IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JIMMY DALE WITMER, Appellant.	No. 39956-3-II UNPUBLISHED OPINION

Van Deren, J. — Jimmy Witmer appeals his convictions for first degree child rape, first degree incest, and first degree child molestation. He argues that (1) the trial court erred in admitting the child victim's statements to several witnesses because the child did not testify about those statements at the pretrial *Ryan*[1] child hearsay hearing, (2) his convictions for first degree child rape and first degree incest violate his right to be free from double jeopardy, and (3) the trial court's failure to give a *Petrich*[2] multiple acts unanimity instruction requires reversal of

[1] *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984).

[2] *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984).

his first degree incest conviction.[3] We affirm his convictions.

FACTS

The State charged Witmer, a 35 year old male, with one count of first degree child rape, one count of first degree incest, and one count of first degree child molestation in connection with incidents involving his 9 year old daughter, TAW.[4] The trial court held a pretrial *Ryan* child hearsay hearing to determine the admissibility of TAW's statements to various witnesses.[5] In its briefing for the pretrial *Ryan* hearing, the State described TAW's statements to Thurston County Sheriff Detective Erick Kolb and asked the trial court to find that TAW's statements to "law enforcement," among others, were admissible. Clerk's Papers (CP) at 106. Numerous witnesses testified about statements TAW made to them about Witmer's actions.

Gina Winslow, Witmer's former fiancée, testified that she began living with Witmer on July 3, 2008. TAW, who had been living with her paternal grandparents, came to live with Witmer after Winslow moved in with him. In late December 2008, Witmer and Winslow went to TAW's bedroom to help her with her homework. Winslow told Witmer that she would be in

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[3] Witmer also argues that, absent admission of the child victim's statements to the other witnesses who testified at trial, sufficient evidence does not support his convictions for first degree child rape, first degree incest, and first degree child molestation. He further argues that, even if we hold that the statements were admissible, we should not find them credible due to the witnesses' alleged biases. But we hold that the trial court properly admitted the statements to the other witnesses and credibility issues are for the trier of fact. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970, *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Thus, we do not further discuss these arguments.

[4] We refer to the victim, a juvenile, by her initials in order to protect her privacy.

[5] The trial court continued the August 3, 2009, hearing until September 10, 2009. The same bound report of proceedings (RP) volume has the August 3 portion of the hearing in pages 5 through 67 and the September 10 portion in pages 68 through 143. For clarity, we cite to the hearing's transcript as "RP (Aug. 3, 2009)."

TAW's bedroom "in a minute." Report of Proceedings (RP) (Aug. 3, 2009) at 103. When Winslow opened TAW's bedroom door, she saw TAW lying on the floor with Witmer on his hands and knees above her. One of Witmer's hands was in TAW's pants and he was kissing her with his tongue in her mouth. Winslow told Witmer to get out of TAW's room and then reassured TAW that she was not in trouble and that the incident was not her fault. Witmer told Winslow that he was just checking TAW for a rash.

Winslow went back into TAW's room and asked her whether anything similar had happened before. She asked TAW about a previous occasion when Witmer and TAW were in the living room together. On that occasion, when Winslow walked into the living room, she saw TAW sitting on the couch and Witmer "standing right in front of [TAW]." RP (Aug. 3, 2009) at 104. Witmer "jumped away from [TAW]" and "spun around," and Winslow saw that his pants' zipper was down. RP (Aug. 3, 2009) at 104. Witmer told her he had forgotten to zip up after using the bathroom and TAW said at the time that they had been "talking and watching [television]." RP (Aug. 3, 2009) at 105. When Winslow inquired about the living room incident following the events in the bedroom in December 2008, TAW told Winslow that Witmer "had asked her to touch him" during the living room encounter. RP (Aug. 3, 2009) at 105.

Winslow did not notify the authorities because she loved Witmer and just wanted to keep TAW safe and to "get help" for Witmer. RP (Aug. 3, 2009) at 106. Thereafter, she and a friend, who also lived with Witmer, took turns making sure that Witmer and TAW were never together in a room without someone else present.

Deborah Buettner, TAW's grandmother, testified that TAW lived with her for "at least five days a week," and sometimes weekends, before TAW left to live with Witmer. RP (Aug. 3,

2009) at 15. According to Buettner, TAW was not prone to lying and could separate reality from fantasy. On Saturday, January 3, 2009, Buettner picked TAW up at Witmer's residence. While in the car, TAW said, "[Winslow] is going to go to jail." RP (Aug. 3, 2009) at 18. Buettner asked TAW a series of questions to determine what she meant and TAW said that Winslow was blackmailing Witmer. When Buettner asked TAW why Winslow was blackmailing Witmer, TAW said, "[She, TAW, was] not supposed to tell" because she would "have to go live with strangers" and never "see [Buettner] or any of [her] family again." RP (Aug. 3, 2009) at 18. Buettner reassured TAW that she would not have to live with strangers and not see Buettner again. TAW then said that Winslow had walked into her bedroom while Witmer "was checking her for a rash" . . . 'in [her] private place'" and Witmer had forgotten to zip up his pants. RP (Aug. 3, 2009) at 19.

Concerned about TAW's statements, Buettner called a family friend, Kae Ecklebarger, a former child protection social worker, and asked to meet with her. Ecklebarger testified that she had known TAW for 3 years, that TAW told everyone that she had "picked" Ecklebarger as family, and that TAW was "just like family" to her. RP (Aug. 3, 2009) at 70. Ecklebarger had worked as a "child protection social worker" for 11 years, 2 of which were spent on a child incest team that interviewed alleged sexual assault and incest victims. RP (Aug. 3, 2009) at 71. Ecklebarger had training in forensic interviews of children, which emphasized avoiding suggestive questions or leading the child into giving certain answers.

Buettner, TAW, and Winslow met at Ecklebarger's house. While Buettner and TAW were in the room, Winslow related the two incidents she had observed between Witmer and

TAW.[6] Then Ecklebarger asked TAW if Witmer had ever asked her to touch him. TAW replied, "[Y]es"; Ecklebarger asked her where he had asked her to touch him and TAW pointed to her vaginal area and said, "'On him.'" RP (Aug. 3, 2009) at 76. Ecklebarger asked TAW what Witmer asked her to touch him with and TAW replied that he wanted her to touch him with her mouth. Ecklebarger asked what that had tasted like; TAW shuddered and said, "'Blah.'" RP (Aug. 3, 2009) at 76. Ecklebarger asked TAW if she had names for male and female genitalia; TAW said, "[Y]es," and that Witmer had taught her they were called "'[a] cock and a puss.'" RP (Aug. 3, 2009) at 76. Winslow testified that she had never heard TAW use such language before but she had heard Witmer use those words.

Buettner testified that the three women decided not to call the police that night because they did not want to frighten TAW, who believed she would be taken from her family to live with strangers because she had disclosed Witmer's conduct involving her. They also did not want to call Child Protective Services (CPS) due to a fear, based on a past experience, that CPS would place TAW in foster care without certain "court paperwork." RP (Aug. 3, 2009) at 24-25. Instead, the women agreed that TAW would stay with Buettner, Winslow would talk to Witmer about signing over parental custody of TAW to Buettner, and Buettner would not call the police if Witmer signed over parental custody the following Monday. Witmer met Buettner on Monday and transferred custody of TAW to her.

Buettner called CPS on Monday after Witmer signed over TAW's custody to her but she

[6] Buettner's, Winslow's, and Ecklebarger's testimony about Winslow's and TAW's disclosures at Ecklebarger's home were for the most part consistent. However, Ecklebarger testified that TAW was in the room when Winslow related what she had seen, while Buettner and Winslow testified that TAW was not in the room.

was unable to reach a particular social worker until Tuesday morning. Buettner also testified that, on Tuesday morning, she received a telephone call from Linley Olson,[7] a counselor at TAW's school. Olson told Buettner that TAW had written her a note disclosing that, "My daddy put his [private] into my bot[t]om."[8] Ex. 5. TAW had not previously disclosed this encounter between Witmer and her to Buettner, Ecklebarger, or Winslow. Buettner told Olson that she had reported the late December 2008 incident to CPS but CPS said that, because TAW was "in a safe environment" while staying with Buettner, it was "not going to open a case." RP (Aug. 3, 2009) at 26. Olson told Buettner that she was going to call CPS and did so; CPS then called Buettner and reported the incident to the police. Either that afternoon or the next morning, Buettner spoke with Kolb. Kolb subsequently interviewed TAW.

TAW testified at the *Ryan* hearing and correctly answered a series of questions used to determine whether she could discern the difference between the truth and a lie. TAW's testimony at the *Ryan* hearing was vague; she repeatedly stated that she could not remember details or statements that she had related to the other witnesses who testified at the hearing. During direct examination, she said that Witmer "did something really gross with [her]" that made her feel uncomfortable but she was "kind of grossed out to say" what he did. RP (Aug. 3, 2009) at 48. She called her genitals her "lower front private," and referred to her "bottom" and her "chest." RP (Aug. 3, 2009) at 50-51. Witmer had told her to call them something different but she did not remember what. Witmer had asked her to touch him but she did not remember where he asked

[7] Olson did not testify at the pretrial *Ryan* hearing.

[8] Buettner also testified that Olson had subsequently shown her the note. She identified the note offered into evidence by the State as the note Olson had shown her and identified the note's handwriting as TAW's.

her to touch him. Witmer had told her not to tell "what happened between [them]," but she did not recall specifically what he had said. RP (Aug. 3, 2009) at 51. Finally, she viewed the note offered by the State, confirmed that it was the same note she had written to Olson, and confirmed that she had written, "'My daddy put his private in my bottom.'" RP (Aug. 3, 2009) at 50.

During cross-examination, she testified that she remembered when Winslow walked into her bedroom while TAW and Witmer were alone together but she could not recall why Winslow became upset or whether Witmer had been checking her for a rash. TAW could not recall telling Buettner about this incident. She recalled the meeting at Ecklebarger's house but she could not recall a discussion about Witmer.

At the hearing's close, the State discussed how the evidence established the *Ryan* factors and, thus, the admissibility of TAW's hearsay statements to the other witnesses. The State referred to Kolb once. Witmer argued that Ecklebarger's, Winslow's, Buettner's, and TAW's testimony did not establish admissibility of TAW's statements. His argument also focused on the difference between the acts described in TAW's disclosures to Winslow, Buettner, and Ecklebarger and her disclosure to Olson, and the failure of the State to call Olson to testify at the hearing. He specifically objected to Olson testifying at trial because she had not testified at the pretrial hearing regarding admissibility of TAW's statements to others.

The trial court reserved ruling on the admissibility of TAW's note to Olson, concluding that the State had to prove the chain of custody. It remarked on TAW's multiple hearsay statements to Winslow and Buettner separately and to Winslow, Buettner, and Ecklebarger while at Ecklebarger's house. It also stated, "I'm not even gonna get into the statement . . . to the detective." RP (Aug. 3, 2009) at 140. Discussing the multiple people who heard TAW's

disclosures, the trial court stated, "We've got Detective Kolb . . . who hear[d that Witmer] puts his cock in [TAW's] privates" and "other statements." RP (Aug. 3, 2009) at 141. After discussing the *Ryan* factors, the trial court orally ruled that "the hearsay statements will come in."[9]

[9] The trial court found:

1. T[A]W is the minor child of Jimmy Witmer. Until the time of disclosure, she lived mostly with her grandmother, Debbie Buettner[,] and visited her father the defendant on the weekends. T[A]W went to live with the defendant full time when he moved his then fiancée, Gina Winslow[,] into his home from California. T[A]W's mother was absent from her life.
2. On January 2, 2009, while driving in the car, T[A]W spontaneously disclosed to her grandmother, comments to the effect that [Winslow] was going to go to jail because she was "blackmailing" T[A]W's father after seeing him kiss her and put his hands down her pants. T[A]W made the same disclosure again later to [Buettner, Winslow], and a family friend, Kae Ecklebarger. T[A]W also disclosed to [Winslow] that the defendant had done other things but that he had not touched her in this manner before she moved in around July 2008. T[A]W made further disclosures to her elementary school counselor, Linley Olson, and Detective Eric[k] Kolb of the Thurston County Sheriff's Office. The court found T[A]W had no apparent motive to lie about the incident.
3. [Winslow] admitted she never called the police, despite witnessing the defendant's actions just before Christmas 2008. The court found she also had no apparent motive to lie about the incident.
4. T[A]W's statements to [Buettner] were spontaneous, but the statements to the three women together were the result of [Eckleberger] asking general questions regarding the previous disclosure made to [Buettner] and [Winslow]. The questioning was found to be non-suggestive and consistent with "spontaneity" as required by case law.
5. The statements were made within three to four weeks of the incident, around Christmastime when T[A]W knew she was leaving her grandmother's house to go back to her father's home.
6. Although only eight or nine-years old at the time, T[A]W used the words "puss" and "cock" to describe the male and female genitalia as she described hearing them called by the defendant.
7. The court found that T[A]W did not want her father to get in trouble, thus there was no reason to believe she was misrepresenting the defendant's involvement.
8. T[A]W stated she did not use to feel safe, but now that she is living with her grandmother she does.
9. There were several instances of disclosures, T[A]W, the declarant, had no apparent motive to lie, the general character of T[A]W is trustworthy, at

RP (Aug. 3, 2009) at 143.

On the first day of trial, while discussing preliminary matters, the trial court[10] observed that no written ruling or order regarding the pretrial *Ryan* hearing had yet been entered.[11] The trial court inquired whether counsel had a clear understanding of the ruling on the admissibility of TAW's statements to others. The State affirmatively replied and said, "[A]ny person who heard [TAW] give statements as to her abuse comes in, and that includes [Kolb], . . . Buettner, . . .Winslow, . . . Ecklebarger[,] and . . . Olson would be included in that as well." I RP at 24. Witmer replied that he agreed, except that he reiterated his objection to Olson's testimony based on her failure to testify at the *Ryan* hearing.

At trial, Olson testified that, having previously spoken and interacted with TAW as her school counselor, TAW had formed a trusting relationship with her. On January 7, 2009, TAW met with Olson and said that she was now living with Buettner, that Buettner, Winslow, and Ecklebarger had explained "that what [Witmer] had done was wrong and [TAW] wouldn't be

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> least six, if not seven people heard T[A]W give an account of the incident, the statements were spontaneous, the timing of the statements and the relationship between T[A]W and her father suggest trustworthiness, the statements contained express assertions of past facts, cross examination would not inherently show T[A]W's lack of knowledge, the possibility of T[A]W's recollection being faulty is remote, and there is no reason to believe T[A]W is misrepresenting her father's involvement.

Clerk's Papers (CP) at 337-38.

The trial court concluded that (1) the *Ryan* factors were established by clear, cogent, and convincing evidence; (2) TAW's hearsay statements were admissible at trial; and (3) the admissibility of TAW's note to Olson was a chain of custody issue for the trial court to decide later.

[10] Different judges presided over the pretrial *Ryan* hearing and Witmer's trial.

[11] The trial court later entered written findings and fact and conclusions of law regarding the admissibility of TAW's out of court statements.

with him anymore," and that "[TAW] felt okay about not living with [Witmer], that he [could not] do it anymore." I RP at 68-69. TAW, referencing "something that had happened to her during the Christmas break," told Olson that she had told the truth to Buettner, Winslow, and Ecklebarger. I RP at 69. She said that Witmer had done something to her and she did not feel comfortable telling Olson about it. When Olson asked her whether she wanted to write it down, TAW wrote her a note stating, "'My daddy put his private into my bottom.'" I RP at 70. Olson identified the note offered by the State as the note TAW had written, and the trial court admitted it. TAW also told Olson that "there were other inappropriate things that [Witmer] did, but she didn't feel good talking about them." I RP at 71-72. Olson, because she felt like she had enough information to file a report, did not inquire further and called Buettner and CPS.

Kolb testified without objection about his recorded interview with TAW. TAW told him that she felt safe now living with Buettner. She said that she had once felt safe living with Witmer but did not feel safe living with him now. When Kolb asked her why, she wrote a note stating, "'My daddy put his private . . . up my bottom.'" II RP at 253. TAW began to cry and was unresponsive to Kolb's specific questions about this incident. Kolb then asked TAW, "[W]hat made that touch[ing] stop," and TAW answered, "[Winslow] walk[ing] in or walk[ing] by [had] made the touch[ing] stop." II RP at 254. When Kolb asked whether Witmer had touched her anywhere else, TAW said, "Lots," and that Witmer had touched her vaginal area with his fingers and his tongue and had digitally penetrated her. Ex. 10, at 23. She was reluctant to provide specific details about these incidents, and she eventually said she did not want to talk about them anymore. The State, without objection, played a recording of Kolb's interview with TAW for the jury.

Kolb also testified about his interview with Witmer. After waiving his *Miranda*[12] rights, Witmer initially denied touching TAW in a sexual or inappropriate manner. Witmer's demeanor was initially "very calm, very cooperative" but, when questioned by Kolb about the incident Winslow interrupted in TAW's bedroom, he "got really upset and at some point he stood up and started yelling and screaming at [Kolb]." II RP at 264. Witmer said that he could not remember inappropriately touching TAW during the bedroom incident but it was "within the realm of possibilities." II RP at 276. He explained that these possible acts and his lack of memory could have been the result of a "'psychotic episode'" or "posttraumatic stress disorder." II RP at 276.

Witmer recalled Winslow yelling at him following the bedroom incident but he did not recall what she had said to him. When asked about allegations that he had touched TAW's genitals, Witmer said that "it was possible that he did do those things and that he hated the fact that [they] could have happened, and if [they] did happen, that he just want[ed] someone to shoot him." II RP at 265.

Kolb arrested Witmer and placed him in handcuffs because he was standing up, yelling at Kolb, and behaving erratically. When Kolb explained why he was arresting him, Witmer "immediately started crying," was "very upset," apologized to Kolb, and repeated that "he wanted [Kolb] to shoot him in the head and that he deserved it." II RP at 266. He told Kolb that "the person who reported th[is] deserves a medal." II RP at 267. After Kolb booked Witmer, Witmer "thanked [Kolb] for arresting him and making [TAW] safe." II RP at 267.

Nancy Young, a nurse at a sexual assault clinic, testified about her examination of TAW. Young told TAW that she knew TAW had spoken with Kolb and asked if TAW could give her

[12] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

any information about that. TAW became "really quiet and almost tearful" and said, "'I'm just too scared to talk about that. I don't want to.'" II RP at 234. Young changed the subject. Young said that TAW had a normal exam showing no signs of abuse. But she said that most children she examined had normal exams "because much of the touching that they describe either doesn't leave any signs of injury or it's already healed up by the time we actually see them." II RP at 237. When the prosecutor asked what percentage of children had normal exams in cases where sexual abuse was later substantiated, Young stated:

> [T]he normal exams are probably at least 95 percent. We have very few abnormals in the genital area. It's a little bit more prevalent than in the anal area, for anal exams less than one percent of the time is it abnormal, so mostly the children that we [see] have normal exams.

II RP at 238.

Winslow testified consistently with her testimony at the *Ryan* hearing about the two incidents she witnessed between TAW and Witmer, TAW's disclosures to her, and the meeting at Ecklebarger's house. Buettner and Ecklebarger also testified consistently with their testimony at the *Ryan* hearing about the meeting at Ecklebarger's house and TAW's disclosures. Buettner also testified that when she met with Witmer to transfer his custody of TAW, he said he could not recall anything that had happened but he had "compelling evidence" that the abuse had happened and was willing to transfer custody. I RP at 98.

TAW testified that she remembered telling Olson a secret by writing it down. She identified the note she had written to Olson and said she told the truth when she wrote it. When asked how she felt about Witmer now, she said, "Angry and my love has shattered into teeny fragments" because "he did something bad." I RP at 152. When asked what Witmer did, she

wrote, "Because my dad is a child sex offender," and she said she could not remember what that meant or whether she had heard that term from someone.[13] I RP at 153.

TAW testified that Witmer touched her chest area in a manner that made her feel uncomfortable now but she did not remember when that occurred. She said that he had to check her vaginal area because she frequently had rashes when she was "little," but he had not checked her for rashes since she was four or five years old. I RP at 155-56. She said that Witmer had touched her anal area in a manner that made her feel uncomfortable but she could not remember specifically what had happened. She could not remember someone asking her to touch their genitals. She neither recalled her disclosures to Buettner nor what was discussed at Ecklebarger's house but she remembered the meeting at Ecklebarger's house.

TAW could not remember speaking with Kolb but she remembered writing the note to him and said that she had been telling the truth. She said that she had told the truth when she told Kolb that Witmer had touched her vaginal area many times. She could not remember whether Witmer had touched her genitals with his tongue or fingers. When asked, as best as she could recall, whether she had told Kolb the truth when she spoke with him, TAW wrote, "'I think so.'" I RP at 165-66.

Witmer testified that, during the incident in TAW's bedroom, TAW told him that "[her] privates hurt again" and she asked Witmer to check them for a yeast infection. II RP at 287-88. He had given her a "quick peck on the lips, just like [he had] always done after every time [he had] checked her just to reassure her everything [wa]s okay" and "[Winslow] blew up at [him]."

[13] Apparently, because of TAW's discomfort with testifying about some subjects, she would write down her responses to some of counsel's questions and then counsel would have TAW read aloud or confirm what she had written.

II RP at 288, 308. Witmer denied any inappropriate sexual contact with TAW.

During closing argument, the prosecutor stated that three acts could have constituted first degree child rape: Witmer having TAW perform oral sex on him, Witmer anally raping TAW, or Witmer performing oral sex on and digitally penetrating TAW. The prosecutor further argued that the first degree incest charge was "very similar" to the first degree child rape charge and stated, "[Witmer] had sexual intercourse with [TAW]? Absolutely. Pick which way he did it." II RP at 354. The prosecutor argued that the incident Winslow observed in TAW's bedroom satisfied the elements of the child molestation charge

The jury convicted Witmer as charged. He appeals.

ANALYSIS

I. TAW's Statements to Other Witnesses

Although Witmer frames his assignments of error as challenges to specific findings of fact and conclusions of law arising from the pretrial *Ryan* child hearsay hearing, the substance of his arguments is based on his misunderstanding of the legal requirements of RCW 9A.44.120 regarding the alleged child victim's testimony at the *Ryan* hearing and the necessity for the trial court to require every witness to first testify at the pretrial hearing. Witmer argues only that the lack of specific testimony by TAW and the failure of Kolb and Olson to testify at the *Ryan* hearing renders the trial court's findings necessarily erroneous, thus, he fails to challenge or discuss the evidence supporting each of the trial court's challenged findings and, likewise, fails to discuss whether the findings support the conclusions of law.[14]

[14] We limit our review to the trial court's findings of fact 2, 4, 5, 6, and 9 because only these findings relate to TAW's statements to other witnesses. Witmer presents no relevant arguments challenging findings 3, 7, and 8, thus, we do not consider his assignments of error to them and we consider them, as well as unchallenged finding of fact 1, as verities on appeal. *State v. Hill*, 123

We normally review a challenge to findings of fact to determine whether substantial evidence supports each challenged finding and we review the trial court's conclusions of law de novo to determine whether the findings support the challenged conclusions. *State v. Halstien*, 122 Wn.2d 109, 128-29, 857 P.2d 270 (1993). But Witmer does not support his challenges to the findings and conclusions with discussion or authority. Therefore, in order to properly analyze the trial court's decision to admit TAW's statements to others, we address without reference to specific findings of fact or conclusions of law the reliability of TAW's statements and whether the trial court abused its discretion in admitting TAW's statements to Winslow, Buettner, and Ecklebarger and its admission of Kolb's and Olson's testimony at trial, even though they did not first testify at the child hearsay hearing.

A. Statements to Winslow, Buettner, and Ecklebarger

Witmer argues that the trial court erred in admitting TAW's statements to Winslow, Buettner, and Ecklebarger at trial because TAW was "never questioned about her disclosures to Buettner, Ecklebarger . . . , []or Winslow[,] all of whom testified at the [pretrial child hearsay] hearing and whose testimony regarding [TAW]'s disclosures and the admissibility of the same were the very subject of the hearing." Br. of Appellant at 18. Thus, because the State failed to question TAW "about pertinent facts that would establish the reliability of her statements," the trial court's findings of fact 2, 4, 5, 6, and 9 and conclusions of law 1, 2, and 3 are not supported by the record. Br. of Appellant at 19.

We review a trial court's decision to admit child hearsay statements for an abuse of discretion.[15] *State v. Woods*, 154 Wn.2d 613, 623, 114 P.3d 1176 (2005). A trial court abuses its

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Wn.2d 641, 647, 870 P.2d 313 (1994).

[15] Although Witmer argues that the trial court erred in admitting these statements, and thus,

discretion when its evidentiary ruling is manifestly unreasonable or is based on untenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). We may uphold a trial court's evidentiary ruling on the grounds the trial court used or on other proper grounds that the record supports. *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995).

RCW 9A.44.120 governs the admissibility of child hearsay statements. It provides:

> A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110, not otherwise admissible by statute or court rule, *is admissible* in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if:
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> (1) *The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and*
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> (2) *The child either*:
>
> (a) *Testifies at the proceedings; or*
>
> (b) *Is unavailable as a witness*: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.
>
> A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his or her intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

(Emphasis added.)

In determining the reliability of child hearsay statements before trial, the trial court considers nine factors: "'(1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements'"; (4) the spontaneity of the statements; "'(5) the timing of the declaration and the relationship between the declarant and

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presumably, the standard of review is de novo for legal error, the proper standard of review of a trial court's admission of child hearsay statements is abuse of discretion.

the witness'"; (6) whether the statement contained express assertions of past fact; (7) whether the declarant's lack of knowledge could be established through cross-examination; (8) the remoteness of the possibility of the declarant's recollection being faulty; and (9) whether the surrounding circumstances suggested the declarant misrepresented the defendant's involvement. *State v. Ryan*, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984) (quoting *State v. Parris*, 98 Wn.2d 140, 146, 654 P.2d 77 (1982)).

First, we observe that the State did question TAW at the *Ryan* hearing about the subject matter of her disclosures, i.e., Witmer's sexual abuse. Witmer then specifically cross-examined her about her disclosures to Winslow, Buettner, and Ecklebarger, to which TAW generally responded that she could not recall specific details. Witmer misrepresents the record by essentially arguing that the record lacks any testimony by TAW that the trial court could consider in determining the reliability of her statements.

Further, although Witmer argues that RCW 9A.44.120 requires specific testimony from a child declarant for the trial court to determine whether the child's statements are reliable, he cites no authority supporting his interpretation of the statute. Thus, we could decide not to consider this argument. RAP 10.3(a)(6). But, because it may be useful to clarify the requirements of RCW 9A.44.120, we address his argument.

RCW 9A.44.120 allows the admission of children's statements to others if the trial court "finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability *and*" the child either testifies at the hearing or is unavailable. RCW 9A.44.120 (emphasis added). This is what happened here.

Although the child's testimony about the time and circumstances surrounding the child's

statements to others aids the trial court in determining the statements' reliability, RCW 9A.44.120's plain language does not make a finding of reliability contingent on specific testimony by the child. Rather, it makes *admissibility* of the hearsay statements to others contingent on a finding of reliability of the child's statements *and* the child's act of testifying or statements corroborated by other evidence when the child is unavailable to testify. RCW 9A.44.120(1), RCW 9A.44.120(2)(b). Similarly, a trial court may find that the *Ryan* factors establish a child hearsay statement's reliability regardless of whether the child testifies at the pretrial hearing. *State v. C.J.*, 148 Wn.2d 672, 678, 683-86, 63 P.3d 765 (2003) (trial court properly admitted child hearsay statements of unavailable declarant after determining reliability under the *Ryan* factors). Thus, the hearsay statements' reliability may be established by testimony other than that of the child.

But TAW testified about the contents of her hearsay statements to Buettner, Winslow, and Ecklebarger and Witmer cross-examined her about their surrounding circumstances. Winslow, Buettner, and Ecklebarger testified with specificity about these statements as to their time, content, and surrounding circumstances. Thus, the trial court could determine the reliability of TAW's statements to these three witnesses, both the State and the trial court thoroughly discussed the *Ryan* factors, and the trial court properly concluded that TAW's statements satisfied the *Ryan* factors. The trial court did not abuse its discretion, and Witmer's claim fails.

B. Statements to Kolb and Olson

Witmer also argues that the trial court erred in admitting TAW's statements to Kolb and Olson because neither of them testified at the child hearsay hearing. The State responds that TAW's and Buettner's testimony about the time, circumstances, and content of TAW's

statements to Kolb and Olson provided sufficient indicia of their reliability.

Where the child declarant, and those the child made statements to, testify at trial and are subject to cross-examination, constitutional confrontation or due process concerns are not implicated by the trial court's failure to comply with RCW 9A.44.120's requirements. *State v. Leavitt*, 111 Wn.2d 66, 71-72, 758 P.2d 982 (1988). Thus, a defendant's failure to raise a timely objection to the testimony precludes appellate review. *Leavitt*, 111 Wn.2d at 71-72; *see also State v. Perez-Cervantes*, 141 Wn.2d 468, 482-83, 6 P.3d 1160 (2000) (failure to object to hearsay testimony at trial waives appellate review). Further, under the invited error doctrine, a criminal defendant may not set up error at trial and then complain of it on appeal. *In re Pers. Restraint of Thompson*, 141 Wn.2d 712, 723, 10 P.3d 380 (2000).

The fact that TAW spoke to Kolb was mentioned several times during the *Ryan* hearing, but the record does not indicate that Witmer objected to the admissibility of Kolb's testimony about TAW's statements to him. Witmer's arguments at the trial court focused on the inadmissibility of TAW's statements to Winslow, Buettner, Ecklebarger, and Olson, focusing particularly on Olson's absence from the pretrial hearing, while making no mention of Kolb. Just before trial began in front of a different judge, who inquired about the parties' understanding of the admissibility rulings from the *Ryan* hearing, Witmer agreed with the State that, based on the *Ryan* hearing, the trial court had ruled that TAW's statements to Winslow, Buettner, Ecklebarger, Olson, and Kolb would be admitted, and he reiterated his objection to only Olson's testimony based on her failure to testify at the child hearsay hearing. Thus, Witmer may not now be heard to complain about the admissibility of Kolb's testimony at trial. His claim fails.

Further, with regard to Olson's testimony that Witmer did object to, erroneous evidentiary

rulings are harmless unless, within reasonable probabilities, they affected the outcome of the trial. *State v. Thomas*, 150 Wn.2d 821, 870, 83 P.3d 970, *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The admission of cumulative evidence is not prejudicial error. *State v. Todd*, 78 Wn.2d 362, 372, 474 P.2d 542 (1970).

Here, TAW wrote both Kolb and Olson notes, which stated that Witmer put his "private" in her bottom. She told both Kolb and Olson about other incidents of abuse by Witmer, adding further detail in her statements to Kolb. She indicated to both Kolb and Olson that she felt "okay" not living with Witmer and that she did not feel safe living with Witmer because of the abuse. I RP at 69. Finally, her statements to Olson about the discussion at Ecklebarger's house were cumulative of her properly admitted statements to Winslow, Buettner, and Ecklebarger and their testimony. Even assuming the trial court erroneously admitted TAW's statements to Olson, the statements were cumulative and any error was harmless. Witmer's claim fails.

II. Double Jeopardy

Witmer contends that his convictions for first degree child rape and first degree incest violated his constitutional right to be free from double jeopardy. The State responds that Witmer's convictions do not violate double jeopardy principles because the offenses are different in law and fact. We agree with the State.

We review double jeopardy claims de novo. *State v. Knight*, 162 Wn.2d 806, 810, 174 P.3d 1167 (2008). Our state constitution provides, "No person shall . . . be twice put in jeopardy for the same offense." Wash. Const. art. I, § 9; *accord*, U.S. Const. amend. V. If double jeopardy results from a conviction for more than one crime, the remedy is vacation of the lesser

offense. *State v. Weber*, 159 Wn.2d 252, 265, 269, 149 P.3d 646 (2006).

When the relevant statutes do not expressly disclose legislative intent to treat the charged crimes as the same offense, we determine whether the charged crimes are the same in law and fact. This is known as the *Blockburger* test. *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932); *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 816-17, 100 P.3d 291 (2004). The *Blockburger* test is a rule of statutory construction used to discern legislative purpose. *State v. Calle,* 125 Wn.2d 769, 778, 888 P.2d 155 (1995). We must answer two questions—whether the two charged crimes arose from the same act and, if so, whether the evidence supporting conviction of one crime was sufficient to support conviction of the other crime. *Orange*, 152 Wn.2d at 820. "The applicable rule is that, 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 an additional fact which the other does not." *Blockburger*, 284 U.S. at 304.

Here, the two crimes arose from the same act, i.e., Witmer having sexual intercourse with TAW. But the evidence required to convict Witmer of first degree child rape is insufficient to convict him of first degree incest. The State charged Witmer with first degree child rape under RCW 9A.44.073, which states in part, "A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim." In contrast, the State charged Witmer with first degree incest under RCW 9A.64.020(1)(a), which states, "A person is guilty of incest in the first degree if he or she engages in sexual intercourse with a person whom he or she knows to be related to him or her, either

legitimately or illegitimately, as an ancestor, descendant, brother, or sister of either the whole or the half blood." The two offenses are not identical in law; first degree child rape requires proof of age and nonmarital status, while first degree incest requires proof of familial relationship.

Further, in *Calle*, 125 Wn.2d at 780-81, our Supreme Court analyzed the legislative intent and purpose of the rape and incest statutes and determined that the legislature intended to punish rape and incest as separate offenses. It observed that "[i]ncest and rape have been regarded as separate crimes in Washington since before statehood" and that, today, incest is codified in chapter 9A.64 RCW, Family Offenses, while second degree rape is codified separately in chapter 9A.44 RCW, Sex Offenses. *Calle*, 125 Wn.2d at 780.

It also observed that the purpose of the incest prohibition is "not only to prevent mutated birth but also to promote and protect family harmony, to protect children from the abuse of parental authority, and 'because society cannot function in an orderly manner when age distinctions, generations, sentiments and roles in families are in conflict.'" *Calle*, 125 Wn.2d at 780-81 (quoting *State v. Kaiser*, 34 Wn. App. 559, 566, 663 P.2d 839 (1983)). In contrast, "the primary intent of [chapter] 9A.44 [RCW] is to prohibit acts of unlawful sexual intercourse, with punishment dependent on the accompanying circumstances," and "[t]he focus of the crime [of rape] is not simply sexual violation, but also the fear, degradation and physical injury accompanying that act." *Calle*, 125 Wn.2d at 781. Therefore, "the rape and incest statutes are 'directed to separate evils' and thus constitute separate offenses." *Calle*, 125 Wn.2d at 781 (quoting *Albernaz v. United States*, 450 U.S. 333, 343, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981)).

As the *Calle* court recognized, these statutes serve different purposes and prohibit

separate offenses. Witmer's convictions for first degree child rape and first degree incest do not violate double jeopardy protections, and his claim fails.

III. Unanimity Instruction

Finally, Witmer argues that the trial court's failure to give a jury unanimity, or *Petrich* instruction, *State v. Petrich,* 101 Wn.2d 566, 683 P.2d 173 (1984), as to which act—i.e., Witmer having TAW perform oral sex on him, Witmer performing oral sex on and digitally penetrating TAW, or Witmer anally raping TAW—constituted the facts upon which the jury relied for his conviction for first degree incest requires reversal of that conviction.[16] The State responds that the lack of a unanimity instruction on the incest charge was harmless error.

In Washington, a jury may convict a criminal defendant only if the members of the jury unanimously conclude that the defendant committed the criminal act with which he or she was charged. *Petrich*, 101 Wn.2d at 569. A defendant's right to a unanimous verdict is rooted in the Sixth Amendment to the United States Constitution and in article I, section 22 of the Washington Constitution. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). Where the evidence indicates that more than one distinct criminal act has been committed but the defendant is charged with only one count of criminal conduct, the jury must be unanimous as to which act or incident constitutes the charged crime. *State v. Noltie*, 116 Wn.2d 831, 842-43, 809 P.2d 190 (1991); *Petrich*, 101 Wn.2d at 572. That is, the "jury must be unanimous as to *which* act or incident constitutes a particular charged count of criminal conduct." *State v. Borsheim*, 140 Wn. App. 357, 365, 165 P.3d 417 (2007).

[16] We note that the State did give a *Petrich* instruction on the first degree child rape charge. It did not need a *Petrich* instruction on the child molestation charge because only the bedroom incident formed the basis of that charge.

The determination of whether a unanimity instruction was required turns on whether the prosecution constituted a "multiple acts case." *State v. Bobenhouse*, 166 Wn.2d 881, 892, 214 P.3d 907 (2009) (emphasis omitted). A multiple acts prosecution occurs when "several acts are alleged and any one of them could constitute the crime charged." *Kitchen*, 110 Wn.2d at 411. For example, the prosecution for a single count of rape based on evidence of multiple, separate acts, "each of which is capable of satisfying the material facts required to prove" the charged crime, constitutes a multiple acts case. *Bobenhouse*, 166 Wn.2d at 894; *see also Kitchen*, 110 Wn.2d at 405-06, 411. Thus, in multiple acts cases, either (1) the State must elect a specific act on which it will rely for conviction or (2) the trial court must instruct the jury that it must unanimously agree that a specific criminal act has been proved beyond a reasonable doubt. *Bobenhouse*, 166 Wn.2d at 893; *Noltie*, 116 Wn.2d at 843; *Petrich*, 101 Wn.2d at 572. The failure of the State to elect a specific act or the trial court's failure to issue a unanimity instruction in a multiple acts case "is constitutional error. 'The error stems from the possibility that some jurors may have relied on one act or incident and some [jurors a different act], resulting in a lack of unanimity on all of the elements necessary for a valid conviction.'" *Bobenhouse*, 166 Wn.2d at 893 (alteration in original) (quoting *Kitchen*, 110 Wn.2d at 411).

We review the failure to give a multiple acts unanimity instruction for constitutional harmless error. *Bobenhouse*, 166 Wn.2d at 893. Such an error is not harmless unless "'a rational trier of fact could find that each incident was proved beyond a reasonable doubt.'" *State v. Camarillo*, 115 Wn.2d 60, 65, 794 P.2d 850 (1990) (quoting *State v. Gitchel*, 41 Wn. App. 820, 823, 706 P.2d 1091 (1985)).

Here, the State specifically told the jury it could rely on any of the three acts as a basis for

the first degree incest charge. Thus, the lack of a unanimity instruction was error. But our Supreme Court found such error harmless in *Camarillo* and *Bobenhouse*.

In *Camarillo*, the victim testified in detail to three incidents, each capable of supporting one count of indecent liberties. 115 Wn.2d at 70-72. Camarillo "'offered no evidence upon which the jury could discriminate between the incidents'" other than his own testimony. *Camarillo*, 115 Wn.2d at 70 (quoting *State v. Camarillo*, 54 Wn. App. 821, 828, 776 P.2d 176 (1989)). The *Camarillo* court reasoned that "the jury may consider the totality of the evidence of several incidents to ascertain whether there is proof beyond a reasonable doubt to substantiate guilt because of the acts constituting one incident and also to believe that if one happened, then all must have happened." 115 Wn.2d at 71. It observed that sufficient evidence established that each act had occurred, that there was no conflicting or impeaching testimony other than the defendant's, and that the victim provided specific detailed testimony. *Camarillo*, 115 Wn.2d at 71-72; *see also Bobenhouse*, 166 Wn.2d at 894. Thus, it held that the lack of a unanimity instruction was harmless beyond a reasonable doubt. *Camarillo*, 115 Wn.2d at 72.

Similarly, in *Bobenhouse* the victim testified that Bobenhouse forced him to perform fellatio on Bobenhouse and that Bobenhouse digitally penetrated the victim's anus, two separate incidents that were independently capable of constituting first degree child rape.[17] 166 Wn.2d at 894-95. Because Bobenhouse offered only a general denial to the allegations, the jury "had no evidence on which it could rationally discriminate between the two incidents." *Bobenhouse*, 166 Wn.2d at 895. Thus, our Supreme Court reasoned that "if the jury in Bobenhouse's case

[17] The testimony about the abuse in *Bobenhouse*, or at least our Supreme Court's description of that testimony, was much less detailed than the testimony in *Camarillo*. *Compare Bobenhouse*, 166 Wn.2d at 885-86, 893-94, *with Camarillo*, 115 Wn.2d at 62-63, 71-72.

reasonably believed that one incident happened, it must have believed each of the incidents happened." *Bobenhouse*, 166 Wn.2d at 895. It held that the lack of a unanimity instruction was harmless. *Bobenhouse*, 166 Wn.2d at 895.

Here, as in *Camarillo* and *Bobenhouse*, TAW, either at trial or through her statements to the other witnesses, testified to three separate incidents that were independently capable of constituting first degree incest. RCW 9A.64.020(1)(a) provides that a person commits first degree incest "if he or she engages in sexual intercourse with a person whom he or she knows to be related to him or her, either legitimately or illegitimately, as an ancestor, descendant, brother, or sister of either the whole or the half blood." Again, the evidence establishes three acts between Witmer and TAW that constituted sexual intercourse[18] and that supported a conviction for incest. The jury heard Buettner's, Ecklebarger's, Olson's and Kolb's testimony describing the incidents involving oral/penile contact, anal rape, digital penetration, and oral/vaginal contact by Witmer. The jury also listened to the tape of TAW's statements to Kolb that described the digital penetration and anal rape. And the record clearly establishes that TAW is Witmer's biological daughter.

As in *Bobenhouse*, Witmer presented no conflicting or impeaching testimony about the incidents other than Witmer's general denial, which gave the jury "no evidence on which it could rationally discriminate between the [three] incidents." 166 Wn.2d at 895. Finally, sufficient evidence supports that each incident occurred. Accordingly, we hold that any error in failing to

[18] RCW 9A.44.010(1) provides that "'[s]exual intercourse' . . . has its ordinary meaning and occurs upon any penetration, however slight, and . . . [a]lso means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, . . . and [a]lso means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex."

give a *Petrich* instruction about the facts underlying a conviction on the incest charge was harmless beyond a reasonable doubt.

We affirm.

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 pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Quinn-Brintnall, J.

Worswick, A.C.J.