NO. 98926-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NATHAN A CHAVEZ,

Petitioner.

ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 52358-2-II
Clallam County Superior Court No. 17-1-00046-8

ANSWER TO PETITION FOR REVIEW

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SERVICE	Travis Stearns Attorney for Petitioner Washington Appellate Project 1511 Third Ave., Ste. 610 Seattle, WA 98101 Email: wapofficemail@washapp.org, travis@washapp.org	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED September 18, 2020, Port Angeles, WA **Original e-filed at the Supreme Court; Copy to counsel listed at left.**

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I. IDENTITY OF RESPONDENT

The respondent is the State of Washington. The answer is filed by Clallam County Deputy Prosecuting Attorney Jesse Espinoza.

II. COURT OF APPEALS DECISION

The State respectfully requests this Court to deny review of the Court of Appeals unpublished decision affirming the conviction in *State v. Chavez,* No. 52358-2-II (July 21, 2020), a copy of which is attached to the petition for review.[1]

The Court of Appeals, in conformity with well-established principles affirmed the convictions of four counts of third degree rape of a child, one count of third degree child molestation, and one count of witness tampering. *Chavez*, 2020 WL 4194604, at *1.

Pointing out that although it was questionable whether evidence of an act of prior sexual misconduct by Chavez against L.L was admissible under ER 404(b), the Court of Appeals held that any error was harmless. *Id.* Further, the Court of Appeals held that although there was insufficient evidence of the abuse of trust aggravating factor, trial court could have properly imposed the same exceptional sentence under the "free crimes" rationale alone. *Id.* The Court of Appeals then remanded the case for resentencing on the basis that it was not clear whether the trial court would have imposed the same exceptional sentence based only upon the free crimes aggravating factor. *Id.*

[1] *See also State v. Chavez*, 2020 WL 4194604, at *1 (Wn. App. Div. 2, 2020).

III. COUNTERSTATEMENT OF THE ISSUES

The question presented is whether this Court should decline to accept review because the petition fails to establish that the Court of Appeals decision in this case is in conflict with a decision by the Supreme Court or a decision of another division of the Court of Appeals and the petition fails to establish any other criteria set forth in RAP 13.4(b)?

IV. STATEMENT OF THE CASE

The State charged Chavez with three counts of Rape of a Child in the Third Degree for the rape of H.W. and with one count of Child Molestation in the Third Degree, also involving H.W. Additionally, the State charged Chavez with two counts of Rape of a Child in the Third Degree for the rape of M.C. and one count of Witness Tampering. CP 223–27. Each of the rape and child molestation counts involving H.W. included a special allegation of abuse of trust. CP 224–25. A jury found Chavez guilty of all counts except for Count V, Rape of a Child in the Third Degree, for the rape of M.C. CP 62, 181.

H.W.'s testimony

H.W. was 14 and in the eighth grade when she met Chavez. RP 87. She met Chavez at Cornerstone Baptist Church. RP 86. H.W. made her acquaintance with Chavez as a new member of the church and Chavez had a role something along the lines of a greeter or usher. RP 88. Chavez would speak to H.W. about the services and ask how she was. RP 88. Then H.W. reached out to Chavez through texting to inquire if he needed a babysitter. RP 89. H.W. was encouraged by her friend Joy to reach out in this manner as Joy was a friend of Chavez'

family. RP 85, 89. Chavez responded that he would like to get to know H.W. more before allowing her to babysit his children. RP 90.

The text communications stopped being about babysitting and became more flirtatious. RP 90. Chavez would comment to H.W. that she was pretty or beautiful. RP 91. Eventually, Chavez and H.W. agreed through text messages to meet one night. RP 92. Prior to this meeting, H.W. and Chavez communicated mostly by text message except for their first in person encounter. RP 92.

First event alleged in Count I (CP 203)

The plan for their first encounter was for H.W. to leave church and then meet up with Chavez and go somewhere and talk. RP 92–93. This was to occur during a church party on New Year's Eve of 2014 going into 2015. RP 96. H.W. was to leave the party and go down the road where Chavez was parked and would pick up H.W. RP 97. Later in the evening when it got dark, around ten or eleven, H.W. did as planned and went down the road to meet Chavez in his car. RP 97.

H.W. got into Chavez' white Toyota sports car and they drove for about 25 minutes to Port Angeles. RP 100. Chavez pulled into a cul-de-sac where there were no people out and no cars passing. RP 100. There were about one or two houses on the road. RP 100. Chavez talked a little then started kissing H.W. RP 101. Chavez then took off H.W.'s clothes and got over H.W. in the front seat and then had sexual intercourse with H.W. RP 104–05. Then they got dressed and drove back to the church. RP 106. H.W. and Chavez had known of each other for about a month at that point and H.W. was 14 years old. RP 93, 106. Chavez was

28 years old. RP 507, 508, 525. Chavez came up with the plan which he and H.W. texted about. RP 95. H.W. had still never babysat for Chavez. RP 96.

Third Event Alleged in Count III (CP 205).

The third time Chavez had sexual intercourse with H.W. was at Chavez's home, when H.W. was still fourteen and in eighth grade. RP 114. The encounter started at H.W.'s house. RP 115. When it was starting to get dark out, Chavez contacted H.W. by text and said he was coming to pick H.W. up. RP 115. H.W. told her mom she was going out for a jog and Chavez picked H.W. up down the corner from her house and drove her to his house. RP 116–17. They went to Chavez and his wife's bedroom and Chavez started kissing H.W. and then undressing her. RP 118–121. Then Chavez had sex with H.W. RP 124. Afterwards, Chavez used the bathroom and then took H.W. home, dropping her off where he picked her up. RP 125–26.

M.C.'s testimony

M.C. was fourteen years old and in the 9th grade at Sequim High School when she first met Chavez. RP 210. M.C. was celebrating with some fellow students at a pep dance after an early season high school football game. RP 211. Chavez's brother, Jesse, picked up M.C. and her friends at the high school to give them a ride to the party in his truck and he took the group to Slab Camp where people like to drink and have fires. RP 212. On the way to Slab Camp, the group stopped at Walmart where they met up with Chavez driving a different truck with two high school girls in it. RP 213. Once at Slab Camp, alcohol was supplied to the students from the bed of Chavez's truck. RP 214.

First Event Alleged in Count V (CP 208).

This event was the first time M.C. had met Chavez although she did not talk with him at the party. RP 215. When it was time to leave, M.C. had to get in Chavez's truck because Jesse's truck was full. RP 216. As they were driving, Chavez began to tell M.C. she was pretty and looked familiar. RP 217. Chavez told M.C. he was 20 years old. RP 217.

Somehow, they lost sight of Jesse's truck at some point and then Chavez put his hand on M.C.'s leg and said he was going to pull over to text Jesse to find out where he was. RP 217–18. Chavez stopped in a field with lots of grass and no street lights. RP 218. M.C. testified that it was dark out and there were no visible house lights or houses in sight and that she would not have been able to find her way home from there. RP 218–19.

Rather than text Jesse, Chavez scooped M.C. out of her seat and put her on his lap and began to kiss M.C. and take her clothes off. RP 219. Chavez put M.C. back in the passenger seat, took off his pants and then had sexual intercourse with M.C. RP 219–20. Then Chavez called Jesse and then drove to a church in Sequim where they met up with Jesse. RP 220–21.

Second Event Alleged in Count VI (CP 209).

A week later M.C. received a text from Chavez that there would be another party and asked if she would go with him. RP 223. M.C. did not give Chavez her phone number and doesn't know who gave it to him. RP 223. Jesse picked up M.C. alone at the high school again and drove her to the party. RP 223–24. Jesse took M.C. to a party at someone's house between Sequim and Port

Angeles. RP 224. Chavez and a bunch of college people were present at the house. RP 224. Chavez and M.C. were drinking hard alcohol at the party. RP 225.

After about an hour at the party that night, Chavez and M.C. left together as Jesse had apparently already left. RP 226. Rather than just take M.C. home, Chavez wanted to hang out longer and suggested they go to Port Williams. RP 227. Chavez took M.C. to Port Williams where, in Chavez's truck, they talked, listened to music, and M.C. drank vodka. RP 227.

A police officer, Deputy Stoppani, appeared and Chavez told M.C. to put the bottle of vodka under the seat. RP 228, 386–87. The officer spoke with Chavez and then left. RP 229. Chavez then suggested that they go four-by-fouring in the truck. RP 229. Chavez drove back towards Sequim and then stopped somewhere in the woods hidden by trees and turned the lights off and had sexual intercourse with M.C. in the truck. RP 229, 231. M.C. could not see any lights or houses from where they were and testified that she would not have been able to find her way home from there. RP 230. Afterwards, Chavez took M.C. home. RP 231.

At trial, the State offered evidence of Chavez's prior sexual misconduct against L.L. as evidence of a common scheme and plan to isolate young females for the purposes of raping them. As an offer of proof, to be considered by the trial court, the State produced a police report (CP 307–10, Attachment A) in which L.L. details in a recorded interview with a detective what happened to her when she was 16. CP 309. L.L. was 28 at the time of the interview and was crying during the conversation. CP 309.

L.L.'s Statement

L.L. stated she was waiting outside her friend's home for a teenage gathering and the defendant showed up and invited her to take his truck for a drive somewhere in the woods. CP 309. The defendant then stopped the truck and conveyed that he wanted to have sex with her and if she did not comply he would not drive L.L. back. CP 309. L.L., not wanting to have sex and give up her virginity, said "Come on we don't have that much time." CP 309. L.L. said Chavez was persistent although she said no and so she went along because she felt helpless and didn't know how to get out of the situation. CP 309.

Chavez raped her in the front seat and took her virginity. CP 309. Chavez had sexual intercourse with L.L. taking away her virginity in the front seat of his truck and ejaculated in her. CP 309–10. L.L. stated that she remembered it hurting and was in pain and she had never been intimate with Chavez before and never had sex with anyone before Chavez. CP 310. Afterwards, Chavez drove L.L. back to her friend's house. CP 310.

The defense objected to the admission of this evidence on the basis that the police report did not establish a common scheme or plan by a preponderance of the evidence. RP 8. The defense argued that L.L. was also not present to be cross examined on the occurrence and thus the State just did not establish that L.L. was raped by a preponderance of the evidence. RP 9.

Trial Court's Findings and Admission of State's ER 404(b) Evidence

The trial court, granted the State's motion to admit the testimony of L.L. under ER 404(b). The trial court laid out its reasoning step-by-step after

acknowledging that it had read the State's motion and offer of proof and the case law regarding the admission of ER 404(b) evidence in the context of sex crimes. RP 10–12, 13.

The trial court found that the sworn report supplied by the State as an offer of proof established the prior rape of L.L by a preponderance of the evidence. RP 11. The court pointed out that in determining whether the proof met the preponderance standard, the court does not just take two testimonies (i.e., L.L. versus Chavez) and divide them by two. RP 10.

Rather, the court considered "the substance of what they say, the motive they have for saying it, words that actually are said." RP 10. The trial court identified the purpose for which the evidence would be introduced as evidence of a common plan or scheme. RP 11. The evidence was deemed to be relevant and highly probative under a common sense approach in the context of a sex case. RP 11–12.

The court found that "the primary relevance of the evidence is that it establishes a plan or design, to rape." RP 12. Finally the court pointed out that the probative value of the evidence outweighed any unfair prejudice and that a limiting instruction would be appropriate. RP 12. At trial, prior to L.L.'s testimony, the court instructed the jury L.L.'s testimony would be allowed for the limited purpose of showing a common scheme and that the jury could not consider the testimony for any other purpose. RP 365.

//

L.L.'s testimony

At trial, prior to L.L.'s testimony, the court instructed the jury that L.L.'s testimony would be allowed for the limited purpose of showing a common scheme and that the jury could not consider the testimony for any other purpose. RP 365. L.L. testified consistent with the State's offer of proof. RP 369–77.

V. ARGUMENT

A. THE PETITIONER HAS NOT ESTABLISHED ANY OF THE CONSIDERATIONS GOVERNING ACCEPTANCE OF REVIEW SET FORTH IN RAP 13.4(b).

RAP 13.4(b) sets forth the considerations governing this Court's acceptance of review:

> A petition for review will be accepted by the Supreme Court only:
>
> If the decision of the Court of Appeals is in conflict with a decision by the Supreme Court; or
>
> If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or
>
> If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

1. The Court of Appeals applied the correct standard of nonconstitutional harmless error and therefore its decision does not conflict with a decision of this Court or another division of the Court of Appeals.

Chavez argues that the trial court erred by admitting evidence of his prior sexual misconduct against L.L. and that this should be reviewed. The Court of Appeals did not rule on whether the admission of such evidence was an abuse of discretion. Rather, finding the admission of the evidence to be questionable, the

Court of Appeals assumed that the admission was error to get to the next inquiry of whether such error was harmless or not.

The Court of Appeals determined that there was harmless error based upon the following inquiry:

> Under the applicable nonconstitutional harmless error test, the question is whether within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.

State v. Chavez, 2020 WL 4194604, at *9 (Wn. App. Div. 2, 2020) (citing *State v. Slocum*, 183 Wn. App. 438, 448, 333 P.3d 541 (2014) (citing *State v. Gresham*, 173 Wn.2d 405, 433, 269 P.3d 207 (2012)).

Chavez, citing *State v. Gower*, suggests that the Court of Appeals erroneously applied the nonconstitutional harmless error by looking at the strength of other evidence in the case. Br. of Petitioner at 15–16 (citing *State v. Gower*, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014)). The assertion that the Court is *not* to examine the strength of other evidence in the case when determining whether error was harmless is incorrect.

Gower referring to *State v. Gresham* simply clarified that harmless error is not found based on *sufficiency* of the evidence to support a jury verdict, but rather, that the "question is whether there is a reasonable probability that the outcome of the trial would have been different without the inadmissible evidence." *Gower*, 179 Wn.2d at 857 (citing *State v. Gresham*, 173 Wn.2d 405, 433–34, 269 P.3d 207 (2012)). Additionally, the *Gower* Court did examine the strength of the admissible evidence in the case and determined that the case was a credibility

case since the sole witness only corroborated the aftermath of one incident and not the incident itself. *Gower*, 179 Wn.2d at 858.

Here, unlike in *Gower*, the Court of Appeals found that this case was not just a credibility contest between accuser and defendant and that the testimonies of the two victims were supported by *substantial* corroborative evidence from multiple witnesses, eye witnesses to count IV, corroborating evidence by Chavez' brother, Deputy Stoppani's interaction with Chavez before one of the rape incidents, and witness tampering. *Chavez*, 2020 WL 4194604, at *8.

Therefore, because the Court of Appeals applied the correct standard of review for nonconstitutional harmless error, the Court of Appeals decision does not conflict with a decision of this Court or another division of the Court of Appeals. RAP 13.4(b). Therefore, this Court should decline review of this issue.

2. The *Chavez* Court's decision does not conflict with a published decision of another division of the Court of Appeals and the *Chavez* Court properly determined that the trial court could impose an exceptional sentence based upon the free crimes doctrine.

Chavez cites to an unreported decision in *State v. Phelps* to support his argument that this Court should accept review because the Court of Appeals decision in this case conflicts with a decision from another division of the Court of Appeals in regards to the free crimes sentencing doctrine. *State v. Phelps*, 2018 WL 1151975, at *4 (Wn. App. Div. 1, 2018) (unpublished).

State v. Phelps is an unpublished decision. "Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court." Gr 14.1. Because *Phelps* has no precedential value and is not binding, it does not

present any conflict with the Court of Appeals decision in *Chavez.* There is no conflict of authority that this Court needs to resolve. Moreover, as stated by the *Chavez* court, *Phelps* is distinguishable. *Chavez,* 2020 WL 4194604, at *12.

Chavez also argues without citing to any legislative history that legislature could not have intended the free crimes aggravating factor to serve as a basis for an exceptional sentence when an offender score surpasses nine because of scoring multipliers. Contrary to this argument, legislative history and case law shows that in 1990 legislature intended to increase the punishment of sex crimes by scoring three points for felony sex crimes, and then, in 2005, to make the free crimes doctrine available as justification for exceptional sentences for multiple current sex offense convictions.

Legislature amended the scoring scheme for sex crimes in 1990 by assigning three points for each prior sex offense conviction to be included in a defendant's offender score. *See State v. Parker,* 132 Wn.2d 182, n.10, 937 P.2d 575 (1997); Laws of 1990, ch. 3, § 706(17) (statutory multiplier for sex crimes).

Fifteen years later, after the U.S. Supreme Court's decision in *Blakely*, legislature amended RCW 9.94A.535 to codify the free crimes doctrine. *See State v. Mutch*, 171 Wn.2d 646, 656–58, 254 P.3d 803 (2011) (citing *Blakely v. Washington*, 542 U.S. 296, 301, 313–14, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); other citations omitted); Laws of 2005, ch. 68, § 3; RCWA 9.94A.535(2)(c) (2006) ("The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances: . . . The defendant has

committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.").

Washington Courts presume that "the legislature enacts laws 'with full knowledge of existing laws.'" *Maziar v. Washington State Dept. of Corrections*, 183 Wn.2d 84, 88, 349 P.3d 826 (2015) (quoting *Thurston County v. Gorton*, 85 Wn.2d 133, 138, 530 P.2d 309 (1975)). Further, "[w]here the meaning of statutory language is plain on its face, [courts] must give effect to that plain meaning as an expression of legislative intent." *State v. Alvarado*, 164 Wn.2d 556, 562, 192 P.3d 345 (2008) (citing *City of Spokane v. Spokane County*, 158 Wn.2d 661, 673, 146 P.3d 893 (2006); *Koenig v. City of Des Moines*, 158 Wn.2d 173, 181, 142 P.3d 162 (2006) (holding that plain language does not require construction)).

Legislature made it clear in 1990 that sex crimes shall never score as one point but should score as three points in order to increase punishment for sex crimes. There is nothing suggesting legislature forgot about the multiplier for sex offense offender scores when it amended RCW 9.94A.535 in 2006 to codify the free crimes doctrine. The statutory language is plain on its face and does not require construction. Yet, Chavez's argument, in order to apply the free crimes doctrine to multiple current sex offenses, would require that prior sex offenses be counted as something other than the legislatively required three points.

Furthermore, Washington Courts have upheld sentences using the free crimes doctrine in the past where statutory multipliers increased a defendant's offender score. *See generally State v. Mutch*, 171 Wn.2d 646, 254 P.3d 803 (2011) (defendant's convictions of five counts of second degree rape and one

count of second degree kidnapping together with to prior out of state robbery convictions resulting in an offender score of 16); *State v. Stephens*, 116 Wn.2d 238, 239, 803 P.2d 319 (1991) *overruled in part in State v. Hughes*, 154 Wn.2d 118, 140, 110 P.3d 192 (2005) (eight counts of burglaries and other prior convictions resulting in a score of 19 and exceptional sentence based upon free crimes doctrine; each burglary counted as 2 points).[2]

The Court of Appeals did not error in ruling that the trial court could properly impose an exceptional sentence upward based upon the free crimes doctrine. Furthermore, the legislative intended to increase the punishment for sex offenses because it codified the free crimes doctrine with full knowledge of the existing statute assigning three points for each prior sex offense.

Therefore, this Court should decline to review the issue of whether an exceptional sentence may be imposed under the free crimes doctrine when an offender score greater than nine results from scoring three points for each current sex offense leaving one or more offense unpunished.

VI. CONCLUSION

State v. Gower, does not hold that a reviewing court is not to consider the remaining evidence when determining whether error in admitting prior sexual misconduct evidence is harmless. 179 Wn.2d 851, 857, 321 P.3d 1178 (2014). Thus, the Chavez Court's decision does not conflict with *Gower* because it properly found harmless error after considering the remaining admissible evidence.

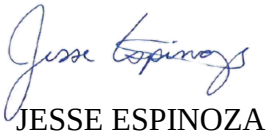
[2] The statutory offender score multiplier for burglary has existed at least since 1983. *See* Laws of 1983, ch. 115, § 7(4).

Further, the *Chavez* Court's decision does not conflict with any published decision in regards to the application of the free crimes doctrine under RCW 9.94A.535(2)(c). Therefore, review of this case is not needed to resolve a conflict between binding authorities. Moreover, it is clear that legislature intended the free crimes doctrine to apply when multiple current felony sex offenses result in a high offender score leaving one or more crimes unpunished because it was fully aware of the offender score multiplier for sex offenses when it codified the free crimes doctrine in RCW 9.94A.535(2)(c).

For the foregoing reasons, review of the Court of Appeals decision is not warranted under RAP 13.4(b). The State respectfully requests that the Court deny Chavez's Petition for Review.

DATED September 18, 2020.

Respectfully submitted,
MARK B. NICHOLS
Prosecuting Attorney



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Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically to Travis Stearns on September 18, 2020.

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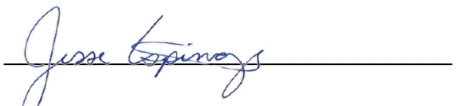

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