IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28009-8-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
LYLE FRANKLIN MILLER,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Kulik, C.J. — Lyle Franklin Miller appeals his convictions for three counts of third degree child molestation. Mr. Miller asserts that the trial court erred by (1) admitting the opinion testimony of the investigating officer, (2) not considering the three counts of third degree child molestation to be the "same criminal conduct" for sentencing purposes, and (3) sentencing him in excess of the statutory maximum allowable for a class C felony. In a statement of additional grounds for review, Mr. Miller contends the sentencing scheme for sex offenses violates double jeopardy. We affirm the convictions. However, we remand for clarification that the imposed sentence is within the statutory maximum.

FACTS

Lyle Miller is a single parent of three children. He claims to suffer from short-term memory loss. On April 26, 2008, Mr. Miller's teenage daughter, A.M., had her friend and classmate, S.M., stay overnight at Mr. Miller's residence. S.M. was born in January 1993 and was a high school sophomore at the time of trial. S.M. had known A.M. since the seventh grade, but had never met Mr. Miller prior to April 27, 2008. Mr. Miller spent most of the evening at his brother-in-law's residence down the street, where he consumed approximately six beers throughout the afternoon and evening. He returned home for the night sometime between 1:30 a.m. and 3:00 a.m.

A.M. and S.M. went to bed after midnight, sharing the twin size bed in A.M.'s brother's bedroom, with S.M. sleeping on her side facing the wall. According to S.M.'s testimony, she was awakened at about 2:00 a.m. by floorboards creaking in the hallway. While pretending to be asleep, she heard someone enter the bedroom and pull on her covers. S.M. then felt the person's hand between her legs rubbing her vagina over her boxer shorts and underwear. After about one minute, S.M. pretended to wake up by squirming. At that point, the person stopped, and A.M. awoke and said, "'Dad, what are you doing?'" Report of Proceedings (RP) (Jan. 6, 2009) at 92. S.M. testified that Mr.

Miller then responded, "'I am checking up on you'" and left the room. RP (Jan. 6, 2009) at 92-93.

According to S.M., Mr. Miller returned and repeated the act three more times with approximately 5 to 10 minutes between each incident. S.M. testified that after the third incident, A.M. asked her father what he was doing and why he kept entering their bedroom, to which Mr. Miller responded that he thought the cat was bothering them. After Mr. Miller removed the cat from the bedroom, S.M. rolled onto her back, pulled her knees to her chest, and tightly gripped the covers over her. Approximately five minutes later, Mr. Miller returned for the fourth time and tried to pull the covers off S.M. and rub near her vagina with his hand.

S.M. did not describe the incidents to A.M. the next day, but she did disclose them to her friend M.C. that afternoon. M.C. relayed the information to her father, who then called S.M.'s mother. After speaking with M.C.'s father, S.M.'s mother confronted a tearful S.M., who admitted that Mr. Miller had touched her inappropriately. S.M.'s parents contacted the Ellensburg Police Department, which sent Detective Jason Brunk to investigate.

On April 28, 2008, Detective Brunk arrested Mr. Miller on suspicion of third degree child molestation. After receiving his *Miranda*[1] rights, Mr. Miller agreed to speak

with Detective Brunk. Mr. Miller admitted to entering the bedroom multiple times but stated he did not recall ever touching S.M.

Mr. Miller was charged with four counts of third degree child molestation—RCW 9A.44.089—committed on or about April 27, 2008, in Kittitas County. He pleaded not guilty to all four counts.

At the jury trial on January 6 and 7, 2009, Detective Brunk testified that during the interview, he observed multiple inconsistencies in Mr. Miller's statements, including the following: the amount of alcohol consumed that day; the chronology of entering the bedroom; the reasons given for entering the bedroom at a given time; the specifics surrounding Mr. Miller slipping and falling onto the bed; his recollection of his daughter waking up and questioning him about being in the bedroom; and whether, and at what point, he observed the screen off the window.

After Mr. Miller described the incident one time, Detective Brunk decided to question him further about the details, which the detective explained was a commonly used interrogation technique employed to determine whether a suspect is "going to be deceptive and start changing his story." RP (Jan. 6, 2009) at 139. Detective Brunk testified that Mr. Miller did, in fact, change parts of his story after that, admitting to

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

entering the bedroom five times and providing a different order for the reasons of entry.

At trial, Detective Brunk referred to these statements as Mr. Miller's second "version" of the events. RP (Jan. 6, 2009) at 146. According to Detective Brunk, at this point in the interview, Mr. Miller became visibly frustrated upon realizing that his stories were different and vocalized a desire to clarify his statements. Detective Brunk reported that Mr. Miller then explained that he suffered from short-term memory loss, and he had probably consumed more alcohol than originally admitted. At trial, Detective Brunk phrased his responses using words such as stories, versions, deceptive, and discrepancies in connection with Mr. Miller's interview responses. Detective Brunk also testified that Mr. Miller appeared very calm throughout the interview—an unusual response given the serious accusations.

Mr. Miller's testimony at trial included an account of the night that differed from either version reported by Detective Brunk. The differences included details about what time he arrived home that night, how much alcohol he had consumed, when and what was said and done by Mr. Miller upon entering the bedroom each time, whether the window screen was completely off the window or just askew, his knowledge of what he slipped on, and his reason for entering the bedroom.

A.M. testified that she recalled Mr. Miller entering the bedroom three or four

times that night and did not recall him slipping on anything or entering to check the window. She believed that Mr. Miller entered the bedroom to tell the two girls that they needed to leave the bedroom before her brother returned home. A.M. also admitted to apologizing to S.M. upon learning of S.M.'s accusations against A.M.'s father.

In its closing argument, the State argued that the facts and circumstances supported S.M.'s account over that offered by Mr. Miller, especially in light of the multiple accounts given by Mr. Miller. The State also argued that Mr. Miller's version of events was further discredited by the testimony of Mr. Miller's daughter and son.

At the end of the State's case, the court denied Mr. Miller's motion to dismiss three of the four counts of child molestation. The jury convicted Mr. Miller of counts 1, 2, and 3, and found him not guilty on count 4. The trial court calculated Mr. Miller's offender score as 6 and sentenced him to 54 months' imprisonment and a term of community custody of 36 to 48 months. Mr. Miller appeals.

ANALYSIS

Opinion Testimony. Mr. Miller first assigns error to the trial court's admission of Detective Brunk's testimony. Mr. Miller contends the detective's testimony constituted

an improper opinion as to his credibility and guilt and, thereby, violated his constitutional right to a fair and impartial trial by jury. Mr. Miller did not raise this issue at trial.

Generally, appellate courts will not consider evidentiary issues raised for the first time on appeal. RAP 2.5(a); *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). However, RAP 2.5(a)(3) creates a narrow exception to allow claims of a manifest constitutional error to be raised for the first time on appeal. *Kirkman*, 159 Wn.2d at 926. In determining whether an alleged error is a manifest constitutional error, the following four-step analysis is applied: (1) whether the alleged error is, in fact, a constitutional issue; (2) whether the error is manifest; that is, whether it had practical and identifiable consequences; (3) whether there is merit to the constitutional issue; and (4) whether the error committed was nevertheless harmless. *State v. Barr*, 123 Wn. App. 373, 380, 98 P.3d 518 (2004); *State v. Heatley*, 70 Wn. App. 573, 585, 854 P.2d 658 (1993) (quoting *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)).

<u>*Constitutional Issue*.</u> We first determine whether the alleged error is in fact a constitutional issue. A trial court's decision to admit or exclude testimony or other evidence is reviewed for an abuse of discretion. *State v. Demery*, 144 Wn.2d 753, 758,

30 P.3d 1278 (2001). Generally, the decision to admit or exclude opinion testimony involves the trial court's routine exercise of discretion under applicable evidentiary rules and does not necessarily implicate constitutional rights. *State v. Trader*, 54 Wn. App. 479, 484, 774 P.2d 522 (1989). However, no witness may express an opinion as to the guilt of a defendant, whether by direct statement or inference. *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Such an opinion improperly invades the province of the jury and, thereby, violates the defendant's constitutional rights to trial by an impartial jury and to have the jury make an independent evaluation of the facts. *State v. Carlin*, 40 Wn. App. 698, 701, 700 P.2d 323 (1985), *overruled on other grounds by City of Seattle v. Heatley*, 70 Wn. App. 573, 854 P.2d 658 (1993).

Because a constitutional issue of fair trial is raised if Detective Brunk's testimony constitutes an impermissible opinion on Mr. Miller's guilt, the first prong of the inquiry is satisfied. *See State v. Johnson*, 152 Wn. App. 924, 934, 219 P.3d 958 (2009).

Manifest Error. Second, we determine whether the alleged error is manifest. An error is manifest if the defendant makes a plausible showing that the alleged error had practical and identifiable consequences in the trial of the case. *Barr*, 123 Wn. App. at

381 (quoting *Lynn*, 67 Wn. App. at 345). Thus, in order to satisfy this prong, Mr. Miller must make a reasonable showing of a likelihood of actual prejudice. RAP 2.5(a)(3); *Lynn*, 67 Wn. App. at 346. When a law enforcement officer's assessments concerning the credibility and truthfulness of the defendant or witnesses are a crucial part of the case, the admission of such opinions is said to have practical and identifiable consequences at trial. *Barr*, 123 Wn. App. at 381.

Here, the case essentially turned on whether the jury believed S.M. or Mr. Miller. In such circumstances, it may be said that Detective Brunk's testimony could reasonably have had practical and identifiable consequences.

Merits. The third factor we determine is the merits of the constitutional issue. *Id.* To meet his burden here, Mr. Miller must establish that the detective's testimony constituted an impermissible opinion on his guilt. *Id*. Although opinion testimony does not necessarily implicate a constitutional right, when it is given by a law enforcement officer it may be especially prejudicial because such opinion often carries a special aura of reliability and trustworthiness in the eyes of the trier of fact. *Carlin*, 40 Wn. App. at 703.

Factors to consider in determining whether testimony is an impermissible opinion on guilt or a permissible opinion pertaining to an ultimate issue include the following:

(1) the particular circumstances of the case, (2) the type of witnesses called, (3) the nature of the testimony and the charges, (4) the defenses invoked, and (5) the other evidence presented to the trier of fact. *Barr*, 123 Wn. App. at 381. An additional relevant consideration is the purpose for which the evidence was offered at trial. *Demery*, 144 Wn.2d at 761.

Improper opinion testimony on guilt generally involves an assertion pertaining directly to the defendant or a key witness. *Heatley*, 70 Wn. App. at 577. However, witness testimony that does not directly comment on the defendant's guilt or the witness's veracity, if otherwise helpful to the trier of fact and based on inferences from the evidence, is not improper opinion testimony. *Id.* at 578.

The record here is distinguishable from those cases where an officer impermissibly gives a direct opinion on the defendant's guilt. Detective Brunk testified that Mr. Miller provided inconsistent statements to him. These inconsistencies were further illustrated through Mr. Miller's own trial testimony, the testimony of his children, and the testimony of S.M. Contrary to Mr. Miller's claim that the detective's editorializing was designed to impeach Mr. Miller and, thus, imply his guilt, the purpose of eliciting the detective's statements was to provide the necessary context to enable the jury to understand what transpired during the interrogation and to assess the reasonableness of Mr. Miller's

interview responses. Such a purpose is permissible. *See*, *e.g.*, *Demery*, 144 Wn.2d at 759-60. Furthermore, "[t]he fact that an opinion encompassing ultimate factual issues *supports* the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt." *Heatley*, 70 Wn. App. at 579. A witness may properly testify to his experience with an observation of a defendant as long as any express or implied conclusion is directly and logically supported by the evidence. *Id*.

Detective Brunk's use of words such as versions, stories, deceptive, extreme differences, and discrepancies to describe the interview proceedings was not an improper indirect comment on Mr. Miller's guilt or credibility. This language provided context and chronology, and allowed the trier of fact to logically differentiate between the multiple accounts rendered by Mr. Miller. Moreover, the use of the word "story" was a generic term that Detective Brunk commonly employs in conducting interviews. As he clarified in his testimony, a typical interrogation technique involves a detailed questioning of a suspect and having the party "re-tell the story" multiple times in order to determine whether the "story" changes. RP (Jan. 6, 2009) at 139. And, rather than indicating that such a change in one's story would implicate guilt, Detective Brunk instead explained that such discrepancies would alert him to possible deception in the interview. The language was not employed to indicate Mr. Miller was, in fact, being deceptive; it was

merely part of the detective's typical interview technique of asking more and more detailed questions and encouraging multiple re-tellings of the incident. Furthermore, as in *Demery*, Detective Brunk's statements are not suspect as carrying a special aura of reliability because they were part of a police interrogation technique commonly used to determine whether a suspect will change his story during the course of an interview.

Additionally, Detective Brunk's single comment on his observation that Mr. Miller appeared very calm given the serious accusations was permissible because Detective Brunk did not opine how such an appearance implied guilt, and his testimony did not further involve any observation of behavior. A witness who has personally observed a defendant "'may relate the basis of his observation and then "state his opinion, conclusion, and impression formed from such . . . observation."'" *State v. Allen*, 50 Wn. App. 412, 418, 749 P.2d 702 (1988) (quoting *State v. Sargent*, 40 Wn. App. 340, 350, 698 P.2d 598 (1985)). Thus, the admission of such an opinion based on personal observation was permissible in these circumstances.

In *Barr*, the officer's testimony of his observations of the defendant's statements and body language during the interview, as informed by the officer's training in a particular investigative technique, clearly embodied an opinion regarding manifestations

of the defendant's guilt. *Barr*, 123 Wn. App. at 384. Detective Brunk's testimony provided no such implications of Mr. Miller's guilt. The detective never stated or otherwise implied that this was determinative of Mr. Miller's guilt, or that his training enabled him to make such determinations of guilt. Rather, Detective Brunk merely relayed to the jury his factual observations of the inconsistency of Mr. Miller's responses, leaving it to the trier of fact to then decide the weight to be afforded to such discrepancies. Therefore, because the detective's testimony did not impermissibly comment on Mr. Miller's guilt, the trial court did not abuse its discretion by permitting the testimony.

Harmlessness. In any event, any error here would be harmless. A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that "any reasonable jury would have reached the same result in the absence of the error." *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). We employ the overwhelming untainted evidence test to determine if an error was harmless. *Id.* at 426. We examine whether the remaining untainted evidence in a case is so overwhelming that it necessarily leads to a finding of guilt. *Id.*; *see also Barr*, 123 Wn. App. at 384.

Here, the untainted evidence is so overwhelming as to necessarily lead to a finding of guilt. Although Mr. Miller's guilt may have hinged, in part, on his credibility, the

untainted evidence is of such a nature and quality as to render the admission of Detective Brunk's testimony harmless beyond a reasonable doubt. Any reasonable jury would have reached the same guilty verdict due to the overall evidence presented during trial. The inconsistencies in Mr. Miller's interview statements and trial testimony were also highlighted by the testimonies of the victim and Mr. Miller's children. Additionally, Mr. Miller's interview responses, offered without the context provided by Detective Brunk, sufficiently illustrated his differing accounts of the incident. Thus, in light of all the evidence presented in the case, the detective's phrasing of answers and use of certain language was harmless. Any reasonable jury would have concluded that Mr. Miller provided inconsistent statements regardless of Detective Brunk's explicit use of language such as "discrepancy," "version," and "story."

Same Criminal Conduct. Mr. Miller next contends that the three child molestation crimes constituted the same criminal conduct pursuant to RCW 9.94A.589(1)(a). A trial court's determination of what constitutes the same criminal conduct for purposes of calculating an offender score is reviewed for an abuse of discretion or misapplication of the law. *State v. French*, 157 Wn.2d 593, 613, 141 P.3d 54 (2006).

When sentencing a person for multiple current offenses, the sentencing court determines the offender score by considering all other current and prior convictions as if

they were prior convictions. RCW 9.94A.589(1)(a). However, if the sentencing court finds that some or all of the current offenses encompass the same criminal conduct, then those offenses may only be counted as one single crime. RCW 9.94A.589(1)(a).

Multiple crimes constitute the same criminal conduct if they "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). Unless all three of these elements are present, the offenses do not constitute the same criminal conduct and must be counted separately in calculating the offender score. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). The legislature intended that the courts construe RCW 9.94A.589(1)(a) narrowly in order to disallow most assertions of same criminal conduct. *State v. Wilson*, 136 Wn. App. 596, 613, 150 P.3d 144 (2007).

In Mr. Miller's case, the three criminal acts of child molestation were committed against the same victim and at the same place. Thus, the issue of whether the three acts of molesting S.M. constitute the same criminal conduct turns on whether the trial court erroneously concluded that Mr. Miller formed a new criminal intent in between the three temporally distinct acts of molesting S.M.

Same Time. As Mr. Miller concedes, his three crimes occurred sequentially, not simultaneously or continuously. Crimes committed in a sequential manner may

nonetheless satisfy the same time element of the same criminal conduct test if they were part of a continuous transaction or occurred in a single, uninterrupted criminal episode over a short period of time. *Porter*, 133 Wn.2d at 183.

Contrary to Mr. Miller's claim, his acts of molesting S.M., while occurring sequentially, cannot be said to have occurred at the same time for purposes of satisfying the same criminal conduct element. Unlike in *Porter*, where the defendant's immediate sequential acts occurred "as closely in time as they could without being simultaneous," Mr. Miller's acts were separated by more substantial time periods of 5 to 15 or 20 minutes. *Id.* Furthermore, Mr. Miller engaged in activities completely unrelated to child molestation during these temporal gaps, such as watching television, fixing the computer, or smoking a cigarette. By engaging in such unrelated activities, Mr. Miller's actions became temporally distinct and separate. As in *State v. Grantham*, 84 Wn. App. 854, 932 P.2d 657 (1997), these facts demonstrate that the criminal episode of molesting S.M. ended after each instance of Mr. Miller retreating from the bedroom, only to reoccur when he later reentered the room after engaging in an unrelated task. Thus, the record shows that Mr. Miller's acts were neither part of a continuous transaction nor occurred in a single, uninterrupted criminal episode over a short period of time. Accordingly, the trial court did not misapply the law in concluding that Mr. Miller's acts were temporally

distinct, with one act being completed before the next was begun.

Same Intent. In any event, Mr. Miller fails to prove that his objective criminal intent remained the same from one act of molestation to the next. And, if a subsequent crime is accompanied by a new objective intent, then the prior crime may be said to have been completed before commencement of the next. *Id.* at 859. To determine whether multiple crimes share a criminal intent, we focus on whether the defendant's objective intent changed from one crime to the next, and whether one crime furthered another, rather than whether all the crimes were part of a recognizable scheme. *Id.* at 858.

Mr. Miller contends that the facts in his case are analogous to those in cases such as *Porter* and *State v. Walden*, 69 Wn. App. 183, 847 P.2d 956 (1993) where the court held that multiple criminal acts nonetheless constituted the "same criminal conduct" because the defendant's criminal intent remained the same between several acts. In *Porter*, the court held that the defendant's back-to-back drug sales constituted same criminal intent and conduct because the criminal acts occurred in a continuing, uninterrupted sequence of conduct as part of a recognizable scheme to sell drugs. *Porter*, 133 Wn.2d at 183. And in *Walden*, two acts of rape committed in short succession were held to involve same criminal intent of sexual intercourse and, thus, the crimes furthered a single criminal purpose. *Walden*, 69 Wn. App. at 188.

Here, the trial court analogized Mr. Miller's case to that of *Grantham*. In *Grantham*, two sequential rapes of the same victim were found to constitute separate and distinct criminal acts because they involved newly formed and different criminal intents. *Grantham*, 84 Wn. App. at 858-59. Pertinent evidence at trial showed that the defendant had completed the first rape before commencing the second; that after the first rape and before the second rape, the defendant had the presence of mind to threaten the victim not to tell; that between the two criminal acts the victim begged for him to stop and take her home; and that the defendant had to use new physical force to obtain sufficient compliance to accomplish the second rape. *Id*. at 859. This evidence was held sufficient to support the trial court's determination that, upon completing the first act of rape, the defendant "had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act. [The defendant] chose the latter, forming a new intent to commit the second act." *Id*. Furthermore, the court affirmed that the evidence additionally supported "the trial court's conclusion that each act of sexual intercourse was complete in itself; one did not depend upon the other or further the other." *Id.*

Here, the trial court based its finding of different criminal intents on a sufficient evidentiary basis. The trial produced evidence showing that each act of molestation

committed by Mr. Miller was separated in time by approximately 5 to 20 minutes. Furthermore, the record is rife with evidence that, between committing the criminal acts, Mr. Miller engaged in numerous activities entirely unrelated to molesting S.M., including the following: retreating from the location of the crimes and entering other rooms, watching television, speaking to his daughter several times about topics such as his son's return and the weather, taking medicine to ease the pain caused by his sore throat, getting a glass of water in the kitchen, consciously thinking about the wastefulness of paying for Internet service while being unable to get online, working on his computer in an attempt to establish an Internet connection, and putting on a jacket and going outside the house to smoke a cigarette.

The evidence showing that Mr. Miller left the bedroom for a period of time and performed other, unrelated tasks, is sufficient to support the trial court's determination that, following each act of molesting S.M., Mr. Miller "had the [time and] opportunity to pause, reflect, and either cease what was criminal activity or proceed to commit further criminal acts." RP (Apr. 15, 2009) at 8-9. Mr. Miller chose to proceed to commit another criminal act of child molestation and, thereby, formed a new intent to commit the subsequent act of molestation. Furthermore, sufficient evidence supports the trial court's conclusion that each act of molesting S.M. was complete in itself because one act did not

depend upon or further another.

Additionally, like the defendant in *Grantham*, Mr. Miller asserts that his three offenses constitute the same criminal conduct because they all had the identical intent of sexual gratification. In *Grantham*, the court declined to follow the *Walden* court's reasoning that the criminal intent was the same—sexual intercourse—for both acts of rape. *Id*. at 860. Finding *Walden* unpersuasive, the *Grantham* court instead held that "[a]lthough sexual intercourse is an element and the objective of every rape, every rape does not share the same intent." *Id*. Thus, the evidence was held sufficient to support the conclusion that, despite sharing the same general criminal objective or purpose of sexual intercourse, Mr. Grantham's two crimes did not involve the same criminal intent and were not committed at the same time. *Id*.

Mr. Miller's three offenses involved different criminal intents. A multitude of activities and thoughts unrelated to molestation that filled the temporal gaps separated each complete criminal act. None of the acts furthered another by serving as foreplay or preparation. Sufficient evidence established that the three counts of third degree child molestation did not constitute the same criminal conduct. The trial court did not err by concluding that Mr. Miller formed a new criminal intent each time he entered the bedroom and molested S.M.

Statutory Maximum Sentence. The Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, prohibits a sentence wherein the combined terms of confinement and community custody have the potential to exceed the statutory maximum allowable for the offense. *State v. Zavala-Reynoso*, 127 Wn. App. 119, 124, 110 P.3d 827 (2005) (quoting RCW 9.94A.505(5)).

The statutory maximum for child molestation in the third degree, a class C felony, is 60 months. RCW 9A.44.089; RCW 9A.20.021(1)(c). The standard range sentence for Mr. Miller was 41 to 54 months. RCW 9.94A.510. Mr. Miller was sentenced to 54 months' imprisonment and a term of 36 to 48 months in community custody. Thus, a combination of the term of confinement with the term of community custody results in a potential total sentence in excess of the maximum sentence allowable under RCW 9A.20.021(1)(c). *In re Personal Restraint of Brooks*, 166 Wn.2d 664, 211 P.3d 1023 (2009) is the controlling authority in remedying such a sentencing error.

We remand to the trial court for a clarification that Mr. Miller's combined sentence does not exceed the statutory maximum of 60 months.

Double Jeopardy. In his statement of additional grounds for review, Mr. Miller

challenges the constitutionality of the tripling provision in the sentencing statute regarding the scoring of other current sex offenses. Because his contentions regard the calculation of his offender score and a double jeopardy violation, his challenge is properly raised for the first time on appeal. *State v. Soonalole*, 99 Wn. App. 207, 211 n.1, 992 P.2d 541 (2000).

This court conducts a de novo review of a sentencing court's calculation of an offender score. *State v. Knight*, 134 Wn. App. 103, 106, 138 P.3d 1114 (2006), *aff'd*, 162 Wn.2d 806, 174 P.3d 1167 (2008). Washington's statutory sentencing scheme provides that "[c]onvictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed 'other current offenses' within the meaning of RCW 9.94A.589." RCW 9.94A.525(1). RCW 9.94A.589(1)(a) directs the sentencing court to treat all other current offenses as prior offenses when calculating an offender score:

> Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, *the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score*: PROVIDED, 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.

(Emphasis added).

Thus, the sentencing court was required to treat both of Mr. Miller's other current offenses for child molestation as prior offenses in determining his offender score, unless the offenses were the same criminal conduct. RCW 9.94A.589(1)(a). Former RCW 9.94A.030(38)(a)(i) (2007) and RCW 9A.44.089 define Mr. Miller's third degree child molestation convictions as "sex offenses." RCW 9.94A.525(17) directs the sentencing court to assign three offender score points for each sex offense if the present conviction is for a sex offense.

Here, the sentencing court followed these statutory directives. In calculating Mr. Miller's offender score for the third degree child molestation conviction, the two other current third degree child molestation offenses were each counted as three points, resulting in a total offender score of six. Given the conclusion that the trial court did not err by finding that the three offenses did not constitute the same criminal conduct, Mr. Miller fails to show any error in his offender score calculation. Thus, unless the statutory tripling provision in RCW 9.94A.525(17) results in a double jeopardy violation, Mr. Miller's claim is without merit.

Double jeopardy challenges are questions of law that are reviewed de novo. *State v. Hughes*, 166 Wn.2d 675, 681, 212 P.3d 558 (2009). The double jeopardy clause of the Fifth Amendment to the United States Constitution provides that "[n]o person shall . . . be

subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Article I, section 9 of the Washington Constitution guarantees that "[n]o person shall . . . be twice put in jeopardy for the same offense." These two provisions provide the same protection. *State v. Weber*, 159 Wn.2d 252, 265, 149 P.3d 646 (2006) (quoting *In re Pers. Restraint of Davis*, 142 Wn.2d 165, 171, 12 P.3d 603 (2000)). Among other things, the double jeopardy provisions bar multiple punishments for the same offense. *State v. Larkin*, 70 Wn. App. 349, 353, 853 P.2d 451 (1993).

The legislature has the authority to assign punishment and, accordingly, may permit multiple punishments. *Id.* "In the multiple punishment context, 'the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.'" *State v. Sulayman*, 97 Wn. App. 185, 190, 983 P.2d 672 (1999) (internal quotation marks omitted) (quoting *Jones v. Thomas*, 491 U.S. 376, 381, 109 S. Ct. 2522, 105 L. Ed. 2d 322 (1989)). Accordingly, double jeopardy is implicated only when the court exceeds its authority and imposes multiple punishments where the legislature has not authorized them. *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). If express or implicit legislative intent authorizing a punishment is found, then double jeopardy has not been violated and the analysis ends. *State v. Freeman*, 153 Wn.2d 765, 771-73, 108 P.3d 753 (2005).

Thus, the dispositive question here is whether the legislature intended to require the court to triple the score for third degree child molestation where prior sex offense convictions exist. The legislative intent underlying the consequences of sex offenses is clear and unambiguous: the existence of prior sex offenses shall result in a longer sentence for a present sex offense conviction. RCW 9.94A.525(1), (17); RCW 9.94A.589(1)(a). Any sentencing redundancy in mandating this tripling is, in fact, intended. Thus, because the legislative intent to triple the offender score for sex offenders with prior sex offense convictions is clear and unmistakable, the analysis ends. Mr. Miller's offender score did not result in a double jeopardy violation.

Conclusion. We affirm the convictions and remand for clarification that the combination of 54 months' confinement and 36 to 48 months' community custody shall not exceed the statutory maximum of 60 months.

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

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Kulik, C.J.

WE CONCUR:

Sweeney, J.

Korsmo, J.