordered supplemental briefing, it is noteworthy that Wilkins agreed that the crimes were same criminal conduct at the time of sentencing. Perhaps because estoppel was not at issue, his brief omitted this fact.

unnecessary to dismiss one of the crimes. Because the prosecutor's statement was not a factual concession but a legal one, the State was not estopped from taking a different position on appeal.

"Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." *Cunningham v. Reliable Concrete Plumbing, Inc.*, 126 Wn.App. 222, 224-25, 108 P.3d 147 (2005). "There are two primary purposes behind the doctrine: preservation of respect for judicial proceedings and avoidance of inconsistency, duplicity, and waste of time." *Anfinson, v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 861, 281 P.3d 289 (2012). Importantly, judicial estoppel is not intended to provide a technical defense for litigants seeking to derail potentially meritorious claims. *Miller v. Campbell*, 164 Wn.2d 529, 544, 192 P.3d 352 (2008).

Questions that guide a trial court's determination of whether to apply judicial estoppel are: (1) whether a party's current position is inconsistent with an earlier position, (2) whether judicial acceptance of an inconsistent position in the later proceeding will create the perception that the party misled either the first or second court, and (3) whether the party asserting the inconsistent position will obtain an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Afinson*,

174 Wn.App at 861-62. Judicial estoppel is only available when the first court adopted the inconsistent claim or position, either as a preliminary matter or as part of a final disposition. *Taylor v. Bell*, 185 Wn.App. 270, 282-83, 340 P.3d 951 (2014), *review denied*, 183 Wn.2d 1012 (2015).

In the criminal context, a court is "not bound by erroneous concessions of legal principles." *Knighten*, 109 Wn.2d at 902. For example in *Knighten*, the Supreme Court was not bound by the State's previous concession that there was no probable cause for arrest at the time of Knighten's detention. *Id.* at 901-02. The Court drew an important distinction between a concession on a matter of law, which is not binding, and concession of fact, that would be binding. *Id.* at 902. The Court stated: "'Whether or not such a concession was made is unimportant, and of course, this court is nowise bound thereby, the question being one of law to be determined from admitted facts.'" *Id.* (quoting *In re Dunn's Estate*, 31 Wn.2d 512, 528, 197 P.2d 606 (1948)).

Here, because at the time of the amendment the State's concession was legal, it does not bind this Court, permitting the State to oppose Wilkins' double jeopardy claim on appeal. When moving to amend the information, the prosecutor explained that the two crimes listed were based on a single act. RP at 233. At the time, double jeopardy was not discussed. RP at 232-35. The prosecutor expressed a belief that there

may be a future merger issue.[2] RP at 233. Of course, at this point in the proceedings neither double jeopardy nor merger were at issue because Wilkins had not yet been convicted or acquitted of either crime. *See State v. Michelli*, 132 Wn.2d 229, 238-39, 937 P.2d 587 (1997) (explaining the merger doctrine does not prevent the State from charging multiple crimes even if those crimes merge, and that "the question of merger arises only after the State has successfully obtained guilty verdicts on the charges that allegedly merge."); *State v. Freeman*, 153 Wn.2d 765, 770-71, 108 P.3d 753 (2005) (applying *Michelli* to the double jeopardy analysis). Thus, when the motion to amend was made, the issue before the court was whether Wilkins could be charged with two crimes based on a single act.

At sentencing, both the prosecutor and Wilkins agreed that because the crimes were based on a single act they should be treated as same criminal conduct. RP at 631-32. Wilkins' attorney stated: "The Court allowed the amendment as stated, but at the time, the parties all indicated it should be same criminal conduct if he was convicted of both and it shouldn't count against each other." RP at 632. Thus, Wilkins and the

[2] The prosecutor's statements about what would happen if Wilkins was convicted of both crimes were qualified: "I think if the jury were to find him guilty of both counts, then the Court would then throw out the lower count. I think that's how it's done. RP at 233. And, "I think if you have two and you have a – merger issue, then the lesser one goes away. So we do that with the understanding that if they find him guilty of both, the Court would be dismissing the child molest in the first degree at some point, or –" RP at 233. The prosecutor's use of the word "or" prior to being cut off by the court suggests the prosecutor may been about to state an alternative. Because the issue of multiple convictions was not yet before the court, these statements were irrelevant to the motion.

State agreed the crimes should be counted as same criminal conduct at sentencing. Wilkins now takes a different position on appeal, arguing that the two convictions violated double jeopardy. Just as Wilkins' prior legal concession at sentencing does not bar him from arguing double jeopardy on appeal, the State should not be bound by a prior legal concession on a point that was not even at issue at the time of the amendment.

Moreover, the court's decision to treat the two crimes as same criminal conduct at sentencing demonstrates that it did not rely on any assertion of a future dismissal when it granted the motion to amend. Obviously, the trial judge had heard from the parties at the time the motion to amend was granted and was aware of what had been stated. Had the trial court interpreted the law as requiring dismissal of the child molestation conviction it could have done so. The court's decision not to dismiss demonstrates its decision on the motion to amend was not based on an intention to dismiss later should a conviction result.

At the time of the amendment, the court's concern was whether the State could charge two separate crimes based on a single act. At sentencing, neither the parties nor the court viewed the State's earlier statements as inconsistent with the position that was taken. To prevent Wilkins from being punished for both crimes, the State advocated for treating the crimes as same criminal conduct because they were based on a

single act, and Wilkins agreed. Neither the court nor Wilkins' attorney claimed to have been misled when the information was amended. Further, the prosecutor demonstrated a continuing effort to be correct legally, stating: "in reading the cases on this, the Court has to make a finding they were same criminal conduct." RP at 631. Thus, there was no attempt to mislead the court or evidence the court was misled. Finally, no unfair advantage was gained by the State's earlier position, because the issues of merger or double jeopardy had no bearing on whether a motion to amend should be granted. The court was required to base its decision on whether the amendment prejudiced Wilkins in his defense.[3] Wilkins' attorney never asserted such prejudice and agreed both crimes were appropriate because of how the jury might interpret the evidence. RP at 235.

When Wilkins argued double jeopardy for the first time on appeal, the State responded by arguing the two offenses were same criminal conduct, consistent with its position at sentencing. Not until sentencing did double jeopardy become an issue, as prior to this point Wilkins had not yet been convicted of two crimes. Since double jeopardy and merger were not at issue at the time of the amendment, the prosecutor's comments

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[3] CrR 2.1(d) permits amending an information "at any time before verdict . . . if substantial rights of the defendant are not prejudiced." "Where the principal element in the new charge is inherent in the previous charge and no other prejudice is demonstrated, it is not an abuse of discretion to allow amendment on the day of trial." *State v. Gosser*, 33 Wn.App. 428, 435, 656 P.2d 514 (1982).

regarding merger at that time should not be considered inconsistent with the State's argument on appeal. Because judicial estoppel is only available when the first court adopted the inconsistent claim or position, and the trial court did not adopt the inconsistent position, estoppel should not apply here. *See Taylor*, 185 Wn.App. at 273, 282-83.

But even if the prosecutor's reference to merger is interpreted as a legal concession that was inconsistent with its argument on appeal, this concession was erroneous on the issue of double jeopardy: "Where the only evidence of sexual intercourse supporting a count of child rape is evidence of penetration, rape is not the same offense as child molestation." *State v. Land*, 172 Wn.App. 593, 600, 295 P.3d 782 (2013). As in *Knighten*, because an erroneous legal concession does not bind the Court, the State was not estopped from opposing Wilkins' double jeopardy claim.

IV. CONCLUSION

For the above stated reasons, judicial estoppel did not prevent the State from responding to Wilkins' argument.

Respectfully submitted this 4th day of April, 2017.

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CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on April 4th, 2017.

Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTOR
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