**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>GEORGE P. WOODARD,<br><br>Appellant. | No. 40293-9-II<br><br>UNPUBLISHED OPINION |

Armstrong, P.J. — George Patrick Woodard appeals his convictions for first degree kidnapping with sexual motivation, second degree child rape, and second degree child molestation. He argues that (1) his first degree kidnapping conviction merged with his child rape and child molestation conviction; (2) the jury instructions on second degree child molestation violated his constitutional right to a unanimous jury verdict and constitutional protection against double jeopardy; (3) the trial court improperly instructed the jury that its yes or no verdict on the special finding of sexual motivation had to be unanimous; (4) evidentiary errors violated his right to a fair trial; (5) the trial court improperly communicated with the jury during deliberations; (6) the sentencing court violated his constitutional right to equal protection of the laws by

determining the existence of his prior convictions; and (7) the trial court erred by failing to enter written findings of fact and conclusions of law following a CrR 3.5 hearing. We reverse Woodard's second degree child molestation conviction and affirm his remaining convictions.

## FACTS

### I. Kidnapping and Sexual Assault

In 2008, 12-year-old M.P. spent Christmas Eve with friends and family members at Woodard's home. M.P. wanted to go to the store to buy a snack, and Woodard agreed to drive her there.

According to M.P., Woodard drove directly to the store and waited in the parking lot while she purchased a snack. He then took a different route home, drove down a back road, and stopped the van. He ordered M.P. to get into the backseat and pull down her pants. He then licked her vagina, inserted his finger into her vagina, put his mouth on her breast over the outside of her sweatshirt, and inserted his penis into her vagina. He stopped after about 10 to 20 minutes and drove home.

The next day, M.P. told a friend what had happened. The State charged Woodard with first degree kidnapping, second degree child rape, and second degree child molestation.

### II. CrR 3.5 Hearing

Before trial, the court held a CrR 3.5 hearing to determine the admissibility of Woodard's statements to a deputy during interviews on December 25 and 26, 2008. The undisputed evidence showed that the deputy read Woodard his *Miranda* rights[1] before both interviews and

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

Woodard agreed to answer questions on both occasions. But Woodard argued that the court should suppress his statements from the second interview because, according to Woodard, he had told a booking officer before that interview that he wanted an attorney. In a lengthy oral ruling, the trial court "conditionally" ruled that all of Woodard's statements were admissible. I Report of Proceedings (RP) at 197-99. The court stated that it would do some independent research on the issue of whether Woodard had successfully invoked his right to counsel: "I'll do some research on my own on the second issue and see what I can find as can counsel, so we can revisit this if we need to." I RP at 197-99. At trial, neither party contested the admissibility of Woodard's statements from the December 26 interview or presented additional authority to the court on that issue.

III. Mistrial Motions

During a pretrial hearing on motions in limine, defense counsel expressed concern that two of the State's witnesses might testify that Woodard had told them he had sex with M.P. on six prior occasions. The State said that it did not intend to elicit testimony about uncharged prior sexual incidents, and the trial court directed the State to instruct its witnesses not to mention Woodard's alleged admissions. The parties also agreed not to elicit testimony regarding any of the witnesses' drug and alcohol use.

At trial, during defense counsel's cross-examination of James Barnes, defense counsel asked, "[Woodard] told you he didn't have sexual intercourse with [M.P.]?" IV RP at 68. Barnes replied, "On Christmas day. On Christmas eve he did not. He had six times of

intercourse before that he bragged about." IV RP at 68. Defense counsel immediately moved for a mistrial, outside the jury's presence. The trial court denied the motion, ruling that defense counsel's question had invited the response. The court then recalled the jury and instructed them to disregard the previous question and answer.

Later, during direct examination of Jonathan Neff, the State asked, "Did [Woodard] ever indicate anything that he had done on Christmas eve of 2008?" IV RP at 78. Neff replied, "Well, he indicated he was at his house with some friends and his wife and they were smoking crack and he was asked—I can't say if he asked or if the victim had asked to go to the store to get some candy. . . ." IV RP at 78. Neff then related what Woodard had told him about what happened after he took M.P. to the store.

At the conclusion of Neff's testimony, defense counsel again moved for a mistrial. The trial court denied the motion, ruling that the State did not purposely elicit testimony regarding Woodard's drug use and that, within the context of Neff's testimony as a whole, the violation was not egregious enough to warrant a mistrial. The trial court offered to instruct the jury to disregard the question and answer, but defense counsel declined the offer.

IV. Jury Instructions and Deliberations

Defense counsel did not object to any of the State's proposed instructions. During deliberations, the jury submitted a question to the trial court expressing confusion over the definition of "sexual contact:" "Regarding # 13 of instruction packet. Sexual contact means any touching of the sexual or other intimate parts. Does this include bare and/or covered breast?" Clerk's Papers (CP) at 52. The trial court responded, "Answer: Reread all your instructions."

CP at 52. After further deliberations, the jury found Woodard guilty on all counts and found by a special verdict that he committed first degree kidnapping with sexual motivation.

V. Sentencing

At sentencing, the State alleged that Woodard had a prior conviction from 1989 for first degree child molestation and presented a certified copy of the judgment and sentence. Woodard contested the sufficiency of the State's evidence. Following testimony from several witnesses regarding fingerprint records, booking records, sex offender registration records, and testimony from the arresting officer for the prior crime, the trial court found that the State had proven Woodard's prior conviction by a preponderance of the evidence.

Based on this prior conviction and Woodard's current convictions for first degree kidnapping and second degree child rape, the sentencing court found that Woodard was a persistent offender and sentenced him to life without the possibility of parole. For the second degree child molestation conviction, the court sentenced Woodard to 41 months' confinement, to be served concurrently with his life sentence.

ANALYSIS

I. Merger of First Degree Kidnapping With Child Rape and Child Molestation

Woodard first contends that his multiple convictions for kidnapping, child rape, and child molestation violate the double jeopardy clauses of our state and federal constitutions. Woodard reasons that because his kidnapping conviction was elevated to the first degree based on his intent to facilitate child rape and child molestation, the underlying offenses should merge with

the greater crime of first degree kidnapping. We disagree.

A. Standard of Review

We review double jeopardy claims de novo. *State v. Jackman*, 156 Wn.2d 736, 746, 132 P.3d 136 (2006). Our state and federal constitutions protect a defendant against multiple punishments for the same offense. U.S. Const. amend. V; Wash. Const. art. I, § 9; *State v. Calle*, 125 Wn.2d 769, 772, 888 P.2d 155 (1995). Under the merger doctrine, when a particular degree of a crime requires proof of another crime, "we presume the legislature intended to punish both offenses through a greater sentence for the greater crime." *State v. Freeman*, 153 Wn.2d 765, 772-73, 108 P.3d 753 (2005) (citing *State v. Vladovic*, 99 Wn.2d 413, 419, 662 P.2d 853 (1983)); *State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979), *overruled on other grounds by State v. Sweet*, 138 Wn.2d 466, 980 P.2d 1223 (1999). A separate conviction for the included crime will not stand unless it involved an injury to the victim that is separate and distinct from the greater crime. *Johnson*, 92 Wn.2d at 680.

B. Merger Does Not Apply

The State charged Woodard with first degree kidnapping under RCW 9A.40.020(1)(b), which provides, "A person is guilty of kidnapping in the first degree if he intentionally abducts another person with intent . . . [t]o facilitate commission of any felony or flight thereafter. . . ." The trial court instructed the jury that to convict Woodard of first degree kidnapping, it must find "[t]hat the defendant abducted [M.P.] with intent to facilitate the commission of rape of a child in the second degree and/or child molestation in the second degree . . . ." CP at 35. Thus, Woodard's kidnapping conviction was elevated to the first degree based on his *intent* to commit

rape and child molestation, not proof that he actually committed those crimes.[2]

In *In re Personal Restraint of Fletcher*, 113 Wn.2d 42, 776 P.2d 114 (1989), our Supreme Court held that the defendant's convictions for first degree kidnapping and first degree robbery did not merge because the kidnapping statute merely requires intent to commit another crime:

> However, the [first degree kidnapping] statute only requires proof of *intent* to commit various acts, some of which are defined as crimes elsewhere in the criminal code. It does not require that the acts actually be committed. RCW 9A.40.020. . . . Thus, the Legislature has not indicated that a defendant must also commit another crime in order to be guilty of first degree kidnapping, and therefore the merger doctrine does not apply. As a result, Fletcher may be punished separately for the kidnapping and robbery convictions.

*Fletcher*, 113 Wn.2d at 52-53; *see also State v. Louis*, 155 Wn.2d 563, 571, 120 P.3d 936 (2005). In *State v. Vaughn*, 83 Wn. App. 669, 682, 924 P.2d 27 (1996), Division One of this court relied on *Fletcher* to hold that first degree kidnapping does not merge with first degree child rape. The *Vaughn* court reasoned, "Merger does not apply when the definition of a crime requires proof only that the defendant *intended* to commit another crime. . . . Because Vaughn need only have had the intent to rape C, and not have actually completed the rape, his crimes do not merge." *Vaughn*, 83 Wn. App. at 682.

Despite this clear authority to the contrary, Woodard relies on *Johnson*, 92 Wn.2d at 681, to argue that his convictions merge. But *Johnson* is distinguishable. In *Johnson*, the *completed*

[2] A person commits second degree rape of a child when "the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.076(1). A person commits second degree child molestation when "the person has . . . sexual contact with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.086(1).

crimes of kidnapping and assault elevated the defendant's rape conviction to the first degree. *Johnson*, 92 Wn.2d at 674, 681. Here, Woodard's *intent* to commit an additional crime elevated his kidnapping conviction to the first degree. Accordingly, merger does not apply. *Fletcher*, 113 Wn.2d at 52-53; *Vaughn*, 83 Wn. App. at 682.

II. Child molestation Instruction on Unanimity And separate and Distinct Acts

Woodard next contends that the trial court erred by failing to instruct the jury that to convict him of second degree child molestation, it must unanimously agree on a single act that is separate and distinct from the act forming the basis for second degree child rape. He argues that this error violated both his constitutional right to a unanimous jury verdict and his constitutional protection against double jeopardy. We agree.

A. Standard of Review

Although Woodard did not raise this objection at trial, failure to give a unanimity instruction affects a defendant's constitutional right to a jury trial and may be raised for the first time on appeal. *State v. Hanson*, 59 Wn. App. 651, 659, 800 P.2d 1124 (1990) (citing *State v. Camarillo*, 115 Wn.2d 60, 64, 794 P.2d 850 (1990); *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)). A double jeopardy challenge also affects a constitutional right and may be raised for the first time on appeal. *Jackman*, 156 Wn.2d at 746. We review alleged constitutional errors de novo. *State v. Bradshaw*, 152 Wn.2d 528, 531, 98 P.3d 1190 (2004).

B. Unanimity Instruction

A criminal defendant has a constitutional right to a unanimous jury verdict. Wash.

Const. art. I, § 22; *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). When the State presents evidence of multiple acts that could constitute the crime charged, "the State must tell the jury which act to rely on in its deliberations or the [trial] court must instruct the jury to agree on a specific criminal act." *Kitchen*, 110 Wn.2d at 409. The prosecution's failure to elect the act coupled with the court's failure to instruct the jury on unanimity, is constitutional error. *Kitchen*, 110 Wn.2d at 411. "The error stems from the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction." *Kitchen*, 110 Wn.2d at 411.

Here, the trial court instructed the jury that to convict Woodard of second degree child molestation, it had to find that he had sexual contact with M.P. on December 24, 2008.[3] The jury was instructed that "sexual contact" means "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party." CP at 42. Although the trial court gave a unanimity instruction for the child rape charge,[4] it did not give a similar

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[3] Instruction 12 provides:

> To convict the defendant of the crime of child molestation in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about December 24, 2008, the defendant had sexual contact with [M.P.];
>
> (2) That [M.P.] was at least twelve years old but less than fourteen years old at the time of the sexual contact and was not married to the defendant;
>
> (3) That [M.P.] was at least thirty-six months younger than the defendant; and
>
> (4) That this act occurred in the State of Washington. . . .

CP at 41.

[4] Instruction 14 provides:

> The State alleges that the defendant committed acts of rape of a child in the second degree on multiple occasions. To convict the defendant of rape of a child in the second degree, one particular act of rape of a child in the second degree must be

instruction for the child molestation charge.

The State presented evidence of four acts that could constitute sexual contact: touching M.P.'s breast, touching the outside of her vagina, inserting his finger into her vagina, and inserting his penis into her vagina. The State argues that it elected Woodard's action of putting his mouth on M.P.'s vagina as the basis for the molestation. In closing arguments, the State argued that Woodard had sexual contact with M.P. when he put his mouth on her vagina and that this satisfied the elements of second degree child molestation. But during deliberations, the jury submitted a question to the trial court expressing confusion over whether sexual contact included touching a bare or covered breast. The jury's question shows that it considered at least one other basis for the child molestation charge and did not necessarily rely on the act that the State argued in closing. Given these circumstances, the failure to clearly elect a specific act or instruct the jury to agree on a specific act for the child molestation charge violated Woodard's right to a unanimous jury verdict. *Kitchen*, 110 Wn.2d at 411.

The State argues that a unanimity instruction is not required when the evidence shows that the defendant was engaged in a continuing course of conduct. "Under appropriate facts, a continuing course of conduct may form the basis of *one charge* in an information." *State v. Petrich*, 101 Wn.2d 566, 571, 683 P.2d 173 (1984)), *overruled on other grounds by Kitchen*, 110 Wn.2d at 405-06 (emphasis added). Here, the State based two charges on the same series of acts: child rape and child molestation. The jury was instructed to unanimously agree on a

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> proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all of the acts of rape of a child in the second degree.

CP at 43.

specific act for the rape charge. If the jury was then allowed to base the child molestation charge on the entire course of conduct, including the act already supporting the rape conviction, Woodard would be punished twice for the same act in violation of double jeopardy principles.

The State next argues that the failure to instruct the jury on unanimity was harmless error. The error is harmless if no rational trier of fact could have a reasonable doubt as to whether each of the multiple acts presented to the jury established the crime beyond a reasonable doubt. *Kitchen*, 110 Wn.2d at 411. Here, the jury's question shows that it was not certain whether one of the acts presented established the crime beyond a reasonable doubt.

C. Separate and Distinct Acts Instruction

Additionally, a criminal defendant is constitutionally protected against multiple punishments for the same offense. U.S. Const. amend. V; Wash. Const. art. I, § 9; *State v. Calle*, 125 Wn.2d 769, 772, 888 P.2d 155 (1995). When the State presents evidence of multiple acts that could constitute more than one of the crimes charged, the trial court should instruct the jury that each count must be based on a separate and distinct act. *State v. Mutch*, 171 Wn.2d 646, ¶ 28-31, 254 P.3d 803 (2011); *State v. Noltie*, 116 Wn.2d 831, 846, 809 P.2d 190 (1991); *State v. Carter*, 156 Wn. App. 561, 565-67, 234 P.3d 275 (2010); *State v. Berg*, 147 Wn. App. 923, 931-35, 198 P.3d 529 (2008). If the instructions do not inform the jury that each count must be based on a separate and distinct act, then we must determine whether the evidence, arguments, and instructions made the separate acts requirement "'manifestly apparent to the jury.'" *Mutch*, 171 Wn.2d at ¶ 31 (quoting *Berg*, 147 Wn. App. at 931). If the separate acts requirement was not manifestly apparent to the jury, then we must vacate the convictions that potentially violate

double jeopardy. *Mutch*, 171 Wn.2d at ¶ 31.

Here, the jury was not instructed that it had to base convictions for child rape and child molestation on separate acts. The State presented evidence of multiple acts that could constitute both child molestation and child rape. Although the State argued in closing that one particular act supported the child molestation charge, the jury's question shows that it considered at least one other basis and did not necessarily rely on the act that the State argued. Because the instructions, evidence, and arguments did not make the separate acts requirement manifestly apparent to the jury, Woodard's second degree child molestation conviction also violated his constitutional protection against double jeopardy. *Mutch*, 171 Wn.2d at ¶ 27-31. Accordingly, we reverse Woodard's conviction and concurrent sentence for second degree child molestation.

III. Unanimity Instruction: Special Verdict

Woodard next contends that the trial court improperly instructed the jury that its "yes" or "no" finding for the special verdict on sexual motivation had to be unanimous. The challenged instruction provided:

> If you find the defendant guilty of this crime of kidnapping in the first degree, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. *Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form.* In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. *If you unanimously have a reasonable doubt as to this question, you must answer "no."*

CP at 49-50 (emphasis added and omitted). A jury is not required to unanimously agree that the State failed to prove a special finding. *State v. Bashaw*, 169 Wn.2d 133, 145-47, 234 P.3d 195 (2010); *State v. Goldberg*, 149 Wn.2d 888, 892-94, 72 P.3d 1083 (2003). Accordingly, this

instruction incorrectly stated the law.

But Woodard did not object to this instruction at trial, and there is a split between Divisions One and Three of this court regarding whether this instructional error affects a constitutional right and may, therefore, be raised for the first time on appeal. *See State v. Nunez*, 160 Wn. App. 150, 158-63, 248 P.3d 103 (2011) (holding the instructional error is not constitutional), *review granted*, 2011 WL 3523949 (2011); *State v. Ryan*, 160 Wn. App. 944, 948-49, 252 P.3d 895 (2011) (holding the instructional error is constitutional), *review granted*, 2011 WL 3523883 (2011).

In *Bashaw*, our Supreme Court implied that the error was not constitutional, but then applied a constitutional harmless error analysis. *Bashaw*, 169 Wn.2d at 146 n.7, 147. The error is therefore harmless if we conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error. *Bashaw*, 169 Wn.2d at 147. Assuming, without deciding, that a defendant may raise this issue for the first time on appeal, we are satisfied that the error is harmless beyond a reasonable doubt.

The special verdict required the jury to determine whether Woodard committed first degree kidnapping with sexual motivation, meaning "one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification." CP at 51, 56. Because the jury had already unanimously determined that Woodard committed first degree kidnapping with intent to facilitate the commission of second degree child rape and/or second degree child molestation, we are satisfied beyond a reasonable doubt that, absent the instructional error, the jury would have still found that Woodard committed first degree kidnapping with sexual

motivation. *Bashaw*, 169 Wn.2d at 147. We affirm the jury's special

finding.

IV. Evidentiary Errors

Woodard next contends that the testimony from Barnes and Neff regarding his admissions of prior sexual acts with M.P. and drug use on the day of the charged crimes, which violated the trial court's orders in limine, violated his right to a fair trial. But Woodard does not assign error to the trial court's denial of his mistrial motions based on these evidentiary errors or argue that the trial court abused its discretion by refusing to grant a mistrial. A trial court will grant a mistrial "'when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.'" *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989) (quoting *State v. Mak*, 105 Wn.2d 692, 701, 718 P.2d 407 (1986)). Because the trial court has already determined that the challenged evidentiary errors did not prejudice Woodard or prevent him from having a fair trial, and Woodard does not assign error to those rulings in his appeal, we decline to address this argument.

V. Trial Court's Ex Parte Communication With Jury

Woodard next contends that the trial court erred by communicating with the deliberating jury without notifying him or his counsel. The State relies on *State v. Langdon*, 42 Wn. App. 715, 713 P.2d 120 (1986), to argue that the error, if any, was harmless. We agree that the error was harmless.

"Any communication between the court and the jury in the absence of the defendant is error and must be proven by the State to be harmless beyond a reasonable doubt." *Langdon*, 42 Wn. App. at 717; *see also State v. Caliguri*, 99 Wn.2d 501, 508-09, 664 P.2d 466 (1983). Here,

nothing in the record shows that either Woodard or his defense counsel was informed of the jury's question or was present when the trial court responded.

In *Langdon*, 42 Wn. App. at 717, a deliberating jury sent a note to the trial court asking for clarification on one of the instructions: "Does 'committing' mean aid in escaping?" After unsuccessfully trying to locate counsel, the trial court replied, "You are bound by those instructions already given to you." *Langdon*, 42 Wn. App. at 717. Division One of this court held that the trial court's error of communicating with a deliberating jury outside the presence of the defendant or his counsel was harmless "because the court's instruction was neutral, simply referring the jury back to the previous instructions." *Langdon*, 42 Wn.2d at 717-18.

Woodard argues that the trial court's response was not harmless in this case because it referred the jury back to the incomplete jury instructions regarding the second degree child molestation charge. Because we reverse Woodard's conviction for second degree child molestation, any potential prejudice from referring the jury back to those instructions has already been remedied. Accordingly, we hold that the trial court's ex parte communication with the jury was harmless beyond a reasonable doubt. *See Langdon*, 42 Wn. App. at 718.

## VI. Equal Protection

Woodard next contends that allowing the trial court to find that he is a persistent offender based on his 1989 conviction for first degree child molestation violated his constitutional right to equal protection, because other criminal defendants have the right to have a jury find their prior convictions beyond a reasonable doubt when the conviction is an element of the crime charged. Specifically, Woodard takes issue with our Supreme Court's reasoning in *State v. Roswell*, 165

Wn.2d 186, 192-94, 196 P.3d 705 (2008).

In *Roswell*, the defendant was charged with communication with a minor for immoral purposes, a crime that is elevated from a gross misdemeanor to a felony if the defendant has a prior conviction for the same crime or a felony sex offense. *Roswell*, 165 Wn.2d at 190; RCW 9.68A.090. The defendant requested that the court bifurcate the trial by having a jury decide the elements of the crime as a misdemeanor and the court separately determine the prior conviction that elevated the misdemeanor to a felony. *Roswell*, 165 Wn.2d at 190. Our Supreme Court affirmed the trial court's ruling rejecting the defendant's request, holding that because the defendant could not be convicted of felony communication with a minor for immoral purposes without proof of the prior conviction, the prior conviction was an essential element of the crime charged and had to be proven to a jury beyond a reasonable doubt. *Roswell*, 165 Wn.2d at 194.

The *Roswell* court reasoned that "[d]espite the similarities between an aggravating factor and a prior conviction element . . . . [t]he prior conviction is not used to merely increase the sentence beyond the standard range but actually alters the crime that may be charged." *Roswell*, 165 Wn.2d at 192. Although the court recognized that under *Apprendi v. New Jersey*, 530 U.S. 466, 468-69, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), prior convictions may be found by a trial court when they function as a sentencing aggravator, the court stated that the *Apprendi* exception does not apply where the prior conviction is an element of the crime rather than an aggravating factor. *Roswell*, 165 Wn.2d at 193 n.5.

Woodard argues that the *Roswell* court's distinction between a prior conviction as a sentencing aggravator and a prior conviction as an element of a crime is arbitrary because the

prior conviction in his case operates in the same fashion as it does in *Roswell*—it merely alters the maximum penalty that the offender is subject to. Divisions One and Three of this court have already considered and rejected the argument that *Roswell*'s distinction violates equal protection. *See State v. Langstead*, 155 Wn. App. 448, 454-57, 228 P.3d 799 (2010); *State v. Williams*, 156 Wn. App. 482, 496-99, 234 P.3d 1174 (2010). We follow *Langstead* and *Williams*. Woodard must pursue his challenge to *Roswell*'s reasoning in the Supreme Court.

VII. Findings of Fact

Finally, Woodard contends that because the trial court failed to enter written findings of fact and conclusions of law following the CrR 3.5 hearing, we must reverse his convictions because the lack of findings and conclusions prejudiced his right to appeal. We disagree.

CrR 3.5(c) requires the trial court to enter written findings of fact and conclusions of law following a CrR 3.5 hearing: "After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor." A trial court's failure to enter written findings and conclusions is an error, but the error is harmless if the court's oral findings are sufficient to permit appellate review. *See State v. Cunningham*, 116 Wn. App. 219, 226, 65 P.3d 325 (2003) (citing *State v. Smith*, 67 Wn. App. 81, 87, 834 P.2d 26 (1992)).

Here, the trial court's lengthy oral ruling is sufficient to permit appellate review. But Woodard does not raise any issues for us to review: he does not challenge the trial court's oral findings of fact or conclusions of law, and he does not argue that inadmissible statements were improperly admitted at trial. He simply argues that the trial court erred by failing to enter written

findings and conclusions. Accordingly, although the trial court should have entered written findings of fact and conclusions of law, the error was harmless.

We reverse Woodard's conviction for second degree child molestation and remand for the trial court to vacate the child molestation sentence. We affirm the remaining convictions and sentence.

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.

Armstrong, P.J.

We concur:

Van Deren, J.

Johanson, J.