IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28543-0-III**
Respondent,	)	
	)	**Division Three**
v.	)	
ERNEST JAMES SORRELL,	)	**UNPUBLISHED OPINION**
Appellant.	)	

Brown, J.— Ernest J. Sorrell appeals his Grant County convictions for two counts of third degree child molestation under RCW 9A.44.089 and two counts of second degree incest under RCW 9A.64.020(2). The counts involved single contacts with Mr. Sorrell's daughter on two separate occasions. The court decided each count of incest encompassed the same criminal conduct with the molestation counts and sentenced Mr. Sorrell to two concurrent 60-month confinements, equaling the statutory maximum sentence. The court imposed community custody of 36 to 48 months for each count and interlineated language to provide for earned early release, but did not specifically limit Mr. Sorrell's combined sentence to the statutory maximum. Mr. Sorrell contends his convictions violate same-offense double jeopardy principles. And, he contends his

sentence exceeds the statutory maximum. We hold Mr. Sorrell's sentence does not violate double jeopardy principles, but remand for the trial court to clarify that the combination sentence shall not exceed the statutory maximum.

FACTS

During the summer 2006, A.S. went camping with her father, Mr. Sorrell. While A.S. was lying in her sleeping bag, Mr. Sorrell climbed on her and, with an erect penis, simulated sex. Both were fully clothed. One to two months later, while A.S. and her father were returning from a fishing trip, Mr. Sorrell approached A.S., held her in a tight hug, and moved his hips, rubbing his erect penis on her as though he were "having sex over the top of clothes." Report of Proceedings (RP) (May 15, 2009) at 120.

The State charged Mr. Sorrell with two counts of third degree child molestation (counts 1 and 3) and two counts of second degree incest (counts 2 and 4). During closing argument at trial, the prosecutor informed the jury that counts 1 and 2 were based on a single act of alleged sexual contact, which occurred during the "camping trip." RP (May 19, 2009) at 84. The prosecutor argued that counts 3 and 4 were based on a single, separate, alleged act of sexual contact, which occurred during the "fishing trip." RP (May 19, 2009) at 84. The jury found Mr. Sorrell guilty as charged.

At sentencing, the court ruled "Count 2 encompasses with Count 1," and "Count 4 encompasses with Count 3," and therefore, based on the same criminal conduct, did not include counts 2 and 4 in the offender score. Clerk's Papers (CP) at 143. The court imposed a standard-range sentence of 60 months' confinement for counts 1 and

3, to be served concurrently. That was equivalent to the statutory maximum sentence for the crime. RCW 9A.20.021; RCW 9A.44.089(2). In addition to the term of confinement, the court imposed 36 to 48 months of community custody for each count. The court orally noted at sentencing that the community custody would be "limited by the earned early release time." RP (Aug. 18, 2009) at 12. However, the judgment and sentence was interlineated "or for the length of earned early release" at paragraph 4.6(A). CP at 146. Mr. Sorrell appealed.

ANALYSIS

A. Double Jeopardy

The issue is whether Mr. Sorrell's convictions violate double jeopardy principles. He contends his second degree incest convictions should be dismissed because third degree child molestation and second degree incest are the same offense.

We review double jeopardy claims de novo. *State v. Kelley*, 168 Wn.2d 72, 76, 226 P.3d 773 (2010).

"Both our federal and state constitutions protect persons from being twice put in jeopardy for the same offense." *State v. Turner*, 169 Wn.2d 448, 454, 238 P.3d 461 (2010); U.S. Const. amend. V; Const. art. I, § 9. This includes, "being (1) prosecuted a second time for the same offense after acquittal, (2) prosecuted a second time for the same offense after conviction, and (3) punished multiple times for the same offense." *State v. Linton*, 156 Wn.2d 777, 783, 132 P.3d 127 (2006). Mr. Sorrell argues the multi-punishment principle is violated here.

Subject to limits imposed by the Eighth Amendment to the United States Constitution, the legislature has the power to define criminal conduct and set out the appropriate punishment. *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998) (citing *Bell v. United States*, 349 U.S. 81, 83, 75 S. Ct. 620, 99 L. Ed. 905 (1955)). To determine whether a person may be convicted of two particular crimes, we first look at the language of the statutes to ascertain whether the legislature expressly intended multiple punishments. *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995); *Ohio v. Johnson*, 467 U.S. 493, 499, 104 S. Ct. 2536, 81 L. Ed. 2d 425 (1984). Some statutes, such as the one governing burglary, expressly authorize cumulative punishment. *See* RCW 9A.52.050 ("Every person who, in the commission of a burglary shall commit any other crime, may be punished therefore as well as for the burglary, and may be prosecuted for each crime separately."). The statutes concerning third degree child molestation and second degree incest do not specifically authorize, nor prohibit, multiple punishments, so it is unclear whether the legislature intended that multiple punishments be imposed. *See* RCW 9A.44.089(1) (third degree child molestation); RCW 9A.64.020(2)(a) (second degree incest).

Because the legislative intent is unclear, we must employ the "same evidence" test. *In re Pers. Restraint of Borrero*, 161 Wn.2d 532, 536-37, 167 P.3d 1106 (2007) (citing *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932)). To violate double jeopardy under the "same evidence" test, a defendant's two convictions must be identical both in fact and in law. *Calle*, 125 Wn.2d at 777. Thus,

although two offenses may be identical in fact (i.e., both offenses are based upon one act of sexual contact), they are not necessarily identical in law. If each offense includes an element not included in the other, and proof of one offense would not necessarily also prove the other, the two crimes are not identical in law, and multiple convictions may stand. *Id.*

Here, each offense contains an element not included in the other. A conviction for third degree child molestation requires sexual contact with an individual "who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim." RCW 9A.44.089(1). Second degree incest does not. *See* RCW 9A.64.020(2)(a). Second degree incest requires sexual contact was "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." RCW 9A.64.020(2)(a). Third degree child molestation does not. *See* RCW 9A.44.089(1).

Mr. Sorrell argues it is irrelevant that the two crimes have different statutory elements because the two offenses are the same in fact and in law if "evidence required to support a conviction upon one of them is sufficient to warrant a conviction on the other." Br. of Appellant at 6-7 (citing *State v. Reiff*, 14 Wash. 664, 667, 45 P. 318 (1896)). He compares this case to the facts in *State v. Hughes*, 166 Wn.2d 675, 212 P.3d 558 (2009), where offenses of rape and child rape were considered the same in law "although the elements of the crimes facially differ." *Id*. at 684. Though

nonconsent is proved "by the mental incapacity or physical helpless of the victim" in second degree rape and "by the age of the victim and the age differential between the victim and the perpetrator" in rape of a child, the *Hughes* court held that "both statutes protect individuals who are unable to consent by reason of their status." *Id*.

This case is distinguishable from *Hughes* because a conviction for third degree child molestation relies upon the age of the victim while a conviction for second degree incest relies upon the familial relationship between the parties. The differences between these elements are not "illusory," as differences between rape and child rape were found to be in *Hughes*. *See id*. Here, two distinct classes of individuals are meant to be protected by the different statutes: those who cannot consent; and those to whom the perpetrator is related. Therefore, Mr. Sorrell is incorrect when asserting the evidence required to support each of his molestation charges was sufficient to support each of his incest charges. Proof that the victim was a certain age would not be sufficient to prove that she was related to Mr. Sorrell. Likewise, proof that the victim was Mr. Sorrell's daughter would not be sufficient to prove that she was a particular age.

B. Statutory Maximum

Mr. Sorrell contends the court was, as a matter of law, not authorized to impose any term of community custody because the term of confinement was equal to the statutory maximum. This question of law is reviewed de novo. *State v. Miller*, 156 Wn.2d 23, 27, 123 P.3d 827 (2005).

When a court sentences a person for third degree child molestation, it must sentence the offender, in addition to the term of confinement, to a three-year term of community custody. RCW 9.94A.42(a)(i); RCW 9.94A.701(1)(a). However, the Sentencing Reform Act of 1981(SRA) chapter 9.94A RCW prohibits a court from imposing a sentence when the term of confinement and the term of community custody exceed the statutory maximum for the defendant's crime. RCW 9.94A.505(5).

The State relies on *In re Personal Restraint of Brooks*, 166 Wn.2d 664, 675, 211 P.3d 1023 (2009), for the rule that a court avoids imposing a term that exceeds the statutory maximum by linking the amount of community custody directly to the amount of earned early release. Br. of Resp't at 5. However, the statute relied on in *Brooks*, that linked the term of community custody to the period of earned early release, RCW 9.94A.715, was repealed and partly replaced by RCW 9.94A.701(8). Laws of 2009, ch. 28 § 42; Laws of 2009, ch. 375 § 5. RCW 9.94A.701(8), which took effect August 1, 2009, applies to Mr. Sorrell's sentence. Laws of 2009, ch. 375 § 20 ("This act applies retroactively and prospectively regardless of whether the offender is currently on community custody or probation with the department, currently incarcerated with a term of community custody or probation with the department, or sentenced after [August 1, 2009]."). RCW 9.94A.701(8) has since been recodified as RCW 9.94A.701(9), but no substantive changes were made. *See* Laws of 2010, ch. 224 § 5.

The term of community custody "shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of

community custody exceeds the statutory maximum." RCW 9.94A.701(9).

The statutory maximum sentence for third degree child molestation is five years. RCW 9A.20.021(c); RCW 9A.44.089(2). The court imposed standard range confinement of 60 months, equaling the statutory maximum sentence. Earned early release time may permit Mr. Sorrell's release before 60 months; adding a full term of community custody could exceed the statutory maximum. Here, the court imposed 36 to 48 months of community custody for each count and recognized the potential for exceeding the statutory maximum. Even so, the sentence does not clearly state that the combined term of incarceration and community custody shall not exceed the statutory maximum. The appropriate remedy "is to remand to the trial court to amend the sentence and explicitly state that the combination of confinement and community custody shall not exceed the statutory maximum." *Brooks*, 166 Wn.2d at 675.

C. Pro Se Statement of Additional Grounds

First, Mr. Sorrell contends the State in bad faith failed to preserve evidence of interviews it conducted of A.S. as required by chapter 26.44 RCW. He argues the failure denied him due process because it could have been useful to his defense. Mr. Sorrell claims A.S. was interviewed "no less than fourteen" times by the State, SAG at 9, and the interviewers failed to properly record the interviews and preserve evidence of them. He claims that the State failed to attempt to collect physical evidence.

Even if Mr. Sorrell's allegations are true, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does

not constitute a denial of due process of law." *State v. Ortiz*, 119 Wn.2d 294, 302, 831 P.2d 1060 (1992) (quoting *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988)). He argues such alleged failure was done in bad faith because it could have provided evidence that he could use to impeach the victim. He argues it was done in bad faith because it was contrary to officer training and against protocol.

Mr. Sorrell provides no citation or cites to his own declaration for evidence of improper interviews, improper record destruction and distribution, and failure to investigate. His self-serving statements, without more, do not provide evidence of the State's bad faith.

Second, Mr. Sorrell contends the State improperly used a wire intercept to record a conversation with his daughter, thus violating his right to remain silent and his right to counsel under the Fifth Amendment and *Miranda.*[1] He argues because the State already had probable cause for his arrest, the interception was unnecessary.

Mr. Sorrell cites to *State v. Bryan*, 40 Wn. App. 366, 698 P.2d 1084 (1985) and *State v. Lewis*, 32 Wn. App. 13, 645 P.2d 722 (1982) to argue it is a *Miranda* violation for police to delay in making an arrest once they have probable cause for the purpose of conducting interviews simply to gather additional incriminating information. He fails to recognize *Miranda* is solely implicated after the suspect is taken into custody or otherwise deprived of his freedom of action in a significant way. *Lewis*, 32 Wn. App. at 17. Mr. Sorrell was neither in custody nor deprived of his freedom of action when he

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

spoke on the phone with his daughter. Accordingly, his argument fails.

Mr. Sorrell argues the trial court erred in applying Sixth Amendment analysis instead of Fifth Amendment analysis when denying his motion to suppress the recorded conversations. Though he solely challenged the evidence under the Sixth Amendment below, the court found neither his Fifth or Sixth Amendment rights were violated. As explained above, no Fifth Amendment violation occurred. He does not assign error to the court's ruling that his Sixth Amendment right to counsel was not violated.

Third, Mr. Sorrell contends his psychologist-patient confidentiality right was violated by allowing his psychologist to testify. He relies on RCW 26.44.053(2) for the proposition that no information given at a psychological examination of a parent is admissible. His argument fails to recognize the rule applies solely to examinations ordered by the court after child abuse allegations. RCW 26.44.053(2). Mr. Sorrell's communications with his psychologist were not the result of a court ordered examination. But a psychologist must report child abuse or neglect under RCW 26.44.030. *See State v. Hyder*, ___ Wn. App. ___, 244 P.3d 454, 461 (2011). Therefore, the testimony of Mr. Sorrell's psychologist was properly admitted.

Fourth, Mr. Sorrell contends the State committed discovery violations denying him a speedy trial and preventing him from impeaching the State's witnesses with their criminal records. Mr. Sorrell moved for dismissal under CrR 8.3(b) based on discovery violations. "A trial court's power to dismiss charges is reviewable under the manifest

abuse of discretion standard." *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). An abuse of discretion exists when the trial court's decision is exercised on untenable grounds or for untenable reasons, or is manifestly unreasonable. *Id*.

Dismissal is proper under CrR 8.3(b) when a defendant shows (1) arbitrary action or governmental misconduct and (2) prejudice affecting the defendant's right to a fair trial. *Michielli*, 132 Wn.2d at 239-40. Dismissal under CrR 8.3(b) is an extraordinary remedy and is not designed to grant courts "the authority to substitute their judgment for that of the prosecutor." *State v. Starrish*, 86 Wn.2d 200, 205, 544 P.2d 1 (1975).

Here, after several lengthy discovery-violation hearings, the trial court determined "the motion to dismiss should be denied because I am unable to associate significant prejudice to the defendant from the state's alleged mismanagement or mismanagement that was found." Report of Proceedings (RP) (May 19, 2009) at 122. Specifically, the court found "no information to suggest that the state failed to provide any [criminal histories of civilian witnesses] that were in its possession." RP (May 19, 2009) at 125. The court determined "continuances have, by and large, been the product of defense requests and the need for defense preparation in the case." RP (May 17, 2009) at 163.

Given all, we conclude the trial court did not abuse its discretion in denying Mr. Sorrell's motion to dismiss for discovery violations.

Fifth, Mr. Sorrell contends the court erred by failing to rule on his motions. He

argues it is "patently unfair" that the court ignored or refused to rule on his suppression motions, and permitting the State to admit more evidence. Mr. Sorrell cites to his declaration for the motions allegedly made. The court did recognize his declaration when it ruled on his suppression motion. Additionally, the court denied Mr. Sorrell's *Franks*[2] hearing motion as untimely because "the basis for it was all available to the defendant and counsel at the time the suppression motion was made and argued." RP (May 7, 2009) at 168. The court indicated it was "not persuaded that there's an adequate basis" for a *Franks* hearing. RP (May 7, 2009) at 168.

Accordingly, Mr. Sorrell's argument is without merit.

Sixth, Mr. Sorrell contends he was denied a fair trial because the prosecutors "repeatedly and flagrantly violated pretrial motions, invited witnesses to violate pretrial motions, ignored court instructions, repeated stricken testimony, and mischaracterized testimony during trial and in closing arguments." SAG at 42.

"A defendant who alleges improper conduct on the part of a prosecutor must first establish the prosecutor's improper conduct and, second, its prejudicial effect." *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995); *State v. Furman*, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993)). "Prejudice on the part of the prosecutor is established only where 'there is a substantial likelihood the instances of misconduct affected the jury's verdict.'" *Id*. (quoting *Pirtle*, 127 Wn.2d at 672).

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[2] *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

Mr. Sorrell argues the prosecutor violated the "Fact of the Complaint" hearsay exception by allowing the State's witnesses to testify that the victim had complained to them about her father abusing her. He cites *State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1992) for the limited rule permitting the prosecution to present evidence of a victim's complaint after an assault. But this concerns the timeliness of a complaint. Mr. Sorrell does not cite to the record where a witness's testimony violated the hearsay rule. Rather, he merely argues the testimony did not establish the complaints were timely made, but fails to cite to any evidence supporting his argument.

Seventh, Mr. Sorrell contends the prosecutor committed misconduct by referring to his daughter as a victim, using the word molestation, and eliciting hearsay. Though Mr. Sorrell points to several places in the record where these alleged violations took place, the court on each occasion sustained objections and struck improper testimony from the record.

Mr. Sorrell argues the prosecutor improperly questioned Dr. Frese and him about his drug use. Mr. Sorrell admits his counsel did not object at trial to this alleged misconduct. And Mr. Sorrell fails to show prejudice. Further, Mr. Sorrell fails to establish, or even allege, prejudice when complaining Detective Darnell "mischaracterize[d] evidence" when answering the State's questions. SAG at 44. Mr. Sorrell argues the prosecutor "invented" testimony and used it to "inflame the jury and to make the already offensive allegations seem violent and forceful." SAG at 44, 45. Mr. Sorrell did not object during the portion of the State's closing argument, which he

now claims was improper. "When defense counsel does not object to a prosecutor's alleged misconduct, request a curative instruction, or move for a mistrial, appellate review of the alleged misconduct is precluded unless the conduct was so flagrant and ill intentioned that no instruction could erase the resulting prejudice." *State v. Dhaliwal*, 113 Wn. App. 226, 241, 53 P.3d 65 (2002), *aff'd*, 150 Wn.2d 559, 79 P.3d 432 (2003). "Prosecutors are permitted latitude to argue the facts in evidence and make reasonable inferences to the jury." *Id*. at 242.

Eighth, Mr. Sorrell contends jury instruction 10 mischaracterized domestic violence and classified an element of the crime as an aggravating circumstance. He provides an incorrect citation to the challenged jury instruction. The record shows the State properly gave notice of its intent to seek an exceptional sentence. Even so, the judgment and sentence show Mr. Sorrell was given a standard-range sentence, not an exceptional sentence. Therefore, Mr. Sorrell's argument concerning that jury instruction is moot.

In sum, we find no merit in Mr. Sorrell's SAG.

Affirmed, and remanded for proceedings consistent with this opinion.

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.

Brown, J.

WE CONCUR:

Kulik, C.J.

Sweeney, J.