Supreme Court No. _____
COA No. 58289-9-II

THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

DENNIS MOWERY JR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR COWLITZ COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Under RAP 13.4, Dennis Mowery Jr. asks this Court to review the opinion of the Court of Appeals filed in his case on September 26. (Attached As Appendix 1-7).

B. ISSUES PRESENTED FOR REVIEW

Absent legislative intent to allow duplicate punishment, imposition of multiple convictions for the same offense violates double jeopardy. Under the merger doctrine, where one offense merges into another, imposition of sentences for both offenses violates double jeopardy. Where a trial court imposes concurrent sentences for merged convictions, the remedy is to strike the merged convictions. Mr. Mowery argued that separate sentences for the incest counts as well as the counts into which they merged violate double jeopardy, necessitating reversal and

remand to vacate the incest sentences. The Court of Appeals misunderstood the doctrine of double jeopardy and failed to engage in any analysis of the elements of the charged offenses. Without any analysis, the opinion concluded the convictions in question are not the same in law. The Court of Appeals seemed to agree with the trial court's determination that the the incest sentences punished the same conduct as other offenses and merged into other offenses, which is the predicate of double jeopardy, yet it offered no relief. This Court should grant review under RAP 13.4(b)(1) because the Court of Appeals' decision misapplying this Court's precedent erodes the longstanding prohibition against multiple punishments for the same offense.

C. STATEMENT OF THE CASE

Mr. Movery was charged with four counts: Count I, first degree rape of a child–domestic violence (for

touching his daughter's vagina); Count II, first degree child molestation–domestic violence (for making his daughter touch his penis); Count III, incest in the first degree (for the same sexual intercourse in Count I); and Count IV, incest in the second degree (for the same sexual contact in Count II). CP 2, 13-15. He pleaded guilty to all four offenses. CP 13.

At sentencing, Mr. Mowery had no prior convictions, and the trial court calculated his offender score as 3 for each offense. CP 20. The parties agreed that Count III (incest) merged into Count I, and Count IV (incest) merged into Count II (molestation). RP 55–56; CP 26. The prosecution explained that Counts I and II "should not have been committed if not for the elements" of incest. RP 56. However, the court entered a finding that the incest counts encompasses the same

criminal conduct for sentencing purposes, instead of merging them. CP 26.

The Court sentenced Mr. Mowery to 150 months to life for rape of a child, 89 months to life for child molestation, 34 months for first degree incest, and 20 months for second degree incest. CP 29; RP 58. Despite the merger, the trial court did not dismiss the incest convictions and it also imposed separate sentences for them. CP 29; RP 58.

On appeal, Mowery argued that given how the prosecution actually charged these crimes, the incest counts merged into the other offenses and the Court of Appeals should dismiss the incest counts. Br. of Appellant at 11-16, 21. As charged, the two incest counts, violated double jeopardy because charged counts I and III had the same elements, and so did counts II and IV. *Id.* The Court of Appeals, without

much analysis, concluded there was no double jeopardy violation. Mr. Mowery asks the Court to accept review because the incest convictions violated double jeopardy.

D. ARGUMENT

This Court should accept review because the Court of Appeals botches the prevailing four-step analysis for determining whether a conviction violates double jeopardy.

The constitutional prohibition against double jeopardy forbids imposition of multiple punishments for the same offense. U.S. Const. amend. V; Const. art. I, § 9; *Brown v. Ohio*, 432 U.S. 161, 165, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977); *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 980, 329 P.3d 78 (2014). Double jeopardy issues are reviewed de novo. *Villanueva-Gonzalez*, 180 Wn.2d at 979-80. A double jeopardy violation may occur when a defendant is convicted of

two crimes that are the same in fact and in law. *Id.* at 985-86.

When the State gains two convictions under different criminal statutes for the same conduct, a reviewing court must determine if the legislature intended multiple convictions (or punishment). *State v. Arndt*, 194 Wn.2d 784, 816, 453 P.3d 696 (2019) (*quoting State v. Freeman*, 153 Wn.2d 765, 771-73, 108 P.3d 753 (2005)). This Court adopted a four "analytical steps" that include:"(1) consideration of any express or implicit legislative intent, (2) application of the *Blockburger*[1] or 'same evidence' test, (3) application of the 'merger doctrine,' and (4) consideration of any independent purpose or effect that would allow punishment as a separate offense." *Id.*

[1] *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180. 76 L. Ed 306 (1932).

Where a single trial and multiple punishments for the same act or conduct are at issue, the initial and often dispositive question is whether the Legislature intended that multiple punishments be imposed. *State v. Kier*, 164 Wn.2d 798, 804, 194 P.3d 212 (2008). If there is clear legislative intent to impose multiple punishments for the same act or conduct, this is the end of the inquiry and no double jeopardy violation exists. *State v. Muhammad*, 194 Wn.2d 577, 617, 451 P.3d 1060(2019). Here, the opinion tactily acknowledges there is no clear legislative intent to impose multiple punishments by going purporting to decide this case based on the *Blockburger* "same evidence" test and the merger doctrine. App. 5-6.

a. Under the Blockburger "same evidence" test these crimes are the same in fact and law.

If such clear intent is absent, then the court applies the *Blockburger* "same evidence" test to

determine whether the crimes are the same in fact and law. *State v. Calle*, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995); *Muhammad*, 194 Wn. 2d at 617.

Under the *Blockberger* test, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger*, 284 U.S. at 304. If application of the *Blockburger* test results in a determination that there is only one offense, then imposing two punishments violates double jeopardy. The assumption underlying the *Blockburger* rule is that the Legislature ordinarily does not intend to punish the same conduct under two different statutes; the *Blockburger* test is a rule of statutory construction applied to discern

legislative purpose in the absence of clear indications of contrary legislative intent. *Hunter,* 459 U.S. at 368.

In *Calle*, the defendant was convicted of first degree incest and second degree rape for the same act of intercourse with his minor stepdaughter. *Calle*, 125 Wn.2d at 771–72. The Supreme Court held that the convictions did not violate double jeopardy, reasoning that the crimes were not the same under the *Blockburger* test because "[i]ncest requires proof of relationship" whereas "the type of second degree" rape [in RCW 9A.44.050(1)(a)] charged "requires proof of force." *Id*. at 778.

This case is distinguishable from *Calle* because of how the prosecution included the domestic violence component to Count I and II. Because of that charging decision, this case is like *State v. Hughes*, 166 Wn.2d 675, 679, 212 P.3d 558 (2009*)*.

In *Hughes*, the defendant sexually assaulted a 12–year–old child with cerebral palsy. *Id*. Hughes was convicted of second degree rape based on the subsection dealing with the victim's inability to consent due to physical helplessness or mental incapacity and second degree child rape. *Hughes*, 166 Wn.2d at 679. There, the statutes at issue were RCW 9A.44.076, rape of a child in the second degree, and RCW 9A.44.050(1)(b), rape in the second degree. *Id.*

Before the Court of Appeals, Hughes maintained that punishing him for both offenses violated double jeopardy. The State argued, first, that the two offenses are not the same in law or in fact, because the elements of the crimes are different. *Id.* at 682–83.The offenses were different because thesecond degree child rape statute requires proof of age of the victim and the defendant, whereas rape in the second degree requires

proof that the victim was incapable of consent because of incapacitation. *Id.* Second, the State argued that the crimes are factually different. It stated that proving the defendant had sexual intercourse with a disabled person in violation of the second degree rape statute does not establish the elements of child rape—the age of the victim and the age differential between the participants. *Id.* Similarly, proving that the defendant engaged in sexual conduct with a child did not prove that the victim was incapable of giving consent sufficient to satisfy the elements for second degree rape. *Id.* In sum, the State argued that proof of one crime fails to prove the other. *Id.* The Court of Appeals agreed with the State.

The Supreme Court reversed the Court of Appeals, and reasoned that both crimes "require proof of nonconsent because of the victim's status." *Id.* at

684. Under the *Blockburger* test, the Supreme Court held that "the two offenses are the same in fact and law" and double jeopardy barred a conviction on separate offense. *Id.* at 683–84.

Here, the type of first degree rape charged in RCW 9A.44.073 does not require proof of force. And inclusion of the domestic violence component added proof of a familial relationship as an element of the greater offense. Therefore, *Hughes* is on point because the first degree rape with a domestic violence component charged requires proving sexual intercourse with a family member. CP 2, 15. Additionally, proof of first degree child molestation, under RCW 10.099.020, with a domestic violence component requires proof of sexual contact with a family member. CP 2-3, 15. Looking at how the State actually charged these crimes the incest counts are lesser included offenses within

the greater offenses of rape of a child and child molestation. *Hughes*, 166 Wn. 2d at 683-84.

Like *Hughes*, the two offenses are the same in fact because they arose out of one act of sexual intercourse with the same victim. *Id.* Proof of incest also proves the other offenses. *Id*. at 682–83. Proof of incest requires showing sexual conduct with a family member—his daughter. The subsection of Child rape with the domestic violence component charged requires proof of incest,the daughter's age, and the age differential between Mr. Mowery and his daughter. As charged, child molestation with the domestic violence allegation requires proof of incest and the age differential between Mr. Mowery and his daughter.

The crimes are factually the same. Proving that Mr. Mowery engaged in sexual conduct with his daughter satisfies the elements for both the first

degree child rape statute and the incest statute, as well as the elements for first degree child molestation statute and the incest statute. *Id*.

Both offenses are also the same in law. Tellingly, the State conceded it could not prove the greater offenses without the elements in the two incest counts. RP 56. Under the *Blockburger* "same evidence" test these crimes are the same in fact and law. *Calle*, 125 Wn.2d at 777-78.

b. Punishing Mr. Mowery for the incest counts that merged into other offenses violates double jeopardy.

The merger doctrine is another aid in determining legislative intent, and it applies even when two crimes have different elements. The merger doctrine may also "help determine legislative intent, where the degree of one offense is elevated by conduct constituting a separate offense." *Muhammad*, 194

Wn.2d at 617 *citing Kier*, 164 Wn.2d at 804, 194 P.3d 212 (*citing State v. Vladovic*, 99 Wn.2d 413, 419, 662 P.2d 853 (1983)).

In this case, the incest counts merged into the other offenses.[2] The facts supporting Counts I and III were the same. Mr. Mowery's conduct of touching his daughter's vagina was charged as Count I, rape of a child in the first degree with a domestic violence component. The statutory elements of this offense included proof of: (1)sexual intercourse, (2) familial relationship, (3) the daughter's age, and (4) the age differential between Mr. Mowery and his daughter. The domestic violence component added familial relationship as an additional element to this offense.

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[2] By pleading guilty, Mr. Mowery did not waive a claim that the sentences for the two convictions violated double jeopardy. Pleading guilty does not waive a double jeopardy challenge. *In re Francis*, 170 Wn.2d 517, 522, 242 P.3d 866 (2010).

Notably, the subsection of the child rape in this charge does not include the element of forcible compulsion. This conduct was charged again as Count III, incest in the first degree: for the same conduct of engaging his daughter in sexual intercourse. CP 2, 15.

COUNT I

Rape of a Child in the First Degree - Domestic Violence

The Defendant, Dennis Lee Mowery, Jr., in Cowlitz County, Washington, on or about July 2, 2021; being at least 24 months older than Jane Doe, had sexual intercourse with Jane Doe, who was less than 12 years old and was not married to and not in a state registered domestic partnership with Dennis Lee Mowery Jr.;

Contrary to RCW 9A.44.073, and against the peace and dignity of the State of Washington.

And further do accuse the defendant, Dennis Lee Mowery Jr., at said time of committing the above crime against a family or household member; a crime of domestic violence as defined under RCW 10.99.020.

CP 2.

COUNT III

Incest In The First Degree

The Defendant, Dennis Lee Mowery, Jr., in Cowlitz County, Washington, on or about July 2, 2021; did engage in sexual intercourse with Jane Doe, a daughter of the defendant, who was known by the defendant to be so related;

Contrary to RCW 9A.64.020(1), and against the peace and dignity of the State of Washington.

CP 2.

Mr. Mowery's conduct of making his daughter touch his penis was charged as Count II, child molestation in the first degree with a domestic violence component. CP 2, 15. The statutory elements of this offense included proof of: (1) sexual contact, (2) familial relationship, and (3)the age differential between Mr. Mowery and his daughter. The domestic violence component added the element of familial relationship to this offense. This same conduct was also charged as Count IV, incest in the second degree: for the same

conduct of engaging his daughter in sexual contact. CP 2, 15.

COUNT II

Child Molestation In The First Degree - Domestic Violence

The Defendant, Dennis Lee Mowery, Jr., in Cowlitz County, Washington, on or about July 2, 2021; being at least 36 months older than Jane Doe, had sexual contact for the purpose of sexual gratification with Jane Doe, who was less than 12 years old and was not married to and not in a state registered domestic partnership with Dennis Lee Mowery Jr.;

Contrary to RCW 9A.44.083, and against the peace and dignity of the State of Washington.

And further do accuse the defendant, Dennis Lee Mowery Jr., at said time of committing the above crime against a family or household member; a crime of domestic violence as defined under RCW 10.99.020.

CP 2.

COUNT IV

Incest In The Second Degree

The Defendant, Dennis Lee Mowery, Jr., in Cowlitz County, Washington, on or about July 2, 2021; did engage in sexual contact with Jane Doe, a daughter of the defendant who was known by the defendant to be so related;

Contrary to RCW 9A.64.020(2), and against the peace and dignity of the State of Washington.

CP 3.

Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the Legislature, it must be presumed the Legislature intended to punish both offenses through a greater sentence for the greater crime. *Vladovic*, 99 Wn.2d at 419. In assessing whether two offenses merge, the court looks not to how the State could have charged the offenses, but how the State actually charged the offenses. *Francis*, 170 Wn.2d at 525.

The imposition of a sentence for the two incest counts that merged into the first two offenses violated double jeopardy. The prosecution acknowledged the incest counts merged into the other offenses. RP 56. The trial court erred in entering a finding that the two incest counts were the same criminal conduct as Count I and II. CP 26; RP 56. It erred in failing to dismiss the

incest counts that merged into other offenses and in imposing separate sentences for the two incest counts. CP 26.

In short, the incest counts merged into Count I and II. The punishments for incest violated double jeopardy.

c. The incest counts must be vacated.

When defendants are convicted in violation of double jeopardy, the remedy is to vacate the lesser offense. *State v. Chesnokov*, 175 Wn. App. 345, 349, 305 P.3d 1103 (2013); *State v. Martin*, 149 Wn. App. 689, 701 & n.49, 205 P.3d 931 (2009). Because the trial court incorrectly entered concurrent sentences for incest counts, the remedy is simply to vacate those convictions. *Id.*

d. The opinion announces the correct Arndt test but decides there is no double jeopardy problem without a cogent, reasoned analysis.

The opinion gives lip-service to this Court's prevailing test in *Arndt* and then neglects to meaningful discuss the four-part analysis. App. 4. It merely gives short-shrift to Mr. Mowery's arguments and leaps to the conclusion that the incest convictions do not violate double jeopardy. App. 5-6. For one, the opinion does not engage in a meaningful analysis of the statutory elements that were actually charged. App. 5-6. It neglects to compare the elements of the offenses at issue or explain how they are not the "same in law and in fact." *Villanueva-Gonzalez*, 175 Wn. App. at 5; *Muhammad*, 194 Wn.2d at 618. Without a meaningful review of what the State charged and the elements of each offense, the opinion conclusorily declares that the "domestic violence special allegation does not add a

new element to rape of a child in the first degree or to child molestation in the first degree." App. 5.

The opinion also claims, without any analysis or discussion, that *Hughes* is distinguishable from this case. App. 5.

But without a rigorous analysis of the elements, the crimes as charged, the opinion ignores why this case is like *Hughes*. Without any analysis, the opinion conclusorily holds that the "statutes for Mowery's convictions are not the same in law under the *Blockburger* 'same evidence' test." App. 5.

In short, the COA opinion purports to distinguish *Hughes* to the facts of this case but does not provide a cogent, principled reason why Hughes is distinguishable. App. 5-6.

Because this Court reviews double jeopardy issues de novo, review is appropriate. *Villanueva-*

Gonzalez, 180 Wn.2d at 979-80. A meaningful, rigorous analysis of the elements of the crimes as charged leads to the inescapable conclusion that the incest convictions violate double jeopardy. This Court should accept review and reverse the two incest convictions.

e. Review is also appropriate as the opinion seems to agree that the incest offenses merged into other offenses and constituted the same criminal conduct.

The same criminal conduct rule provides sentencing courts an important tool to ameliorate the harsh effect of prosecutorial overcharging. *State v. Westwood*, 2 Wn.3d 157, 169, 534 P.3d 1162 (2023) (Madsen, J. dissenting). Under the rule, crimes, when committed with the same objective intent to further a criminal act against the same victim at the same time, should be punished as one crime. *Id*. Without this protection, prosecutors may charge multiple crimes arising from a single incident, each carrying its own

punishment, and a sentencing judge would be required to impose a sentence for each crime. *Id*. at 169-70.

RCW 9.94A.589(1)(a) governs application of the same criminal conduct principle:

> That 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. . . . "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

(Emphasis added.)

The opinion seems to agrees with the trial court factual findings that the incest merged into other offenses and were the same criminal conduct. App. 5-6. Put differently, the incest offenses shared the same objective intent as the two other offenses, against the same victim at the same time. App. 5-6. Such offenses should punished as one crime. App. 5-6. Thus, this Court should accept review and remand to strike the

punishments for the incest from the judgment and sentence. *State v. Chesnokov*, 175 Wn. App. 345, 349, 305 P.3d 1103 (2013).

E. CONCLUSION

Mr. Mowery Jr. respectfully requests this Court accept review of the Court of Appeals' opinion because it misapplied this Court's prevailing analysis for determining whether a conviction violated double jeopardy. RAP 13.4(b)(1).

This brief complies with RAP 18.7 and contains 3,265 words.

DATED this 27th day of September 2024.

Respectfully submitted,

MOSES OKEYO (WSBA 57597)
Washington Appellate Project
Attorneys for Appellant

APPENDICES

Filed
Washington State
Court of Appeals
Division Two

September 24, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DENNIS LEE MOWERY, JR., Appellant.	No. 58289-9-II UNPUBLISHED OPINION

VELJACIC, A.C.J. — Dennis L. Mowery, Jr. appeals his sentence for rape of a child in the first degree, child molestation in the first degree, incest in the first degree, and incest in the second degree. First, he argues that the sentence imposed for incest in the first degree violated double jeopardy because it should have merged with his sentence for rape of a child in the first degree. Second, he argues that the sentence imposed for incest in the second degree violated double jeopardy because it should have merged with his sentence for child molestation in the first degree. Third, he argues that the mandatory victim penalty assessment (VPA) and deoxyribonucleic acid (DNA) collection fees should be stricken. He also argues that the discretionary domestic violence assessment fee should be stricken.

We disagree with Mowery that the imposition of sentences for two counts of incest violated double jeopardy; we therefore affirm his convictions. However, we agree with Mowery that the mandatory fees be stricken as Mowery was found to be indigent, and so we remand to the

sentencing court for the mandatory fees to be stricken. Additionally, we permit Mowery to move for reconsideration of the domestic violence assessment fee to the sentencing court on remand.

FACTS

I. PLEADING

Mowery was charged with one count of rape of a child in the first degree, one count of child molestation in the first degree, one count of incest in the first degree, and one count of incest in the second degree. All involved the same victim. Both rape of a child in the first degree and child molestation in the first degree carried a domestic violence designation. Count I, rape of a child in the first degree, and count III, incest in the first degree, arose out of the same act involving penetration. Count II, child molestation in the first degree, and count IV, incest in the second degree, arose out of the same act involving sexual contact, albeit a different act than that addressed in counts I and III.

Mowery pled guilty to all counts.

II. SENTENCING

The State acknowledged that the incest charges were based on the same criminal conduct as the rape of a child and child molestation charges. Mowery asserted that incest in the first degree merged into rape of a child in the first degree and that incest in the second degree merged into child molestation in the first degree.

The sentencing court found that counts I and III encompassed the same criminal conduct and counts II and IV encompassed the same criminal conduct and counted as one crime in determining Mowery's offender score. The court sentenced Mowery to (1) 150 months to life for count I, rape of a child in the first degree, (2) 89 months to life for count II, child molestation in the first degree, (3) 34 months with 36 months of community custody for count III, incest in the

first degree, (4) 20 months with 36 months of community custody for count IV, incest in the second degree. On counts I and II, the court also imposed lifetime community custody. The court ordered all four sentences to run concurrently with a total confinement period of 150 months. The court found Mowery was indigent, but imposed a $500 VPA fee, a $100 DNA collection fee, and a $100 domestic violence assessment fee as legal financial obligations (LFOs).

Mowery appeals his sentence.

ANALYSIS

I. DOUBLE JEOPARDY

Mowery argues that his sentences for incest in the first degree and incest in the second degree must be stricken because they violate double jeopardy because the domestic violence designations on rape of a child in the first degree and child molestation in the first degree add a familial element to each, making them the same as both incest charges. We disagree.

A. Standard of Review

We review claims of double jeopardy de novo. *State v. Jackman*, 156 Wn.2d 736, 746, 132 P.2d 136 (2006). The appellant may raise claims of double jeopardy for the first time on appeal. *Id.*

B. Legal Principles

"The Fifth Amendment to the United States Constitution and article I, section 9 of the Washington Constitution protect a defendant against multiple punishments for the same offense." *State v. Sanford*, 15 Wn. App. 2d 748, 752, 477 P.3d 72 (2020). "No double jeopardy violation results when the information, instructions, testimony, and argument clearly demonstrate that the State was not seeking to impose multiple punishments for the same offense." *State v. Hayes*, 81

Wn. App. 425, 440, 914 P.2d 788 (1996); *State v. Mutch*, 171 Wn.2d 646, 664, 254 P.3d 803 (2011).

Our Supreme Court has followed four analytical steps to conclude whether the legislature intended cumulative punishment to be authorized: "(1) consideration of any express or implicit legislative intent, (2) application of the *Blockburger*[1] or 'same evidence' test, (3) application of the 'merger doctrine,' and (4) consideration of any independent purpose or effect that would allow punishment as a separate offense." *State v. Arndt*, 194 Wn.2d 784, 816, 453 P.3d 696 (2019) (quoting *State v. Freeman*, 153 Wn.2d 765, 771-73, 108 P.3d 753 (2005)). "[M]erger and same criminal conduct doctrines do not affect the underlying convictions' validity." *State v. Wilkins*, 200 Wn. App. 794, 806, 403 P.3d 890 (2017). When one of two convictions must be vacated for double jeopardy reasons, we strike the lesser conviction. *State v. Hughes*, 166 Wn.2d 675, 686 n 13, 212 P.3d 558 (2009).

The identification of a crime as being one of domestic violence "does not itself alter the elements of the underlying offense; rather, it signals [to] the court that the law is to be equitably and vigorously enforced." *State v. O.P.*, 103 Wn. App. 889, 892, 13 P.3d 1111 (2000).

C. Domestic Violence Special Allegation Does Not Alter Elements

Relying on *Hughes*, Mowery argues that because of the domestic violence special allegation on count I, rape of a child in the first degree, and count II, child molestation in the first degree, his sentences for count III, incest in the first degree, and count IV, incest in the second degree, would constitute double jeopardy because counts I and III would have the same elements, and counts II and IV would have the same elements. 166 Wn.2d at 675.

[1] *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180. 76 L. Ed 306 (1932).

Mowery's reliance on *Hughes* is unavailing. In *Hughes*, the Supreme Court held that Hughes's convictions for rape and rape of a child violated double jeopardy because the legislature did not intend one act of sexual intercourse to violate both the rape and statutory rape provisions of our code. 166 Wn.2d at 685. *Hughes* does not stand for the proposition that adding a special allegation of domestic violence to rape of a child in the first degree or child molestation in the first degree causes the elements to be the same as for the crimes of incest. Indeed, the identification of a crime as being one of domestic violence "does not itself alter the elements of the underlying offense; rather, it signals [to] the court that the law is to be equitably and vigorously enforced." *O.P.*, 103 Wn. App. at 892. As further explained in *O.P.* and by the Domestic Violence Act, chapter 10.99 RCW, the purpose of the act was to enhance enforcement of the already adequate existing criminal statutes that provide protection for victims of domestic violence. *See* 103 Wn. App. at 892; RCW 10.99.010; LAWS OF1979 ch. 105, § 1. Thus, the domestic violence special allegation does not add a new element to rape of a child in the first degree or to child molestation in the first degree.

Furthermore, Mowery's case is unlike *Hughes* because the statutes for Mowery's convictions are not the same in law under the *Blockburger* "same evidence" test. Additionally, the *Hughes* court was able to determine that the legislature intended that rape and statutory rape share the same legislative intent while we were unable to do so here for any of the crimes when considering any of the methods of determining legislative intent. Mowery's arguments fail.

Mowery also asserts that the sentencing court erred when entering a finding that the two incest counts were the same criminal conduct as rape of a child in the first degree and child molestation in the first degree. But as our Supreme Court recognized in *State v. Calle*, 125 Wn.2d 769, 781, 888 P.2d 155 (1995), the legislature validated the concept of multiple convictions arising

out of the same criminal act in what is now RCW 9.94A.589(1)(a). A finding of same criminal conduct does not necessarily compel a conclusion that the convictions violate the prohibition on double jeopardy. *Id.* at 781-82.

Moreover, merger and same criminal conduct doctrines do not affect the underlying convictions' validity. *Wilkins*, 200 Wn. App. at 806. Accordingly, we hold that Mowery's convictions do not violate double jeopardy.

III. LFOs

Mowery argues that we should remand to the sentencing court to strike the VPA fee, DNA collection fee, and domestic violence assessment fee based on recent legislative changes. Effective July 1, 2023, RCW 7.68.035(4) prohibits courts from imposing the VPA fee on indigent defendants. *See State v. Ellis*, 27 Wn. App. 2d 1, 16, 530 P.3d 1048, *pet. for rev. filed*, 102378-2 (2023). The legislature also amended RCW 43.43.7541 to require waiver of a DNA collection fee imposed before July 1, 2023 upon the defendant's motion. RCW 43.43.7541(2). The State concedes that we should remand for the sentencing court to strike the aforementioned LFOs. We accept the State's concession and remand for the sentencing court to strike the aforementioned LFOs.

Regarding the domestic violence assessment fee, former RCW 10.99.080(1) (2015) states that the trial court may impose a domestic violence assessment on any adult offender convicted of a crime involving domestic violence. Recent amendments to this statute did not change this language. LAWS OF 2023, ch. 470, § 1003. The assessment fee is not mandatory. Sentencing courts "are encouraged to solicit input from the victim or representatives for the victim in assessing the ability of the convicted offender to pay the penalty," but are not required to do so. *See* RCW 10.99.080(5); LAWS OF 2015, ch. 275, § 14. Because there is no showing regarding the sentencing

court's decision to impose the domestic violence assessment fee, we permit Mowery to move for the trial court to reconsider that fee on remand.

CONCLUSION

Accordingly, we affirm Mowery's sentences for rape of a child in the first degree, child molestation in the first degree, incest in the first degree, and incest in the second degree as these sentences do not violate double jeopardy. However, we remand to the sentencing court to strike the VPA and DNA fees, and reconsider the domestic violence assessment fee.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Veljacic, A.C.J.

We concur:

Price, J.

Che, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 58289-9-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal Date: September 27, 2024
Washington Appellate Project

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