S. Ct. No. 98892-7
COA No. 36087-3-III

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MILFORD L. BUTCHER,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Milford L. Butcher asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Milford seeks review of the decision of the Court of Appeals, Division III, filed on July 15, 2020, affirming his convictions and sentence. A copy of the opinion is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

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

2. Was the State's evidence insufficient to support the convictions beyond a reasonable doubt?

3. Did the court err by determining the convictions were not barred by double jeopardy and/or were the same criminal conduct?

D. 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, 1014; 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).

Ms. Winston did a forensic interview with L.J.H. the same day as K.J.G. (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 Butchers' 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 find it, 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 G., 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. Mr. G.'s wife and Kathi, Mr. Butcher's wife, interacted and worked at the Gs' 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. G. 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. G. discussed this incident with his sister-in-law, Desiree H. (RP 442). Wondering whether it was a concern or not, Mr. G. felt nothing needed reporting. (RP 443). After the touching and bleeding, he changed his mind. (*Id*.). At this time, Mr. G. was unaware of allegations by his sister-in-law's kids. (RP 450).

Mr. G.'s wife, Paula, talked with Kathi Butcher and the G parents 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. G. 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. G. 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. G. saw it. (*Id*.). 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). She liked going there, but mildly disliked it when Mr. Butcher drove them 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). He always touched the lower region, the vagina. (RP 466). And it happened to her. (*Id*.).

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, perhaps once. (RP 472, 473). She did not see him touch other kids. (RP 473-74).

K.J.G. testified Mr. Butcher had a gun. While telling her 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 said 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, when some abuse occurred as Mr. Butcher touched her lower region when playing the game while she was 5 or 6. (RP 499, 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 G., K.J.G.'s mother and the sister of Janet H., had two kids, K.J.G. and C.G. (RP 517-19). Her brother Luke's wife was Desiree H. (RP 521). Ms. G. 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. G. 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*.).

A concern arose regarding the Butcher home about October 2011. (RP 528). Ms. G.'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. G.'s sister-in-law, Desiree, told her about it. (*Id*.). Ms. G. 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. G. trusted her and thought it was a misunderstanding. (RP 531-32). She did not talk to Mr. Butcher and decided to let K.J.G. go back to the Butchers. (RP 533). Her daughter enjoyed going there because she loved the dogs. (RP 534).

The Gs discussed the accusations with the Hs. (RP 534). Luke H. 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 H kids went back to the Butchers. (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 H kids went over to the Butchers and Bear told them to pull their pants down. One refused; the other did. (*Id*.). The Gs 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. G. went to the H house and told them Mr. Butcher was touching K.J.G., too. (*Id*.). Mr. G. 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. (RP 544). Ms. G. said the gun incident happened at the Butchers' home. (RP 545). 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 at her first time there. (RP 551). Neither of the other kids said anything about a gun. (*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 and touched their privates. (RP 614-615). Mr. Butcher touched L.J.H.'s penis with his hands. (*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*.). He 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. (RP 626).

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 in it, 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 he 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 H.'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. (RP653). 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 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 without a 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 H. 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. worked at 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 H. 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 Hs did not tell the Gs 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 return. (*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. H. asked E.M.H. what was happening, she became upset and told her Mr. Butcher said for them to take their clothes off and he would violate 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 H. and Ryan G. 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. H.'s kids went back in December 2011. (RP 708).

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. G. on July 2, 2014. (RP 741). It involved a child molestation accusation so he told Mr. G. a sex crimes detective would be in touch in a day or two. (RP 748-49). Deputy Chamberlain spoke only to Mr. G. (RP 749). On July 3, he spoke with Desiree H., 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. G. said K.J.G. had fingers put in her and had 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, the detective said he did not get a warrant 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, and 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 socialize 10-week old dogs. (RP 958). The routine was to walk with the dogs to the H house and pick up the kids at 9 a.m. (RP 960). If the G 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 G 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 on 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 H 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 H. asking her to come over that day, so she met with her and Nancy, her mother. (RP 1029-30, 1032). Janet related that 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 Hs 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 as Bear did not have the opportunity and would never do anything like that anyway. (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 nor did he 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 them in the jeep. (*Id*.). After 2011, Ms. Butcher did not leave him alone with the kids. (RP 1115).

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 closing argument, the State articulated 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. (RP1171). 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 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 of 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*.).

The Court of Appeals affirmed in an unpublished opinion.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Batson has a three-part test when attempting to prove a racially motivated strike. *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 90 L. Ed.2d 69 (1986). First, the defendant must establish a prima facie case giving rise to an inference of discriminatory purpose. 476 U.S. at 94; *State v. Jefferson*, 192 Wn.2d 225, 231-32, 429 P.3d 467 (2018). The struck juror must also be a member of a "cognizable racial group." *City of Seattle v. Erickson*, 188 Wn.2d 721, 732, 398 P.3d 1124 (2017). When the State strikes the final member of such a group, the accused automatically presents a prima facie case of discrimination. On this record, that is what happened here.

Second, if a prima facie case is made, the burden shifts to the prosecutor to provide an adequate, race-neutral reason for the strike. *Jefferson*, 192 Wn.2d at 232. 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. *Id*. Mr. Butcher having made a prima facie showing of racial discrimination, the trial court was required to conduct a full *Batson* analysis by the trial court. *Erickson*, 188 Wn.2d at 724. After agreeing with the State's purported race-neutral reasons for

removing these jurors, the court did not do that analysis. (1/3/18 RP 245, 250, 255).

The Court of Appeals nevertheless determined Mr. Butcher did not establish a prima facie case for a *Batson* challenge. To support its reasoning, the Court of Appeals engages in racial stereotyping by assuming Mr. Xiong and Mr. Hopa were Asian by their very names. (Op. at 9). Yet, Mr. Everett, whose name was not "Asian-sounding," was branded as Asian because he looked like he was. (*Id*.). The trial and appellate courts engaged in the worst kind of racial inequity by essentially concluding, "If it sounds like one, it must be one; if it looks like one, it must be one." This cannot be what *Batson* and *Jefferson* stand for. Indeed, the *Batson* challenges were timely made and all the trial court had to do was direct inquiry as to those stricken jurors' race or ethnicity. It did not. The Court of Appeals then said "[s]ubjective impressions of race by counsel do not suffice." *State v. Brogden*, 329 N.C. 534, 407 S.E.2d 158, 166 (1991). Subjective impressions by judges likewise should not suffice and their speculation as to the ethnicity of seated juror Valenzuela, in particular, is insufficient.

Review is warranted under RAP 13.4(b)(1) as the Court

of Appeals decision conflicts with both *Jefferson* and *Erickson*. This case has the facts to be the test for analyzing *Batson* challenges under those Washington Supreme Court decisions. Accordingly, the issue presented is one of substantial public interest that should be determined by this Court. RAP 13.4(b)(4).

As to the sufficiency of the evidence, the court did not address the issue on the ground that it did not consider conclusory arguments unsupported by citation to authority. *Joy v. Department of Labor & Industries*, 170 Wn. App. 614, 629, 283 P.2d 187 (2012), *review denied*, 176 Wn.2d 1021 (2013). To the contrary, argument was made and authority was provided. The Court of Appeals apparently did not want to deal with the issue. But that is its duty.

As stated in Mr. Butcher's brief, resolution of the case depended on whom the jury believed. *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. 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. Those inconsistencies were set forth in his statement of the case,

which the court did read as the opinion borrows from it.

Even if the State's evidence is taken as true, the issue remains whether the elements of all the crimes were proven beyond a reasonable doubt. The State fell short of proving Mr. Butcher committed first degree child rape and first degree child molestation. The children going back to the Butchers' puppy boot camp even after the allegations were made is inconsistent with what they said happened to them. The parents did not believe them, either. 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 could not stand. *State v. Hutton*, 7 Wn. App. 7 Wn. App. 726, 728, 502 P.2d 1037 (1972).

Mr. Butcher presented argument and authority for his sufficiency challenge. The Court of Appeals' decision to ignore it conflicts with *Joy* and review should be accepted under RAP 13.4(b)(2).

Mr. Butcher argued the State's charging him 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 presented by the State 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.

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*. By finding no double jeopardy violation, the Court of

Appeals decision conflicts with *Calle* and *Tvedt* so review is appropriate under RAP 13.4(b)(1).

As for same criminal conduct, the defense argued double jeopardy was also implicated in its challenge. *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 were 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). Indeed, as argued by the defense at trial, the offenses occurred in the same course of criminal conduct. So viewed, the multipliers should not have been used and the offender score was incorrect. Remand for resentencing is the remedy.

By finding the crimes of first degree rape of a child and first degree child molestation involving K.J.G. and E.M.H., respectively, were not the same criminal conduct, the Court of Appeals decision

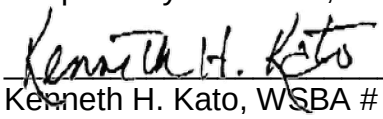
conflicts with this court's decisions in *Hughes*, *Calle*, *Adel*, and *Pena Fuentes*, thus warranting review under RAP 13.4(b)(1).

F. CONCLUSION

Based on the foregoing facts and authorities, Mr. Butcher respectfully urges this Court to grant his Petition for Review.

DATED this 12th day of August, 2020.

Respectfully submitted,



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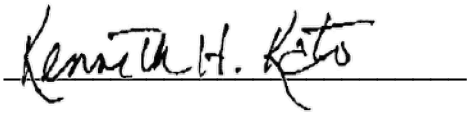
CERTIFICATE OF SERVICE

I certify that on August 12, 2020, I served a copy of the petition for review by USPS on Milford L. Butcher, # 405098, PO Box 769, Connell, WA 99326; and by the eFiling portal on Gretchen Verhoef at her email address.



APPENDIX

Renee S. Townsley
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CASE # 360873
State of Washington v. Milford Lee Butcher
SPOKANE COUNTY SUPERIOR COURT No. 151005538

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be <u>received</u> (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:sh
Enclosure
c: **E-mail** Honorable Annette S. Plese

c: Milford Lee Butcher
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FILED
JULY 16, 2020
In the Office of the Clerk of Court
WA State Court of Appeals Division III

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

STATE OF WASHINGTON,	)	
	)	No. 36087-3-III
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
MILFORD LEE "BEAR" BUTCHER,	)	
	)	
Appellant.	)	

FEARING, J. — Milford Butcher appeals, on many grounds, his multiple convictions for rape of a child and child molestation and his sentencing. He raises *Batson* challenges to jury selection. He claims insufficient evidence supports his convictions. He asserts that rape convictions and child molestation convictions covered the same acts and thereby violate double jeopardy principles. Finally, he argues that some of the convictions constitute the same criminal conduct for purposes of sentencing. We reject his assignments of error.

FACTS

We glean the facts from trial testimony. We recite the facts in a version favorable to the State. The names of all minors and the last names of the minors' parents are

pseudonyms. Because the minor children called the appellant Milford Butcher "Bear," this opinion sometimes refers to him as "Bear."

The alleged victims are three young children, two of whom are brother and sister and the third who is a cousin of the other two. The children were neighbors of the accused, Milford Butcher. Because the victims are minors, we do not know specific dates of the alleged rapes or molestations.

In 2001, Ryan and Paula Gilbert moved to a ten acre plot of land in rural Spokane County. Five years later on August 14, 2006, their daughter, Karen, was born. Paula Gilbert's brother, Luke Hartzog, and his wife Desiree, reside with their children across the street from the Gilberts' residence. Elaine Hartzog was born on November 9, 2005, and Lowell Hartzog was born on April 10, 2007. Karen, Elaine, and Lowell are the alleged victims. Paula Gilbert and Luke Hartzog operate a dairy farm nearby.

Milford "Bear" Butcher and his wife, Kathi Butcher, were neighbors to the Gilberts and the Hartzogs. In 2005, Paula Gilbert hired Kathi as a part-time milker at the dairy. The Gilberts and the Butchers thereafter developed a close friendship.

Milford and Kathi Butcher operated, on their rural property, a business known as "Puppy Boot Camp," which business crate trained, house broke, and socialized ten-week-old puppies. Report of Proceedings (RP) at 944-45. From 2010 to 2014, the three children, Karen Gilbert, Elaine Hartzog, and Lowell Hartzog frequented the Butchers' dog operation. The three often walked the puppies, fed them, and cleaned up their waste.

The Butchers paid the children for the time they spent caring for the dogs. The only adults involved at the Puppy Boot Camp operation were Milford and Kathi Butcher.

In October 2011, Paula Gilbert heard from the Hartzog children that Milford Butcher directed them to pull down their pants, and, while jumping on the bed with them, Butcher's pants fell down. Paula expressed concerns to Kathi Butcher, who promised her that nothing of the sort happened at the Butcher residence. Paula Gilbert trusted Kathi and concluded that the Hartzog children mistakenly reported the misconduct. The three children thereafter continued to assist at Puppy Boot Camp.

According to Karen Gilbert, Milford Butcher permitted the children to drive his Jeep on a gravel road in the neighborhood. The driving child sat on his lap to steer the car while the other children sat in the back passenger compartment. On many occasions as Karen sat on Butcher's lap and steered the Jeep, Butcher touched her vagina with his finger both over and under her clothes. On some occasions, Butcher's finger penetrated Karen's vagina. Milford Butcher also touched Karen Gilbert while inside his residence. Karen and her cousins played hide and seek, and, during one such game, Butcher ran his hand over Karen's vagina on top of her clothes while she hid in a dog kennel. Butcher threatened to shoot Karen if she told anyone that he touched her.

Elaine and Lowell Hartzog experienced the same touching from the hands of Milford Butcher. Butcher touched Lowell's penis, under Lowell's clothes, on more than one occasion. Sometimes, Butcher ordered Lowell to remove Lowell's clothes and then

asked Lowell to touch Butcher's penis. Butcher also touched Lowell's privates on top of his clothes when Lowell sat on his lap while driving the car. Butcher tickled Lowell on his privates. Kathi Butcher was not present when Butcher touched him. Butcher told Lowell he should not tell anyone about the touching. Butcher also showed Lowell his gun.

Milford Butcher touched Elaine Hartzog's vagina under her clothes. One time, Butcher told Elaine to take her clothing off, she complied, and Butcher touched her vagina. Butcher told Elaine not to tell anyone, otherwise he would not give her food after working with the dogs.

Milford Butcher directed Elaine to sit on his lap and steer his Jeep. While Elaine steered, Butcher tickled Elaine's vagina on the outside of her clothes. Butcher's finger once penetrated Elaine's vagina. On one occasion, Butcher, while naked, directed her, Lowell, and Karen Gilbert to touch his penis.

Elaine Hartzog saw Milford Butcher touch Lowell's penis, sometimes with Lowell's clothing on once with his clothes removed. Elaine also observed Butcher touch Karen's vagina, once with Karen unclothed and other times with her clothed.

One day the children, including Elaine Hartzog, saw Milford Butcher carrying a gun. The children began to run home, but Butcher told them that, if they did not return, he would shoot them.

At some unknown date, Desiree Hartzog, Lowell and Elaine's mother, noticed that her children no longer wished to visit Puppy Boot Camp and made excuses to avoid going to the Butcher residence. Lowell then told his mother that "Bear had been touching their privates" and "pinching his penis." RP at 684-85. When Desiree Hartzog asked Elaine about her time at the Bucher home, Elaine cried and, after calming down, told her mother that Butcher touched her vagina. Desiree and Luke Hartzog confronted Butcher, who denied the allegations. After a conversation with the extended family, the Hartzog parents allowed Elaine and Lowell to return to the Butcher property to work with the dogs because the parents thought their children misunderstood the behavior of Butcher. Kathi Butcher then promised to stay with the children at all times.

At some later date, Lowell Hartzog reported to his mother that Milford Butcher continued to touch his penis and increased the frequency of the touching. Desiree Hartzog questioned Elaine outside the presence of Lowell. Elaine haltingly told her mother that Butcher ordered the children to remove their clothes and Butcher then licked their privates.

On June 30, 2014, Luke Hartzog telephoned Paula Gilbert and advised her that his children reported that Milford Butcher directed them to remove their pants. Paula asked her daughter Karen whether anything at the Butcher household discomforted her. Karen pointed to her vagina and reported that "she didn't like it when Bear touched her." RP at

538. Karen told both parents that she might have blood in her stool because "Bear keeps putting his fingers down there." RP at 422.

Ryan Gilbert reported Milford Butcher's conduct to law enforcement. Ryan did not then press Karen for any more details of the misconduct.

On July 2, 2014, Spokane County Sheriff's Office Deputy Craig Chamberlin interviewed Ryan Gilbert. Ryan commented that Bear Butcher inserted his fingers inside his daughter's vagina. On July 3, Desiree Hartzog contacted Deputy Chamberlin and informed him of her children's reports about Milford Butcher's behavior.

On August 5, 2014, forensic child interviewer, Karen Winston, conducted separate interviews of Karen Gilbert and Lowell Hartzog. On the same day, Spokane County Sheriff's Office Detective Brandon Armstrong interviewed Elaine Hartzog. The interviews were audio and video recorded.

PROCEDURE

The State of Washington charged Milford "Bear" Butcher with eight crimes: (1) first degree child rape of Karen Gilbert occurring between August 1, 2010 and July 2, 2014, (2) first degree child molestation of Karen occurring between August 1, 2010 and July 2, 2014, (3) first degree molestation of Elaine Hartzog occurring between July 23, 2010 and July 2, 2014, (4) first degree child molestation of Elaine occurring between July 23, 2010 and July 2, 2014, (5) first degree child rape of Elaine occurring between July 23, 2010 and July 2, 2014, (6) first degree child molestation of Lowell Hartzog occurring

between July 25, 2010 and July 2, 2014, (7) first degree child molestation of Lowell occurring between July 25, 2010 and July 2, 2014, and (8) first degree child molestation of Lowell occurring between July 25, 2010 and July 2, 2014.

During jury selection on January 3, 2018, the State used peremptory challenges to strike at least three venire people: juror 11 Goua Xiong, juror 19 Johnrey Hopa, and juror 32 Ricardo Manning. Milford Butcher alleged a *Batson* violation after the striking of each of the three. *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

After the preemptory removal of Goua Xiong from the jury, Milford Butcher's counsel remarked:

> [THE DEFENSE]: Yes, Your Honor. That's a gentleman—I can't pronounce his name, Judge. Appears to be Goua Xiong, Number 11, and that's the first strike of the prosecutor. I think he's probably one of three or four people on the jury of color, and I'm making a *Batson* challenge.

RP (Jan. 3, 2018) at 242. The State's attorney responded:

> [THE STATE]: Your Honor, the basis that I have for scratching that juror was that he 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 the delayed disclosure in that case, and it was for those reasons that I struck this juror.
>
> It had nothing to do with his race. The defendant is Caucasian. I think every person who's either a witness or a victim in this case is Caucasian. There just is no racial basis for me to strike that juror.

RP (Jan. 3, 2018) at 242-43. The trial court concluded that the State presented a race neutral basis for removing Goua Xiong from the jury panel and denied Milford Butcher's *Batson* challenge.

Milford Butcher identified juror 19 Johnrey Hapa as possibly being of Asian heritage and also challenged the State's exercise of a peremptory challenge of Hapa. Defense counsel commented:

> Your Honor, Johnrey Hapa is another *Batson* challenge. I think he's of Asian de[s]cent.

RP (Jan. 3, 2018) at 245. The prosecuting attorney responded:

> [THE STATE]: 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 in this case was; A, I have almost no information on him. It didn't appear that 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 is to at least have somebody who has experience either working with or having their own children to help them understand.
>
> So, Judge, those are the bases for my strike if Your Honor does find that Juror Number 19 was part of an ethnic minority.

RP (Jan. 3, 2018) at 245-46.

The trial court agreed with Milford Butcher that Johnrey Hapa was of Asian descent. The court concurred with the State's assessment that Hapa rarely spoke during jury selection and his biography indicated he was single with no children. Butcher

asserted that the State's proffered reasons for excluding Hapa did not satisfy *Batson*. The State's attorney added:

> I want people who understand children and, also, when a person doesn't pipe up or volunteer anything, I try to have a pretty engaging voir dire. It's a little bit of a red flag to me.
>
> Also, I'll point out, I mean, I hate telling [sic] these things up because it sounds like points, and it makes it sound racist, but I left Number 13, Mr. Valenzuela, who appears to be Hispanic, and his name suggests is. I have no racial reason for dismissing any of the challenges—dismissing any of the jurors that I challenged preemptory.

RP (Jan. 3, 2018) at 248-49. The trial court denied the second *Batson* challenge because the State's explanations were acceptable reasons for striking the juror other than the juror's race.

The State exercised a peremptory strike for prospective juror 32 Ricardo Manning. Defense counsel lodged another *Batson* challenge. Counsel commented that he did not know whether Manning was Hispanic or Asian, but that Manning did not appear to be non-Hispanic Caucasian. The prosecutor responded:

> [THE STATE]: 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 I wasn't very happy with either 30 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 the importance of 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.
>
> So those are the reasons that I struck Mr. Manning, who, again, I did not notice as being of a different race.

RP (Jan. 3, 2018) at 252-53. At the time of the State's removal of Ricardo Manning, juror 30 was tentatively seated as the first alternate juror.

The trial court denied Milford Butcher's third *Batson* challenge. The court commented that the State presented a sufficient race neutral basis.

After empaneling of the jury, the prosecutor noted that at least one minority juror sat on the panel:

> [THE STATE]: 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. 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.

RP (Jan. 3, 2018) at 261. The trial court added:

> 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, just by the name seems to have some kind of ethnic background. I do note Number 3 appeared to be of some Asian de[s]cent. Anymore I'm not really sure, but the Court made its rulings.

RP (Jan. 3, 2018) at 262-63.

Karen Winston, former director of the Child Advocacy Center at Partners with Families and Children, testified at trial. Winston conducted a child interview with Karen Gilbert on August 5, 2014, when Karen was eight years old. The trial court admitted the recorded interview and played the video for the jury. During the interview, Winston offered Karen body diagrams and asked Karen to mark the areas where Milford Butcher touched her. Karen circled the crotch area, calling it a "private" and the buttocks, calling it the "bottom." Ex. P-10, P-11; RP at 376. Karen told Winston that Butcher touched her privates "many many times" and "only in the truck." Ex. P-8, at 8 min., 30-59 sec. (audio of child interview with Karen). She stated that he sneaked into her pants and underneath her underwear, which made her a "crazy driver." Ex. P-8, at 10 min., 20-39 sec. Karen described that Butcher used his finger, that the finger went "in the inside," and that the finger hurt her. Ex. P-8, at 14 min., 24-50 sec. She knew Butcher inserted his finger because "I would recognize his finger anywhere in my body." Ex. P-8, at 14 min. 39-45 sec.

Karen Winston also conducted a forensic interview with Lowell Hartzog. The trial court admitted the recorded interview as Exhibit P-3, and played it for the jury. During the interview, Lowell told Winston that "Bear" forced him, his sister, and his cousins to pull their pants down while Kathi Butcher smoked elsewhere. Ex. P-3, at 10 min.-12 min., 10 sec. (audio of child interview with Lowell). Lowell reported that Butcher made him "punch [Butcher's] privates," while Butcher controlled his hands, and

that "he did it gently." Ex. P-3, at 14 min., 13-59 sec. Lowell also asserted that Butcher tickled him high on his chest and then moved down to his penis. Ex. P-3, at 25 min., 30-40 sec. Butcher also touched his buttocks on the outside. Ex. P-3, at 23 min., 5-7 sec. Winston presented Lowell with body diagrams, and Lowell marked his penis and buttocks. On an adult body diagram, Lowell marked that he had to touch Butcher's penis.

Detective Brandon Armstrong testified that Elaine Hartzog was nearly nine years old at the time he interviewed her. The trial court admitted as Exhibit P-1 the recorded interview, and the State played the recording to the jury. During the interview, Elaine described Milford Butcher "poking" her privates with his finger while she drove his Jeep. Ex. P-1, at 13 min., 39-50 sec. (audio of child interview with Elaine). Elaine added that Butcher cornered the children and pulled their pants down. Ex. P-1, at 9 min., 20-30 sec. Sometimes Butcher touched her on top of her clothing and sometimes he poked "inside" her pants. Ex. P-1, at 13 min., 2-sec. to 14 min., 55 sec. Butcher also played "tickle monster" with her, by tickling her belly and her vagina. Ex. P-1, at 25 min., 10-55 sec. Butcher poked her privates on the inside, "on the top" when she was alone, but he touched her on the outside of her clothes when the other children were present. Ex. P-1, at 29 min., 1-37 sec.

After the State rested its case, Milford Butcher moved to dismiss based 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, and counts VI, VII, and VIII being the same course of conduct. Butcher asked the trial court to dismiss, at a minimum, two of those counts. Butcher also argued that the State presented no evidence that he raped Elaine Hartzog, the basis of count V. The trial court ruled that same course of conduct was a sentencing, not a charging, issue and sufficient testimony supported all eight charges.

Milford Butcher testified in his own behalf. He denied having any sexual contact with the kids. Butcher averred that, after the first allegations of his touching in 2011, he allowed the children back in his home because the children were confused and the allegations were of little importance. After the 2011 accusations, Kathi did not leave Butcher alone with the children. Butcher conceded that he allowed the children to sit on his lap while he drove his Jeep. He wrapped his hand around the driver's waist to keep him or her from the steering wheel. Butcher insisted that he did not place his hand close to their privates during the drives.

During the State's closing argument, the prosecuting attorney listed for the jury the particular incidents relating to each count. Count I, first degree rape of a child, involved Milford Butcher's penetration of Karen Gilbert while in the Jeep. Count II, child molestation in the first degree, involved touching Karen without penetration in the Jeep. Count III, child molestation in the first degree, involved the touching of Elaine Hartzog without penetration while in the Jeep. Count IV, child molestation in the first

degree, involved Elaine while Milford Butcher played "tickle monster." RP at 1172. Count V, rape of a child in the first degree, refers to the occasion when Butcher poked inside Elaine's vagina. Count VI, child molestation in the first degree, involved Butcher forcing Lowell Hartzog to touch Butcher's penis. Count VII, child molestation in the first degree, involved the touching of Lowell's penis while Lowell drove the Jeep. Finally, Count VIII, child molestation in the first degree, involved the touching of Lowell's bottom.

The jury returned guilty verdicts on each count. At the sentencing hearing, Milford Butcher argued double jeopardy and same criminal conduct. Butcher noted the way the State charged the crimes acted as an enhancement to the sentence. Moreover, Butcher argued the multipliers under the sentencing scheme constituted double jeopardy because it permitted further punishment on top of the original punishment for the crime. Butcher also argued the enhancements were not found by a jury so they were improper. The State denied that any of offense constituted the same criminal conduct as another offense because the acts occurred at different times and at different places.

The trial court concluded that the evidence showed that the crimes did not occur at the same time and place, and, therefore, no two convictions constituted the same criminal conduct. The court also rejected the application of double jeopardy.

LAW AND ANALYSIS

On appeal, Milford Butcher challenges his convictions based on a lack of evidence and the State's purported discriminatory choosing of jurors. Butcher challenges his sentence on the basis of double jeopardy and same criminal conduct. We address his contention of insufficient evidence first since we would dismiss the charges if we agreed.

Sufficiency of Evidence

Milford Butcher contends that the jury needed to speculate in order to find him guilty of each crime charged. In turn, he claims that insufficient evidence supports each conviction.

Although he recognizes the principles of law applied to sufficiency of the evidence challenges, Milford Butcher argues that the testimony of the children contained inconsistencies and that the children falsely asserted that he displayed a gun. In support of these factual contentions in his brief's argument section, Butcher cites "See Statement of the Case." Br. of Appellant at 29. Butcher, however, fails to cite specific trial testimony to show inconsistencies in the children's testimony or to show that the evidence did not fulfill each element of the crimes. He also fails to discuss the elements of rape of a child in the first degree or first degree child molestation and whether the State presented evidence to support those elements. Finally, we note that Butcher's contentions conflict with the rule that the jury decides who told the truth.

We decline to address Milford Butcher's sufficiency of the evidence argument. RAP 10.3(a)(6) directs each party to supply, in its brief, "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." This court does not consider conclusory arguments unsupported by citation to authority. *Joy v. Department of Labor & Industries*, 170 Wn. App. 614, 629, 285 P.3d 187 (2012). 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).

Jury Selection

On appeal, Milford Butcher contends the trial court erred when it denied his *Batson* challenges to the State's peremptory removal of the only three minority jurors in the box. The State disputes that it removed all of the minority members of the venire. The State argues that it presented sufficient race neutral reasons for the peremptory challenges and that an objective observer would not conclude that race was a factor in the exercise of the strikes.

The State denies a criminal defendant equal protection of the laws when it excludes members of the jury, even during a peremptory challenge, on the basis of race. *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). A juror may be excluded if unfit, but a person's race does not render him or her unfit as a juror.

Thiel v. Southern Pacific Co., 328 U.S. 217, 227, 66 S. Ct. 984, 90 L. Ed. 1181 (1946); *Batson v. Kentucky*, 476 U.S. at 87.

Washington cases apply a three-part test when the accused asserts that the State exercised a peremptory strike based on race. *State v. Jefferson*, 192 Wn.2d 225, 231, 429 P.3d 467 (2018). First, the defendant must establish a prima facie case that suggests an inference of discriminatory purpose. *Batson v. Kentucky*, 476 U.S. at 93-94; *State v. Jefferson*, 192 Wn.2d at 231-32. As part of the first prong, the accused must first demonstrate that the struck juror is a member of a "cognizable racial group." *City of Seattle v. Erickson*, 188 Wn.2d 721, 732, 398 P.3d 1124 (2017). When assessing whether the defendant establishes a prima facie case, the trial court should consider all relevant circumstances, including a pattern of strikes against members of a constitutionally cognizable group and the prosecutor's questions and statements during voir dire. *Batson v. Kentucky*, 476 U.S. at 96-97. More importantly, when the State strikes the final member of a racially cognizable group, the accused automatically presents a prima facie case of discrimination. *State v. Jefferson*, 192 Wn.2d at 232; *City of Seattle v. Erickson*, 188 Wn.2d at 724 (2017).

Under the second prong of the Washington test, if the defendant shows a prima facie case, the burden shifts to the prosecutor to provide a race-neutral explanation for the challenge. *State v. Jefferson*, 192 Wn.2d at 232. Third, if the State meets its burden at step two, the trial court must determine if the defendant establishes "purposeful

discrimination." *State v. Jefferson*, 192 Wn.2d at 232. This appeals court reviews *Batson* challenges for clear error and defers to the trial court to the extent that its rulings are factual. *State v. Jefferson*, 192 Wn.2d at 232.

As noted earlier, step one of the *Batson* analysis requires the defendant to establish a prima facie case giving rise to an inference of discriminatory purpose. Milford Butcher solely contends that he made a prima facie showing of racial discrimination by relying on the bright line rule announced in *City of Seattle v. Erickson* to the effect that the State removed the final member of a racial group from the jury pool.

On appeal, Milford Butcher contends that Goua Xiong, Johnrey Hopa, and Ricardo Manning, the three struck jurors, were each the sole member of a particular race in the jury venire. When challenging the removal of Goua Xiong, trial counsel stated that Xiong was a juror of color. But he did not indicate the race. We might guess that, based on his name, Xiong is of Asian descent.

When challenging the State's peremptory removal of Johnrey Hapa, defense counsel remarked: "I think he's of Asian de[s]cent." RP at 245. The trial court agreed with Butcher that Hapa was of Asian descent.

Next, when the State exercised a peremptory strike for Ricardo Manning, Milford Butcher's counsel responded that he did not know whether Manning was either Hispanic or Asian, but exclaimed that Manning was not white. The prosecutor denied that

Manning was of any ethnicity. The State's attorney emphasized that he left a Hispanic named Valenzuela on the jury.

After empanelment of the jury, the State's attorney commented that juror 3, Steven Everett, was of Asian descent despite his last name. The court further mentioned juror Eugene Valenzuela was Hispanic and that juror Steven Everett appeared to be of Asian descent. Butcher did not challenge the trial court's and the State's assessment that Everett was of Asian descent.

We conclude that Milford Butcher did not establish a per se prima facie case for his *Batson* challenge. Assuming Goua Xiong and Johnrey Hapa are Asian, the final panel included the Asian Steven Everett. We do not know if, during a *Batson* challenge, a "cognizable racial group" is Asians as a whole, or if the litigants should establish the discreet nationality or subrace of the jurors. Butcher cites no law to assist us. Assuming Ricardo Manning to be of Hispanic descent, the cognizable group of Hispanics was represented on the jury by Steve Valenzuela.

We note some uncertainty as to the identity of the races of jurors. Other courts have held that the accused carries the burden of showing the ethnicity of removed and remaining jurors when asserting a *Batson* challenge on appeal. *State v. Bennett*, 843 S.E.2d 222, 231, (N.C. 2020); *State v. Raynor*, 334 Conn. 264, 221 A.3d 401, 404 (2019); *Commonwealth v. Reid*, 627 Pa. 151, 99 A.3d 470, 485 (2014). Subjective impressions

of race by counsel do not suffice. *State v. Brogden*, 329 N.C. 534, 407 S.E.2d 158, 166 (1991).

Same Criminal Conduct

Milford Butcher contends that the multiple convictions involving Karen Gilbert were one in fact and law as they were acts done to the same victim during the same course of conduct. Butcher repeats this argument with the multiple convictions involving Elaine Hartzog. Because the child molestation and rape merged and were one offense, Butcher further argues that sentencing him for each offense separately with respect to Karen and Elaine violated double jeopardy. The State responds that the trial court properly determined the offenses were not the same course of conduct.

A determination of "same criminal conduct" at sentencing affects the standard range sentence by altering the offender score, calculated by adding a specified number of points for each prior offense. RCW 9.94A.525. For purposes of the offender score calculation, current offenses are treated as prior convictions. RCW 9.94A.589 (1)(a). But, "if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime." RCW 9.94A.589 (1)(a).

Offenses are the "same criminal conduct" when 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). Deciding whether crimes involve the same time, place, and victim

involves determinations of fact. *State v. Graciano*, 176 Wn.2d 531, 536, 295 P.3d 219 (2013). 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 at 539-40. 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 offense score. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

Milford Butcher claims only that the crimes of rape of a child in the first degree of Karen Gilbert and Elaine Hartzog constitute the same criminal conduct as the first degree child molestation charges involving the respective child. We disagree. Elaine Hartzog and Karen Gilbert testified that the sexual contact occurred at different times over many years. Sometimes the sexual touching occurred in Butcher's vehicle, other times it happened inside the home. The abuse did not occur at the same time and place.

Both girls also described the acts of molestation as being separate from the acts of rape. Karen recalled Butcher touching her vagina both over and under her clothes at different times. Sometimes, Butcher's finger penetrated Karen's vagina. Karen noted that this occurred every weekend that she sat in the driver's seat of the car. Similarly, Elaine testified that Butcher asked her to take her clothing off, she complied, and Milford

then touched her vagina. On a different occasion, Butcher's finger penetrated Elaine's vagina while she drove the Jeep.

Double Jeopardy

Milford Butcher next argues that his first degree child rape and first degree child molestation convictions respectively relating to Karen Gilbert and Elaine Hartzog violate the prohibition against double jeopardy because the rape and molestation charges merge into one crime. We disagree.

The United States Constitution provides that a person may not be subject for the same offense to be twice put in jeopardy of life or limb. U.S. CONST. amend. V. Similarly, the Washington State Constitution provides that a person may not be twice put in jeopardy for the same offense. WASH. CONST. art. I, § 9. The guaranty against double jeopardy protects against multiple punishments for the same offense. *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). "A double jeopardy claim is of constitutional proportions and may be raised for the first time on appeal." *State v. Mutch*, 171 Wn.2d 646, 661-62, 254 P.3d 803 (2011). This court's review is de novo. *State v. Mutch*, 171 Wn.2d at 662. The remedy for a double jeopardy violation is to vacate the lesser of the two convictions. *State v. Womac*, 160 Wn.2d 643, 660, 160 P.3d 40 (2007).

To determine whether multiple convictions violate the prohibition against double jeopardy, this court first examines the language of the applicable statutes. *State v. Hughes*, 166 Wn.2d 675, 681, 212 P.3d 558 (2009). If the statutes do not expressly allow

for multiple convictions arising from the same act, this court then determines whether two statutory offenses are the same in law and in fact. *State v. Calle*, 125 Wn.2d at 777. If each offense includes elements not included in the other, the offenses are different and a presumption arises that the legislature intended to allow multiple punishments for the same act. *State v. Calle*, 125 Wn.2d at 777.

An individual is guilty of first degree child rape "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). An individual is guilty of first degree child molestation "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(1). "Sexual contact" is "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party." RCW 9A.44.010(2).

Because neither statute expressly authorizes multiple convictions for offenses arising out of a single act, the next step is to determine whether the two statutory offenses are the same in law and in fact. Offenses are not the same if there is any element in one offense not included in the other and proof of one offense would not necessarily prove the other. *State v. Trujillo*, 112 Wn. App. 390, 410, 49 P.3d 935 (2002). Child

molestation requires that the offender act for the purpose of sexual gratification, an element not included in first degree rape of a child, and first degree rape of a child requires that penetration or oral to genital contact occur, an element not required in child molestation. Thus, each offense requires proof of an element that the other does not, and therefore "the offenses are not the 'same offense' for double jeopardy purposes." *State v. Jones*, 71 Wn. App. 798, 825, 863 P.2d 85 (1993). Under the same analysis, "child molestation does not merge as a lesser included offense of rape of a child." *State v. Jones*, 71 Wn. App. at 825.

Although *State v. Jones* held that child molestation and rape of a child do not merge, Milford Butcher, relying solely on *State v. Calle*, 125 Wn.2d 769 (1995), asserts that the rape and molestation charges merge when the molestation occurs during the commission of the rape. Without a citation to the record, Butcher argues he was convicted of child molestation by virtue of the fact that child molestation occurred immediately preceding or during the commission of the rape.

State v. Calle does not assist Milford Butcher. The trial court convicted James Calle of first degree incest and second degree rape arising from a single act of intercourse. The Supreme Court recognized that the offenses charged may be identical in fact since both occurred when Calle had sexual intercourse with the victim. Nevertheless, the convictions were not identical in law. Incest requires proof of a

familial relationship, while rape requires proof of force. Thus, double jeopardy did not preclude punishment for both convictions.

Similarly the offenses of rape of a child and child molestation are not identical in law. Nor did the convictions relating to Karen Gilbert and Elaine Hartzog arise from a single act of molestation and rape. Both girls testified that the molestation occurred over a period of time, on different occasions, either inside the house or in Milford Butcher's Jeep. During at least one instance, Butcher respectively penetrated the vagina of a child, turning the act into a rape. The State elected the acts supporting each crime, and each of those acts were distinct.

CONCLUSIONS

We affirm Milford Butcher's convictions and his sentence.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.

WE CONCUR:

Lawrence-Berrey, J.

Pennell, C.J.

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