

No. 41179-2-II
COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent

vs.

ZACHARY V. S. COLLINS,

Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY
The Honorable Wm. Thomas McPhee, Judge
Cause No. 09-1-01264-8

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P.M. 2-18-2011

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to reduce the trial court's oral decision regarding the suppression motion to mandatory written findings of facts and conclusions of law.
2. The trial court erred in denying Collins's motion to suppress the recording of his telephone call with Arthur where the application to authorize the recording did not satisfy RCW 9.73.130(3)(f).
3. The trial court erred in overruling Collins's objection to the State's improper closing argument vouching for and/or bolstering the testimony of CDA (the child victim) where such an argument constituted prosecutorial misconduct.
4. The trial court erred in not dismissing Collins's conviction for child molestation in the first degree (Count II) as a violation of double jeopardy principles where the child molestation was incidental to, a part of, or coexistent with his conviction for rape of a child in the first degree (Count I).
5. The trial court erred in calculating Collins's offender score where it appears that his convictions in Counts I and II constituted the same or similar criminal conduct.
6. The trial court erred in failing to take the case from the jury for lack of sufficient evidence to establish beyond a reasonable doubt that Collins was guilty of rape of child in the first degree (Count I) and child molestation in the first degree (Count II).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in failing to reduce the trial court's oral decision regarding the suppression motion to mandatory written findings of facts and conclusions of law? [Assignment of Error No. 1].

2. Whether the trial court erred in denying Collins's motion to suppress the recording of his telephone call with Arthur where the application to authorize the recording did not satisfy RCW 9.73.130(3)(f)? [Assignment of Error No. 2].
3. Whether the trial court erred in overruling Collins's objection to the State's improper closing argument vouching for and/or bolstering the testimony of CDA (the child victim) where such an argument constituted prosecutorial misconduct? [Assignment of Error No. 3].
4. Whether the trial court erred in not dismissing Collins's conviction for child molestation in the first degree (Count II) as a violation of double jeopardy principles where the child molestation was incidental to, a part of, or coexistent with his conviction for rape of a child in the first degree (Count I)? [Assignment of Error No. 4].
5. Whether the trial court erred in calculating Collins's offender score where it appears that his convictions in Counts I and II constituted the same or similar criminal conduct? [Assignment of Error No. 5].
6. Whether there was sufficient evidence elicited at trial to prove beyond a reasonable doubt that Collins was guilty of rape of child in the first degree (Count I) and child molestation in the first degree (Count II)? [Assignment of Error No. 6].

C. STATEMENT OF THE CASE

1. Procedure

Zachary V. S. Collins (Collins) was charged by first amended information filed in Thurston County Superior Court with one count of

rape of a child in the first degree (Count I) and one count of child molestation in the first degree (Count II).¹ [CP 22].

Prior to trial, Collins made a motion pursuant to CrR 3.6 and RCW 9.73.130 to suppress the recorded telephone conversation between himself and Andrea Arthur (Arthur), the victim's mother, arguing that the authorization allowing the recording of this conversation did not satisfy the requirements of RCW 9.73.130(3)(f). [Vol. 1 RP 41-54].² After argument from the State and Collins's counsel as well as considering the application for authorization, the court denied Collins's motion to suppress holding that the application was sufficient under RCW 9.73.130(3)(f) because it was likely Collins would deny any accusation regarding his sexual misconduct against CDA so that other investigative methods were unlikely to be successful thus allowing for the recording of his conversation with Arthur while specifically holding that no evidence supported a finding that Arthur would be exposed to danger during a

¹ This court should note that the victim in this case is a child, D.O.B. March 16, 2000, and as such her initials, CDA, will be used throughout this brief.

² This court should note that the transcript regarding the motion to suppress, [Vol. 1 RP 41-54], reveals that Collins's attorney sent the motion to suppress to the court via email, that the court received the same, and that the court reviewed the application for authorization for recording the telephone call between Collins and Arthur when considering the merits of both the State's and Collins's argument on the issue. For some inexplicable reason, Collins's motion to suppress as well as the application for the authorization to record the telephone conversation between Collins and Arthur was not filed as part of the trial court record. While the transcript of the motion to suppress details the particular fact statement required under RCW 9.73.130(3)(f), this court pursuant to RAP 9.10 and/or RAP 9.11 may order the actual motion and application be made part of the record.

conversation with Collins as an alternative basis to justify the recording of the conversation. [Vol. 1 RP 41-54]. The court did not enter the required written findings of fact and conclusions of law following a suppression hearing.

Prior to trial, the court also heard motions regarding the admissibility of child hearsay statements pursuant to RCW 9A.44.120, and regarding the admissibility of Collins's prior conviction for child molestation pursuant to RCW 10.58.090. [CP 10-21; Supp. CP 94-112; 5-24-10 RP 4-79; Vol. 1 RP 54-75]. The court found that the child hearsay statements were admissible. [5-24-10 RP 77-79]. The court also found that Collins's prior conviction was admissible. [Vol. 1 RP 68-75]. In neither instance did the court enter written findings and conclusions.

Collins was tried by a jury, the Honorable Wm. Thomas McPhee presiding. Collins had no objections and took no exceptions to the court's instructions. [CP 26-38; Vol. 2 RP 363-364]. During the State's closing argument, Collins's counsel was forced to object to the State's improper closing vouching for the victim's credibility, which was overruled. [Vol. 3 RP 417]. The jury found Collins guilty as charged on both counts. [CP 39, 40; 7-15-10 RP 5-9].

The court sentenced Collins to a standard range sentence on Count I (rape of child in the first degree) of 174-months, and to a standard range

sentence on Count II (child molestation in the first degree) of 130-months running the sentences concurrently for a total sentence of 174-months based on an offender score of 6 given Collins's prior conviction for a sex offense as well as his respective "other current offense" for each count. [CP 50, 51, 52, 63-76, 79-92; 9-8-10 RP 17-20]. At sentencing, the court failed to consider whether Collins's current offenses constitute the same or similar criminal conduct for purposes of calculating his offender score. [CP 63-76, 79-92; 9-8-10 RP 4-20].

Notice of appeal was timely filed on September 8, 2010. [CP 62-76]. This appeal follows.

2. Facts

One night at approximately 10 PM in the springtime near the end of the 2009 school year, Andrea Arthur (Arthur) was at her home with her boyfriend, Eddie, her cousin, Kelly Wulfekuhle (Wulfekuhle), as well as her children including CDA, a juvenile girl D.O.B. 3-16-00, when CDA came to her and said she had something to tell Arthur. [Vol. 1 RP 92-95]. Arthur took CDA into a back bedroom where CDA told her "Zach," meaning Collins, had touched her inappropriately. [Vol. 1 RP 95-96]. Arthur was shocked and got Wulfekuhle to come talk to CDA. [Vol. 1 RP 96-97]. CDA told Wulfekuhle and Arthur that "Zach" had touched her with his fingers and licked her "new-new," meaning her vagina. [Vol. 1

RP 97-99]. The next day, Arthur reported CDA's disclosure to CDA's school counselor. [Vol. 1 RP 99-101].

Arthur was contacted by Thurston County Sheriff's Office Detective Chris Ivanovich (Ivanovich), who asked her to telephone Collins to get him to confess to CDA's accusations, which phone call was recorded and played to the jury. [Vol. 1 RP 101-103; Vol. 2 RP 270-272, 277-278, 293-323]. During the phone call, Collins initially denied CDA's accusations, but eventually confessed to them. [Vol. 1 RP 101-103; Vol. 2 RP 293-323]. CDA was interviewed and then taken to a sexual assault clinic for an evaluation. [Vol. 1 RP 103-104; Vol. 2 RP 263-270]. Lisa Wahl (Wahl), a family nurse practitioner/SANE nurse with Providence St. Peter Hospital Pediatric Sexual Assault and Child Maltreatment Center, conducted a SANE exam on CDA in which CDA told Wahl that "Zach" had touched her inappropriately on her breasts with his hands and touched her inappropriately on her V.G. (meaning CDA's vagina) with his hands and tongue. [Vol. 1 RP 193, 196-198; Vol. 2 RP 207-246].

CDA testified that "Zach" touched her private parts on one occasion, specifically testifying that Collins touched her chest with his hands and touched her "front private part" with his hands and tongue when she was eight years old. [Vol. 1 RP 151-152, 154-155]. CDA explained that the incident occurred when Collins had been spending the night

sleeping on the couch of her home and she awoke from a nightmare and had gone looking for her mother but encountered Collins instead. [Vol. 1 RP 156-158, 162-167].

Collins testified in his own defense. He acknowledged that he received a phone call from Arthur in which she accused him of touching her daughter, CDA, inappropriately. [Vol. 2 RP 344-345]. Collins testified that he denied doing so in the phone conversation, but eventually admitted to the accusations by simply repeating what Arthur was saying because Arthur kept pressuring him saying she was going to call the police during the phone call and because he was afraid given his prior conviction. [Vol. 2 RP 345-348, 354-355]. He denied touching CDA inappropriately—committing child rape and child molestation. [Vol. 2 RP 345, 350-351, 353-354].

D. ARGUMENT

- (1) COLLINS'S CONVICTIONS FOR RAPE OF A CHILD IN THE FIRST DEGREE (COUNT I) AND CHILD MOLESTATION IN THE FIRST DEGREE (COUNT II) SHOULD BE REVERSED AND DISMISSED FOR THE STATE'S FAILURE TO FILE WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING THE MOTION TO SUPPRESS AS REQUIRED BY CrR 3.6.

In the instant case, Collins was charged by first amended information filed in Thurston County Superior Court with one count of rape of a child in the first degree (Count I) and one count of child molestation in the first degree (Count II). [CP 22]. Prior to trial, Collins made a motion pursuant to CrR 3.6 to suppress a telephone call between himself and Arthur arguing that the recording of the phone was not authorized under RCW 9.73.130, which motion was denied. [Vol. 1 RP 41-54]. The matter then proceeded to trial at which the jury found Collins was found guilty on both counts. [CP 39, 40; 7-15-10 RP 5-9]. The State has not filed written findings and conclusions for the CrR 3.6 hearing.

Under RAP 10.4(d), a party may include in the brief a "motion which, if granted, would preclude hearing the case on the merits." Therefore, Collins moves this court for reversal and dismissal of his convictions for one count of rape of a child in the first degree (Count I) and one count of child molestation in the first degree (Count II) based on

the State's failure to file written findings of fact and conclusions of law following his motion to suppress statements as required by CrR 3.6. This motion, if granted, would preclude hearing the case on the merits as the matter would be decided based on the State's failure to comply with applicable rules.

As stated by our Supreme Court:

CrR 6.1(d) requires entry of written findings of fact and conclusions of law at the conclusion of a bench trial. (footnote omitted). The purpose of CrR 6.1(d)'s requirement of written findings of fact and conclusions of law is to enable an appellate court to review the questions raised on appeal. *See City of Bremerton v. Fisk*, 4 Wn. App. 961, 962, 486 P.2d 294 (1971), disapproved on other grounds by *State v. Souza*, 60 Wn. App. 534, 805 P.2d 237 (1991); cf. *State v. McGary*, 37 Wn. App. 856, 861, 683 P.2d 1125 (1984) (JuCR 7.11); *State v. Stock*, 44 Wn. App. 467, 477, 722 P.2d 1330 (1986) (CrR 3.6)...A trial court's oral opinion and memorandum opinion are no more than oral expressions of the court's informal opinion at the time rendered. *State v. Mallory*, 69 Wn.2d 532, 533, 419 P.2d 324 (1966). An oral opinion "has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment." *Id* at 533-34[.]

State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998).

The above rationale is also applicable to the CrR 3.6 hearing where the trial court denied the Appellant's motion to suppress.

On appeal, the court reviews solely whether the trial court's findings of fact are supported by substantial evidence and, if so, whether the findings support the trial court's conclusions of law. *Mairs v.*

Department of Licensing, 70 Wn. App. 541, 545, 954 P.2d 665 (1993). Unchallenged findings of fact are verities on appeal and an appellate court “will review only those facts to which error has been assigned.” State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). The failure to challenge findings of fact is not a technical flaw contemplated in RAP 10.3(a)(3). *See* State v. Olson, 126 Wn.2d 315, 323, 893 P.2d 629 (1995). Moreover, error cannot be predicated on the oral decision of the trial court. State v. Reynolds, 80 Wn. App. 851, 860 n. 7, 912 P.2d 494 (1996). The State, as the prevailing party, has the primary obligation of presenting findings, which accurately reflect the trial court’s oral ruling, but the trial court also shares some responsibility of ensuring that the record is complete. State v. Portomene, 79 Wn. App. 863, 865, 905 P.2d 1234 (1995).

Where there is an absence of findings or inadequate written findings, the appellant cannot properly assign error as required and the appellate court cannot conduct the appropriate review. Here, the trial court has failed to enter the required written findings of fact and conclusions of law following the CrR 3.6 motion to suppress the recorded telephone conversation. For the reasons stated in Head, *supra*, without the proper written findings required by CrR 3.6, which are long overdue, Collins is prejudiced in that he is unable to assign error to the trial court’s written findings and conclusions, and prepare the appropriate analysis of

the issues presented by his trial with the result that he is without recourse to properly raise issues pertaining to the same.

Based on the above, Collins respectfully requests this court reverse and dismiss his convictions because of the State's failure to enter written findings and conclusions following the juvenile bench trial. *See State v. Witherspoon*, 60 Wn. App. 569, 571, 805 P.2d 248 (1991) (now Justice Alexander in reversing and dismissing with prejudice stating, “[w]e cannot ignore the absence of findings and conclusions. We are not confronted here with a mere late entry of findings, but rather, complete noncompliance with the rule.”)

(2) THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE RECORDED TELEPHONE CONVERSATION BETWEEN ARTHUR AND COLLINS WHERE THE RECORDING OF THIS CONVERSATION SHOULD NOT HAVE BEEN AUTHORIZED UNDER RCW 9.73.130.

a. Overview Of What Occurred.

Det. Ivanovich, pursuant to RCW 9.73.130, made an application for authorization to record a telephone conversation between Collins, a young man suspected of child sexual assault; and Arthur, the mother of the child victim CDA, in an attempt to get Collins to admit his involvement in CDA's accusations. [Vol. 1 RP 41-54]. Ivanovich was granted authorization and recorded a telephone conversation between Collins and

Arthur in which conversation Collins eventually admitted to committing rape of a child and child molestation against CDA. [Vol. 1 RP 101-103; Vol. 2 RP 270-272]. Arthur was allowed to testify at trial regarding the content of the telephone conversation she had with Collins and the recorded telephone conversation was played to the jury. [Vol. 1RP 101-103; Vol. 2 RP 293-323].

Prior to trial, Collins's counsel made a motion to suppress the recorded telephone conversation arguing that the authorization for the recording should not have been granted because the application did not meet the requirements set forth in RCW 9.73.130(3)(f), to-wit: 1) the application did not support a finding that other investigative methods had been tried or were unlikely to succeed where the application merely asserts (seemingly to acknowledge that no attempt to contact and question Collins had been made) that Collins probably wouldn't discuss the incident with police and would likely deny any accusation as protection against prosecution (seemingly assuming that law enforcement has the right to a confession); and 2) the application did not support a finding that other investigative methods were too dangerous to employ where the application merely asserts that having Arthur discuss the incident with Collins in person would expose her to physical danger if the recording device were discovered without any evidence establishing that Collins is

dangerous. [Vol. 1 RP 41-52]. The trial court denied Collins's motion to suppress the recorded telephone conversation ruling that the recorded telephone conversation was admissible because "from reading this document" it was reasonable to believe the defendant would deny having sexual contact with the victim to protect himself from criminal prosecution and other investigative methods were unlikely to succeed because there was no other corroborative evidence available at that time that could have been obtained that would provide additional evidence to support the allegations of the child while specifically holding that "'having Andrea discuss the incident with the suspect in person would expose her to physical danger if the suspect discovered the recording device' is not supported by evidence in the record." [Vol. 1 RP 52-54].

b. Applicable Law.

Washington's Privacy Act, RCW 9.73 et seq, is one of the most restrictive in the nation, State v. Townsend, 147 Wn.2d 666, 672, 57 P.3d 255 (2002); and is designed primarily to protect private persons from public dissemination of illegally obtained information. State v. Ejerme stad, 114 Wn.2d 828, 834, 791 P.2d 897 (1990). This statute provides that it is unlawful for any individual to "intercept, or record any":

Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise

designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all participants in the communication.

RCW 9.73.030(1)(a). Evidence obtained in violation of the statute is inadmissible in any civil or criminal case including any testimony about the recorded conversations when the recording itself is suppressed. RCW 9.73.050 *see also* State v. Williams, 94 Wn.2d 531, 534, 617 P.2d 1012 (1980).

However, RCW 9.73.090 provides an exception to the prohibition against recording private conversations and provides in pertinent part:

- (2) It shall not be unlawful for a law enforcement officer acting in the performance of the officer's official duties to intercept, record, or disclose an oral communication or conversation where the officer is a party to the communication or conversation or one of the parties to the communication or conversation has given prior consent to the interception, recording, or disclosure: PROVIDED, That prior to the interception, transmission, or recording the officer shall obtain written or telephonic authorization from a judge or magistrate, who shall approve the interception, recording, or disclosure of communications or conversations with a nonconsenting party for a reasonable and specified period of time, if there is probable cause to believe that the nonconsenting party has committed , is engaged in, or is about to commit a felony....

In order to obtain the authorization required under RCW 9.73.090, a law enforcement officer must meet the application for authorization requirements set forth in RCW 9.73.130. RCW 9.73.130 provides in pertinent part:

Each application for an authorization to record communications or conversations pursuant to RCW 9.73.090 as now or hereafter amended shall be made in writing upon oath or affirmation and shall state:

...

- (3) A particular statement of the facts relied upon by the applicant to justify his belief that an authorization should be issued, including:

...

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

This court reviews the trial court's decision authorizing the interception and recording of communications to determine whether the facts set forth in the application "are minimally adequate" to support the court order. State v. Constance, 154 Wn. App. 861, 880, 226 P.3d 231 (2010), *citing* State v. Johnson, 125 Wn. App. 443, 455, 105 P.3d 85 (2005). An application to intercept and record communications cannot rely on boilerplate justifications alone, but must show that the police gave "serious consideration to other methods" and explain why those methods are inadequate. State v. Manning, 81 Wn. App. 714, 720, 915 P.2d 1162 (1996). The requirement for a "particular statement of facts" reflects the Legislature's desire to allow electronic surveillance under certain circumstances but not to endorse it as routine procedure. Id. Before

resorting to an application under RCW 9.73.130, the police must either try, or give serious consideration to, other methods and explain to the issuing judge why those other methods are inadequate in the particular case. Id. An application that contains “nothing more than general boilerplate” undermines and violates the intent and language of RCW 9.73.130(3)(f) to set forth particular facts showing normal investigative methods were tried or appear unlikely to succeed. Id. at p. 721.

In Manning, a police informant told police that Manning had contacted him several times offering to purchase large quantities of cocaine and for consideration on a pending criminal matter the police informant agreed to introduce an undercover officer to Manning to discuss the purchase of cocaine. The police informant gave a detailed description of Manning, a description of his vehicle, his telephone number, the location of his home, and that Manning carried a semi-automatic pistol. Using this information, police confirmed the identification of Manning, ran a records check confirming Manning’s vehicle and residence, and the fact that Manning had been arrested several times including once for carrying a concealed weapon. The police also learned that during an earlier narcotics investigation an undercover officer attempted to sell Manning a kilogram of cocaine but did not complete the deal as it involved lengthy negotiations and was too dangerous given that Manning

possessed many firearm; but the investigation had involved several controlled buys where Manning sold small quantities of cocaine to a confidential witness.

The police presented an application for authorization to record the transaction with Manning, which was granted. The application set forth boilerplate language that the recording should be authorized to avoid a “swearing match” and allegations of entrapment, the recording would be the most reliable evidence of what took place in that no other investigative method is capable of capturing the words in such clear and admissible evidentiary form, and “was necessary to intercept and record the conversations at the earliest stage of case development to maintain the integrity and proper direction of the investigator.” The application also included particular facts establishing that Manning had been the target of previous narcotics investigations that ended inconclusively and were terminated because Manning was known to be armed and dangerous.

Division I, in finding the application was sufficient to support the authorization for recording did so because the application did not solely contain boilerplate language rather there was a particular statement of facts demonstrating that the officers had used other methods to investigate Manning that had been unsuccessful and there was a particularized

statement establishing Manning's dangerousness, which satisfied the requirements of RCW 9.73.130(3)(f).

Recently in State v. Constance, supra, Division I again addressed the issue of whether the application for authorization to record satisfied RCW 9.73.130(3)(f). In Constance, the defendant had/was about to commit the felony of solicitation to commit murder. The application to authorize the recording of Constance's conversation with an undercover police officer posing as a hit man included twelve pages plus attachments outlining in detail the investigation including unsuccessful attempts to question Constance, evidence of Constance's violation of restraining orders/propensity towards violence, and language that the recording would be independent verification as well as avoid a claim of entrapment. Authorization was granted.

Division I, in finding the application was sufficient to support the authorization for recording did so because the application did not solely contain boilerplate language rather there was a particular statement of facts demonstrating that the officers had given serious consideration to other methods to investigate Constance and explained why they were inadequate or too dangerous, and described unsuccessful attempts to question Constance, which satisfied the requirements of RCW 9.73.130(3)(f).

In the instant case, an application to authorize the recording a telephone call between Collins and Arthur was made by Det. Ivanovich. [RP 41-52]. Unlike Manning and Constance, the application's particular statement of facts to support the authorization of the recording contains nothing but boilerplate language limited to the fact that Collins probably would not discuss the incident, the fact that it would be reasonable to believe Collins would deny his involvement to avoid criminal prosecution, and that it would be dangerous for Arthur to discuss the incident in person with Collins should he discover a recording device. [RP 41-52]. The application in the instant case does not contain any particular statement of facts regarding investigative techniques used related to Collins—there is no statement that the police even attempted to question Collins only a vague statement that Collins probably would not talk with police. More importantly, the application in the instant case appears to be based on the assumption that the police are entitled to a confession no matter by what means that confession is obtain given its assertion that Collins probably would not talk with police and the more troubling statement that Collins would likely deny CDA's accusation to avoid criminal prosecution thereby ignoring Collins's constitutional right to remain silent. The application in the instant case does not contain a particularized statement of facts sufficient to satisfy RCW 9.73.130(3)(f).

In denying Collins's motion to suppress, the trial court held that the application satisfied RCW 9.73.130(3)(f) solely because it was reasonable to believe the defendant would deny having sexual contact with the victim to protect himself from criminal prosecution and other investigative methods were unlikely to succeed because there was no other corroborative evidence available providing additional evidence to support the allegations of the child that could have been obtained. [Vol. 1 RP 52-54]. In so ruling, the trial court relied on nothing more than boilerplate language to uphold the authorization to record Arthur's telephone conversation with Coilins. The trial court's ruling was error and the recording should have been suppressed as well as any testimony related to the recorded telephone conversation with the result that Collins's convictions should be reversed.

(3) THE STATE COMMITTED PROSECUTORIAL MISCONDUCT IN TRYING THIS MATTER, WHICH DEPRIVED COLLINS OF A FAIR TRIAL.

The law in Washington is clear, prosecutors are held to the highest professional standards. A prosecuting attorney, here the State, is a quasi-judicial officer. *See State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). The State Supreme Court has characterized the duties and responsibilities of a prosecuting attorney as follows:

He represents the State, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial. State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956),

We do not condemn vigor, only its misuse. When the prosecutor is satisfied on the question of guilt, he should use every legitimate honorable weapon in his arsenal to convict. No prejudicial instrument, however, will be permitted. His zealousness should be directed to the introduction of competent evidence. He must seek a verdict free of prejudice and based on reason.

State v. Coles, 28 Wn. App. 563, 573, 625 P.2d 713 (1981), *citing* State v. Huson, 73 Wn.2d 660, 440 P.2d 192 (1968).

A prosecutor has a duty as an officer of the court to seek justice as opposed to merely obtaining a conviction. Id. In cases of professional misconduct, the touchstone of due process analysis is fairness, i.e., whether the misconduct prejudiced the jury, thereby denying the defendant a fair trial guaranteed by the due process clause. State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984). If the prosecutor lays aside that impartiality to seek a conviction through appeals to passion, fear, or resentment, then he or she ceases to properly represent the public interest. State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

a. Overview Of What Occurred

During the State's closing argument the following occurred:

State: She's [CDA] clearly very uncomfortable talking about the subjects. She didn't want to say the words. She showed me her

hands when I asked her what he touched you with. And not all parts of the story fall out conveniently in order. That's the way of nature of the way people, as human beings, tell stories. At this time, this was a nine-year old girl and now a ten-year old girl recounting what she told people a year ago. She did a really good job. But you get to decide---

Defense: Your Honor, I'm going to object to her vouching for the credibility of the witness.

The Court: Overruled.

State: Your Honor--

The Court: That's not improper.

State: Thank you.

[Vol. 3 RP 417].

b. The Prosecutor Committed Misconduct, Over Collins's Objection, To Vouch For And Bolster The Credibility Of CDA—The Child Victim During Closing Argument.

It is improper for a prosecutor to vouch for or against the credibility of a witness. State v. Horton, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003); *see also* State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007) (testimony relating indirectly to credibility, if not objected to at trial, does not necessarily give rise to a "manifest" constitutional error). Trained and experienced prosecutors presumably do not risk appellate reversal of a hard fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the

jury in a close case. State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996).

Sadly, this is what has occurred in the instant case during the State's closing argument (pertinent portion set forth above). The only issue involved in the instant case was whether Collins had committed the crimes CDA had accused him of committing. Collins testified and denied committing the crimes. The case essentially turned on whether the jury believed CDA's accusations or Collins's denial given there was no physical evidence. Instead of making a proper closing argument, the State by its misconduct focused the jury on the fact that the State, a powerful public official, believed the child in order to improperly obtain a conviction. It cannot be said based on the totality of this record that the jury rendered a verdict based solely on the evidence given that the State's misconduct has tainted the fundamental issue for the jury to decide. This court should reverse Collins's convictions.

- (4) COLLINS MAY NOT BE CONVICTED OF CHILD MOLESTATION IN THE FIRST DEGREE (COUNT II) WHERE THE CHILD MOLESTATION WAS INCIDENTAL TO, A PART OF, OR COEXISTENT WITH HIS CONVICTION FOR RAPE OF A CHILD IN THE FIRST DEGREE (COUNT I).

Article 1, section 9 of the Washington State Constitution and the Fifth Amendment to the United States Constitution provide that no person

should twice be put in jeopardy for the same offense. Double jeopardy may be violated by multiple convictions even if the sentences are concurrent. State v. Calle, 125 Wn.2d 769, 775, 888 P.2d 155 (1995). A double jeopardy argument may be raised for the first time on appeal because it is a manifest error affecting a constitutional right. State v. Turner, 102 Wn. App. 202, 206, 6 P.3d 1226, *reviewed denied*, 143 Wn.2d 1009 (2001) (*citing* RAP 2.5(a) and State v. Adel, 136 Wn.2d 629, 631, 965 P.2d 1072 (1998)). The issue is whether the Legislature intended to authorize multiple punishments for criminal conduct that violates more than one criminal statute. State v. Calle, 125 Wn.2d at 772.

A three-prong test is applied to determine legislative intent. First, multiple convictions constitute double jeopardy even if the offenses “clearly involve different legal elements, if there is clear evidence that the Legislature intended to impose only a single punishment.” In the Matter of Personal Restraint of Anthony C. Burchfield, 111 Wn. App. 892, 897, 46 P.3d 840 (2002) (*citing* State v. Calle, 125 Wn.2d at 780). Because the Legislature is free to define crimes and fix punishments as it will, “the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.” Brown v. Ohio, 432 U.S. 161, 165, 53 L. Ed. 2d 187, 97 S. Ct. 2221 (1977).

Here, neither the rape of a child in the first degree nor the child molestation in the first degree statutes contains specific language authorizing separate punishments for the same conduct. RCW 9A.44.073; RCW 9A.44.083. The offenses at issue here are thus not automatically immune from double jeopardy analysis. In re Burchfield, 111 Wn. App. at 896.

Second, when, as here, the Legislature has not expressly authorized multiple punishments for the same act, this court applies the “same evidence test,” which asks “whether each offense has an element not contained in the other.” Id. The statute under which Collins was convicted of rape of a child in the first degree requires sexual intercourse involving a child under 12. RCW 9A.44.073. The child molestation in the first degree statute requires sexual contact involving a child under 12. RCW 9A.44.083. These offenses appear to contain the same elements given that the only difference is the severity of the sexual touching (intercourse or contact) and, therefore, may be established by the “same evidence.” Thus the prohibition against double jeopardy is not violated here only by applying the same evidence test in its strictest interpretation.

The “same evidence” test, however, is not always dispositive. In re Burchfield, 111 Wn. App. at 897; In re Personal Restraint of Percer, 150 Wn.2d 41, 50-51, 75 P.3d 488 (2003). This court must also determine whether there is evidence that the Legislature intended to treat conduct as a single offense for double jeopardy purposes. Id. This merger doctrine is simply another way, in addition to the “same evidence” test, by which this court may determine whether the Legislature has authorized multiple punishments. State v. Frohs, 83 Wn. App. 803, 811, 924 P.2d 384 (1996). “Thus, the merger doctrine is simply another means by which a court may determine whether the imposition of multiple punishments violates the Fifth Amendment guarantee against double jeopardy....” Id. The question is whether there is clear evidence that the Legislature intended not to punish the conduct at issue with two separate convictions. State v. Calle, 125 Wn.2d at 778. If a defendant is convicted of two crimes, his or her second conviction will stand if that conviction is based on “some injury to the person or property of the victim or others, *which is separate and distinct from and not merely incidental to the crime of which it forms the element.* [Emphasis Added]. State v. Johnson, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979).

court determines that the child molestation in the first degree (Count II) “was incidental to, a part of, or coexistent” with the rape of a child in the first degree (Count I), then Collins’s conviction in Count II cannot be sustained on these facts and must, therefore, be reversed.

Caselaw from our State Supreme Court supports this conclusion. Formerly, as set forth in State v. Warrow, 91 Wn.2d 301, 588 P.2d 1320 (1978), the State Supreme Court rejected an argument that a defendant cannot be convicted of both felony murder and the underlying felony. The court upheld both convictions by considering statutory merger and due process finding neither was principle violated. However, recently in State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007), the State Supreme Court apparently reversed this decision by analyzing the issue in terms of double jeopardy.

In Womac, the defendant was charged in three separate counts and convicted of homicide by abuse, felony murder based on criminal mistreatment, and assault. The trial court accepted all three convictions, but imposed sentence only on the homicide by abuse. On appeal, the appellate court remanded the case for resentencing on the homicide by abuse and conditionally dismissed the felony murder and assault convictions so long as the homicide by abuse conviction withstood further appeal. The State Supreme Court vacated the felony murder and assault

convictions on double jeopardy grounds holding Womac had in actuality committed a single offense against a single victim yet was held accountable for three crimes in violation of double jeopardy prohibition against multiple punishments for a single offense. In doing so, the State Supreme Court engaged in the three-part analysis set forth above. The State Supreme Court determined that double jeopardy was violated even though Womac received no sentence on the felony murder and assault convictions as “conviction” in itself, even without imposition of sentence, carries an unmistakable onus which has a punitive effect. In sum, the court held:

As this court noted in Calle, “[i]t is important to distinguish between charges and convictions—the State may properly file an information charging multiple counts under various statutory provisions where evidence supports the charges, *even though convictions may not stand* for all offenses where double jeopardy protections are violated.

[Citations omitted]. State v. Womac, 160 Wn.2d at 657-58.

That is what exactly what has happened here. The State properly filed an information charging multiple counts (the rape of a child in the first degree charge as well as an child molestation in the first degree charge), obtained convictions on these multiple counts and even obtained a sentence on both convictions, but all the convictions cannot stand given

double jeopardy principles for the reasons set forth above. This court should reverse Collins's conviction on Count II.

- (5) THIS MATTER SHOULD BE REMANDED FOR RESENTENCING WHERE IT APPEARS THAT COLLINS'S CONVICTIONS FOR RAPE OF A CHILD IN THE FIRST DEGREE (COUNT I) AND CHILD MOLESTATION IN THE FIRST DEGREE (COUNT II) CONSTITUTED THE SAME OR SIMILAR CRIMINAL CONDUCT FOR PURPOSES OF CALCULATING COLLINS'S OFFENDER SCORE.

A sentencing court's calculation of a defendant's offender score is a question of law and is reviewed de novo. State v. McCraw, 127 Wn. 2d 281, 289, 898 P.2d 838 (1995). A challenge to the calculation of an offender score may be raised for the first time on appeal. Although a defendant generally cannot challenge a presumptive standard range sentence, he or she can challenge the procedure by which a sentence within the standard range was imposed. State v. Ammons, 105 Wn.2d 175, 183, 718 P.2d 796, *cert. denied*, 479 U.S. 930 (1986).

The Washington Supreme Court has held that that a sentence in excess of statutory authority is subject to collateral attack, that a sentence is excessive if based on a miscalculated upward offender score, "that a defendant cannot agree to punishment in excess of that which the Legislature has established," and that "in general a defendant cannot waive a challenge to a miscalculated offender score." In re Goodwin, 146

Wn.2d 861, 873-74, 50 P.3d 618 (2002). In defining the limitations to this holding, the court, *citing State v. Majors*, 94 Wn.2d 354, 616 P.2d 1237 (1980) as instructional, went on to explain that waiver does not apply where the alleged sentencing error is a legal error leading to an excessive sentence, as opposed to where the alleged error “involves an agreement to facts (e.g., agrees to be designated as habitual offender in hopes of obtaining a shorter sentence), later disputed, or if the alleged error involves a matter of trial court discretion.” *Id.*

Here, Collins was convicted in Count I of rape of a child in the first degree based on him having sexual intercourse with CDA (his licking of CDA’s vagina). [CP 39]. He was also convicted in Count II of child molestation in the first degree based on him having sexual contact with CDA (his touching of CDA’s breasts and/or vagina). [CP 40]. Both of these crimes occurred on the same occasion. These crimes should have been considered the same or similar criminal conduct and counted as one for purposes of calculating Collins’s offender score.

If multiple crimes encompass the same objective intent, involve the same victim and occur at the same time and place, the crimes encompass the same course of criminal conduct for purposes of determining an offender score. *State v. Dunaway*, 109 Wn.2d 207, 217, 743 P.2d 1237 (1987).

“RCW 9.94A.589(1)(a) requires multiple current offenses encompassing the same criminal conduct to be counted as one crime in determining the defendant’s offender score.” State v. Tresenriter, 101 Wn. App. 486, 496, 4 P.3d 145 (2000), *reviewed denied*, 143 Wn.2d 1010 (2001) (*quoting* State v. Tili, 139 Wn.2d 107, 118, 985 P.2d 365 (1999)). As used in this subsection, “same criminal conduct” is defined as “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a).

For purposes of RCW 9.94A.589(1)(a), intent is not defined as the specific intent required as an element of the crime charged. Rather, the inquiry focuses on the extent to which criminal intent, as objectively viewed, changed from one crime to the next. Whether one crime furthered the other may be relevant but generally does not apply when the crimes occurred simultaneously. State v. Vike, 125 Wn.2d 407, 412, 885 P.2d 824 (1994). Moreover, our courts have held that separate incidents may satisfy the same time element of the test when they occur as part of a continuous transaction or in a single, uninterrupted criminal episode over a short period of time. *See e.g.*, State v. Porter, 133 Wn.2d 177, 183, 942 P.2d 974 (1997); State v. Deharo, 136 Wn.2d 856, 858, 966 P.2d 1269 (1998).

Here, it cannot be disputed that Counts I and II, involved the same victim—CDA. [CP 22]. Nor can it be disputed that Counts I and II occurred at the same time and place—CDA’s home on a single night between January 1, 2008, and April 30, 2009 [CP 22; Vol. 1 RP151-152, 154-155]; and that Collins’s “intent” remained the same, i.e. his intention to touch CDA in a sexual manner. Thus, the trial court should have determined that Collins’s convictions in Counts I and II constituted same or similar conduct for purposes of calculating his offender score with the result that his offender score would be three for both counts and not six as found by the trial court given Collins has a prior conviction for a sex offense. This court should remand for resentencing based on the correct offender score.

- (6) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT COLLINS WAS GUILTY OF RAPE OF CHILD IN THE FIRST DEGREE (COUNT I) AND CHILD MOLESTATION IN THE FIRST DEGREE (COUNT II).

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829

P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Here, the State charged and Collins was convicted of rape of a child in the first degree (Count I) and child molestation in the first degree (Count II) [CP 22, 39, 40; 7-15-10 RP 5-9]. The State bore the burden of establishing beyond a reasonable doubt that Collins committed these crimes. This is a burden the State cannot sustain.

The Sum of the State’s evidence against Collins essentially amounts to CDA’s accusation that Collins committed these crimes—CDA testified and then others were allowed to testify merely repeating what CDA had told them—as there was no physical evidence. In other words, this case involved CDA accusing Collins compared to Collins denying CDA’s accusations. In considering whether the State has satisfied its burden, it must be remembered that the State resorted to an improper

closing argument to vouch for or bolster CDA's testimony and that CDA, a young child who had just been taught about "good" and "bad" touches in school and was upset by the divorce of her parents [Vol. 1 RP 95-96, 107, 119-125], suddenly reported a single incident approximately a year after it happened. While it is true the State presented a recording of a telephone conversation between Arthur and Collins in which Collins eventually admits to CDA's accusations, as argued above in section 2) of this brief, the admission of this recording was error. Moreover, should this court consider the recording as part of the State's evidence, it should be reviewed in a critical manner as Collins initially and repeatedly denied CDA's accusations during that telephone conversation and only acquiesced to Arthur's demands to confess at the end of the telephone conversation when Collins was terrified that Arthur would call the police and then merely repeated CDA's accusation as relayed to him by Arthur. Careful consideration of the entire record demonstrates that it cannot be said beyond a reasonable doubt that Collins committed the crimes for which he was convicted. This court should reverse and dismiss Collins's convictions.

E. CONCLUSION

Based on the above, Collins respectfully requests this court to reverse and dismiss his convictions.

DATED this 18th day of February 2011.

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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 18th day of February 2011, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

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(and the transcript)

A handwritten signature in black ink is written over a vertical stamp. The stamp contains the text "SUPERIOR COURT" and "FEBRUARY 2011" in a vertical orientation.

Signed at Tacoma, Washington this 18th day of February 2011.

Patricia A. Pethick
Patricia A. Pethick