NO. 42787-7

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JAMES A. OLIVER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Susan K. Serko

No. 09-1-05834-4

BRIEF OF RESPONDENT

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Table of Contents

Table of Authorities

State Cases

Federal Cases and Other Jurisdictions

Constitutional Provisions

Statutes

Rules and Regulations

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to show that the trial court abused its discretion in granting the State's motion in limine to preclude reference to the victim's step-father's status as a registered sex offender?

2. Has defendant failed to show that his right to present a defense was violated by the court's exclusion of irrelevant evidence?

3. Has defendant failed to preserve his claim regarding the admission of D.O.'s video recorded forensic interview as being cumulative for appellate review?

4. Has defendant failed to show that the trial court abused its discretion in admitting the tape of D.O.'s forensic interview given that such evidence was admissible under the child hearsay statute?

B. STATEMENT OF THE CASE.

1. Procedure

On December 31, 2009, the Pierce County Prosecutor's Office charged appellant, James Alan Oliver ("defendant"), with one count of rape of a child in the first degree and five counts of child molestation in the first degree. CP 1–3. On August 18, 2011, the State amended the charges to one count of rape of a child in the first degree against D.O.

(count I), one count of child molestation in the first degree against D.O. (count II), and one count of attempted child molestation in the first degree against D.M. (count III). CP 49–50. On August 24, 2011, the State again amended the information as to the offense date in count two. CP 146–147.

On August 23, 2011, the case proceeded to a jury trial before the Honorable Susan K. Serko. 1 RP 3.[1] Trial began with a child hearsay hearing in which the court ruled that statements made by D.O. to her half-sister and a forensic interviewer would be admissible at trial. 1 RP 70.

The court considered motions in limine brought by both parties. 1 RP 77; CP 26–31, CP 108–112; *see infra* pp. 10–13. The State moved to preclude reference to D.O.'s step father Glenn Whitworth's status as a registered sex offender. CP 26–31. The court granted the State's motion, finding that the evidence was not relevant. 2 RP 95.

After hearing the evidence, the jury convicted defendant of child rape in the first degree against D.O. (count I) and child molestation in the first degree against D.O. (count II). 4 RP 580–581; CP 231, 232. The jury was unable to reach a verdict for count III regarding D.M. 4 RP 580–581; 233.

At sentencing, the court imposed a low-end sentence of 129 months to life imprisonment on the rape of a child in the first degree

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[1] The State will refer to the verbatim report of proceedings as follows: The four sequentially paginated volumes referred to as 1–4 will be referred to by the volume number followed by RP.

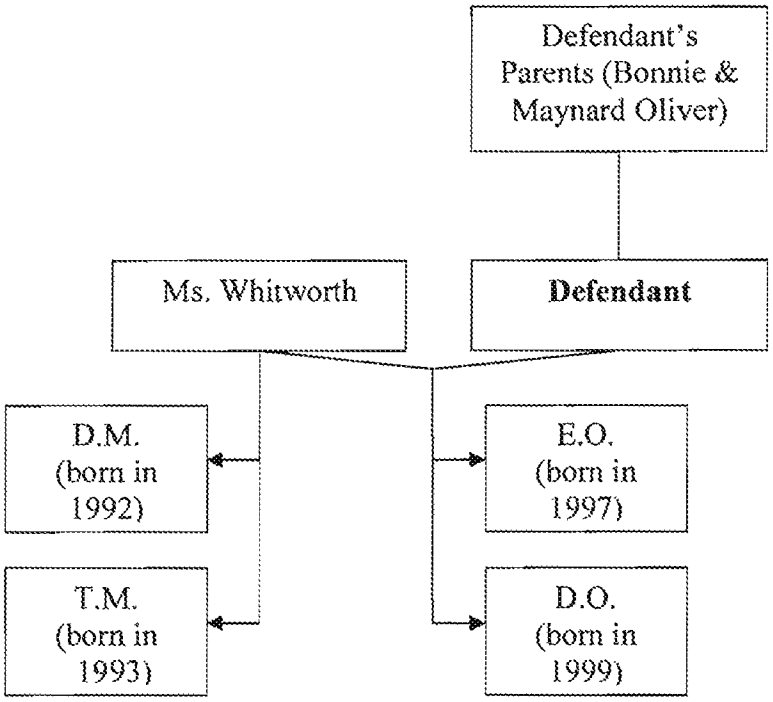
conviction and 72 months to life imprisonment on the child molestation in the first degree conviction, to be served concurrently. 4 RP 597–598; CP 263–279.

Defendant filed this timely notice of appeal on November 10, 2012. CP 289–308.

2. Facts

a. Family Background and Relationships

Defendant began dating Ms. Whitworth in 1993. 2 RP 118–119. When the two decided to move in together, Ms. Whitworth had two children of her own: a daughter, D.M (born in 1992), and a son, T.M. (born in 1993). 2 RP 118. Some time later, defendant and Ms. Whitworth married and gave birth to a girl, E.O. (born in 1997). 2 RP 126–127. In 1991, Ms. Whitworth gave birth to her and defendant's second child, a girl, D.O. 2 RP 128. The family relationships are represented in the following diagram:



At some point after D.O.'s birth, Ms. Whitworth's relationship with defendant began to deteriorate. 2 RP 130. In February 2002, Ms. Whitworth moved out of the house and all four children remained with defendant. R2 P 130–131.[2] Defendant and all the children then moved in with defendant's parents to a home in Bonney Lake. 2 RP 130. Ms. Whitworth had visitation with her children for three weekends out of the month and two weeks in the summer. 2 RP 132. The visitation routine became the "status quo." 2 RP 133, 165–166.

[2] Ms. Whitworth's divorce from defendant became finalized in January, 2003. 2 RP 132.

b. Sleeping Arrangements at the House in Bonney Lake.

Bonnie and Maynard Oliver's house in Bonnie Lake has three bedrooms upstairs and a large recreation room downstairs that was partitioned into two bedrooms. 2 RP 134, 3 RP 388. D.M. slept in her own bedroom upstairs. 2 RP 134. E.O. and D.O. shared a room together upstairs. 2 RP 134. Bonnie and Maynard Oliver also slept together in a bedroom upstairs. 2 RP 134. T.M. and defendant slept downstairs, in the same area, but in different beds. 2 RP 134. The sleeping arrangements changed in 2007 or 2008 when D.M. moved out of the house and in with a friend. 2 RP 135. E.O. moved into the room that D.M. used to sleep in, leaving D.O. in a room by herself. 2 RP 136.

T.M. moved out of the Bonney Lake house when he was about 13 years old and lived with Ms. Whitworth, but then moved back to the Bonney Lake house in March 2009 when he was about 16. 2 RP 137–138. Ms. Whitworth testified that T.M. moved out of the Oliver's house again in June 2009 and lived with a friend. 2 RP 137.

c. Sexual Abuse

On September 5, 2009, Ms. Whitworth received a troubling phone call from her oldest daughter, D.M., in which D.M. was crying and related that her father (defendant) had exposed himself to her when she was a young girl. 2 RP 140. Ms. Whitworth subsequently asked her youngest

daughter, D.O., if defendant had ever touched her, to which D.O. responded by curling up in a "little ball on the couch" and crying. 2 RP 142. D.O. later testified that, beginning when she was just five years old, defendant would insert his fingers into D.O.'s vagina and feel her breasts.[3] 3 RP 254–255, 260.

On September 9, 2009, D.O. reported the abuse to Ms. Patricia Mahaulu-Stephens, a child forensic interviewer at the Pierce County Child Advocacy Center at the Mark Bridge Children's Hospital campus. 2 RP 198, 215. D.O.'s statements to Ms. Mahaulu-Stephens were recorded in a formal interview setting. 2 RP 212. At trial, Ms. Mahaulu-Stephens described her occupational training and interview techniques. 2 RP 199–200, 203. Ms. Mahaulu-Stephens did not testify as to the details of her interview with D.O. The video recorded interview between Ms. Mahaulu-Stephens and D.O. was admitted and shown to the jury. 2 RP 218.

In the forensic interview, D.O. details sexual abuse by defendant that began when D.O. was five years old. 3 RP 260. D.O. described that defendant would feel under D.O.'s underwear and "have his hand straight out and move it side to side." Exhibit 1-A (17:50).[4] D.O. also explained that "sometimes a finger would go in but it wouldn't go far, it would hurt,

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[3] Ms. Whitworth noted that D.O. has since experienced behavioral changes; namely, that "she has nightmares, she began wetting the bed again and she's very fearful of a lot of things." 2 RP 142.

[4] The State will refer to the time elapsed into the actual interview rather than the timestamp on the DVD image itself.

and I told him it hurt, and sometimes he would leave but most of the time he would stay." (17:50). On at least one occasion, defendant licked D.O.'s stomach. (22:13). D.O. further related that defendant would punish her if she looked at him during the sexual abuse: "[…] if he caught me looking he would hit me […] on my arm […]. Sometimes he would just slap me and sometimes he would punch me. […]. Sometimes he would grab my wrist and I had bruises all over my wrist from it […]." (25:10). D.O. told Ms. Mahaulu-Stephens that the abuse did not occur outside of her bedroom. (20:02). D.O. recalled that the most recent incident of defendant's abuse occurred about one month prior to the interview with Ms. Mahaulu-Stephens. (12:11). D.O. also said that one time when she was nine, she was going to the bathroom and "blood came out." (29:48), (36:40).

During the interview, D.O. also related that her brother T.M. had abused her, but said that it "[…] was a long time ago. I don't remember how long ago. I just don't remember it happening very recently." When asked to explain the abuse from T.M., D.O. said "I really don't remember what happened." (26:39).

D.O. testified at trial, nearly two years after her forensic interview with Ms. Mahaulu-Stephens. 3 RP 235. D.O. testified that defendant's acts of sexual abuse occurred not only upstairs at the Oliver residence, but also downstairs. 3 RP 251. She did not tell this to Ms. Mahaulu-Stephens during the forensic interview because she did not remember it at that time.

3 RP 251. D.O. also testified that defendant's fingers went into her vagina more than five times. 3 RP 255–256. D.O. explained that she did not report the abuse sooner because she "was afraid of not being able to see [defendant] again." 3 RP 261.

D.O. also testified that T.M. had sexually abused her. 3 RP 248–250. She described the abuse of T.M. in greater detail than in the forensic interview. She explained that T.M. touched her vagina with his hand and that she knew it was T.M. because she could see him. 3 RP 250. She also testified that neither T.M.'s finger nor any part of his body penetrated her vagina. 3 RP 250.

Ms. Cheryl Hanna-Truscott, a medical examiner at the Child Abuse Intervention Department at the Mary Bridge Hospital campus and an advanced registered nurse practitioner (ARNP), conducted a medical examination of D.O shortly after D.O. completed her forensic interview with Ms. Mahaulu-Stephens. 3 RP 288, 292. Ms. Hanna-Truscott testified that D.O. was "premenarche."[5] Ms. Hanna-Truscott's medical examination of D.O. revealed "[…] a blunted crescentic hymen" and that "[t]his hymen appearance could be residual from healed penetrating trauma or a variant of the normal." 3 RP 305. Ms. Hanna-Truscott was

[5] Ms. Hanna-Truscott explained that being "premenarche" meant that "[D.O.] hasn't gone through puberty; she hasn't started having her periods." 3 RP 295.

concerned by the findings and noted that "[i]t's very rarely that we see that." 3 RP 302.

D.O.'s older sister D.M. also testified at trial. 3 RP 313. D.M. testified that D.O. had confided in her regarding defendant's acts of sexual abuse. 3 RP 330. D.O. told D.M. that "she didn't feel like she was a virgin any more" and that "she thought she had started her period." 3 RP 330.

The defense called defendant's mother, Bonita Oliver, as a witness. Ms. Oliver testified that "[D.O.] stated she wanted to be with her mother constantly." 3 RP 384. Ms. Oliver also testified that T.M. "started acting more aggressive and angry, very angry" once his mother and defendant divorced. 3 RP 390. T.M. was "especially rough on [D.O.]" and [he] would "[...] tackle her and hurt her [...]." 3 RP 390.

The defense called defendant's father, Maynard Oliver, as a witness. Mr. Oliver repeated much of the same testimony given by defendant's mother; namely, that T.M. had an anger issue and that "[...] it seemed like [D.O.] always wanted to be with her mom." 4 RP 430, 442.

Defendant also testified as a witness in his own behalf, denying that he sexually abused any of his children. 4 RP 466, 492. He described T.M. as having "always been short fused" and explained that "it wouldn't take him long to explode [...]." 4 RP 477. Defendant testified that T.M. hurt D.O. and the rest of his siblings. 4 RP 478. According to defendant, T.M. hit D.O. in the face with a cord and then punched defendant in the

face. 4 RP 479. Defendant also testified, like his mother and father, that D.O. wanted to live with her mother. 4 RP 517.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ERR IN REFUSING TO ADMIT IRRELEVANT EVIDENCE.

Defendant argues that the trial court erred in excluding evidence of Glenn Whitworth's status as a registered sex offender and that such exclusion violated his constitutional right to present a defense. Each of these claims, however, raises distinct issues regarding the proper standard of review.[6] Whether the trial court properly excluded Glenn Whitworth's sex offender status is reviewable only for an abuse of discretion.

a. The trial court did not abuse its discretion in granting the State's motion in limine to preclude reference to Glenn Whitworth's status as a registered sex offender when such evidence was irrelevant.

A trial court's ruling on a motion in limine will not be disturbed absent an abuse of the court's discretion. ***State v. Powell***, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." ***State v. C.J.***, 148 Wn.2d 672, 686, 63 P.3d 765 (2003). A

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[6] And as such, will be addressed separately. *See infra* p. 13 for discussion of defendant's constitutional right to present a complete defense.

discretionary decision is manifestly unreasonable if it "is outside the range of acceptable choices, given the facts and the applicable legal standard." ***State v. Lamb***, __P.3d__, 2012 WL 5316890 (2012), *quoting* ***Powell***, 126 Wn.2d 244 at 258. A discretionary decision "is based on 'untenable grounds' or made for 'untenable reasons' if it rests on facts unsupported in the record or was reached in applying the wrong legal standard." ***State v. Rohrich***, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) *quoting* ***State v. Rundquist***, 79 Wn. App. 786, 793, 905 P.2d 922 (1995).

Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Such evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence. A defendant seeking to introduce evidence connecting another person to a crime must show proof of connection, "such as a train of facts or circumstances [that] tend clearly to point out someone besides the prisoner as the guilty party." ***State v. Rehak***, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, 844 P.2d 1018 (1993). Such proof of connection requires "a clear nexus between the person and the crime." ***State v. Strizheus***, 163 Wn. App. 820, 831, 262 P.3d 100 (2011).

Here, the State moved to preclude reference to Glenn Whitworth's sex offender status in a motion in limine. CP 26–31. Defendant filed a response to the State's motion, arguing that Glenn Whitworth's sex offender status was relevant to establishing what D.O. knew she had to overcome in order to live with her mother. CP 113–142 at 122. That is, by introducing D.O.'s knowledge of Glenn Whitworth's sex offender status and establishing that D.O. wanted to live with her mother, it would provide a greater motive for D.O. to falsify instances of abuse at the hand of her father. CP 113–142 at 122. Defense counsel repeated this argument again during the pre-trial hearing. 2 RP 89–90. After listening to the defense's argument, the court stated that "[...] I really have a hard time understanding getting over the first hump of why his status as a sex offender would be at all relevant." 2 RP 92. The court acknowledged defendant's argument–the theory that D.O. fabricated instances of her father's alleged abuse "to get out of that house"–yet still believed the evidence was irrelevant to prove that point. 2 RP 93. Nevertheless, defense counsel insisted that the evidence was relevant because "[...] it's connected to that issue of seeing her brother and sister living [with D.O.'s mother] and wanting to be in that environment [...]." 2 RP 94. Once again, the court rejected this argument and concluded that Glenn Whitworth's sex offender status was not relevant. 2 RP 94.

The trial court did not abuse its discretion in granting the State's motion in limine to preclude reference to Glenn Whitworth's sex offender

status. Glenn Whitworth is a registered sex offender living with D.O.'s mother and is prohibited from being around children (although D.M. and T.M. have allegedly been around him), thus establishing that a registered sex offender lived with D.O.'s mother made it less likely that D.O. would be permitted to live with her. 2 RP 93, 3 RP 264.

It was not defendant's argument that Glenn Whitworth was responsible for the abuse of D.O. 2 RP 89. Glenn Whitworth was never around D.O. during the dates of sexual abuse. 2 RP 89–90. With no practical connection between Glenn Whitworth and D.O.'s abuse, he is no different from the six registered sex offenders in D.O.'s neighborhood and the more than 2,500 registered sex offenders in Pierce County.[7] The trial court's decision to preclude reference to a registered sex offender who was never in contact with the victim and whose status as a sex offender would make it less likely that D.O. would be allowed to live with her mom was not manifestly unreasonable or based on untenable grounds.

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[7] There are over 2,500 registered sex offenders in Pierce County. Pierce County Sheriff, Sex Offender Registration Program Information, http://www.co.pierce.wa.us/pc/abtus/ourorg/sheriff/sexoffendersearch.htm (last visited Nov. 7, 2012). There are six registered sex offenders in D.O.'s neighborhood in Bonney Lake. 2 RP 92.

b. Defendant has no constitutional right to present irrelevant evidence and was allowed to present a complete defense.

Defendant asserts that the exclusion of Glenn Whitworth's sex offender status violated his constitutional right to present a defense. "Under the due process clause of the Fourteenth Amendment, it must be demonstrated that the State's prosecution ... comported with prevailing notions of fundamental fairness such that [the defendant] was afforded a meaningful opportunity to present a complete defense." ***State v. Greiff***, 141 Wn.2d 910, 920, 10 P.3d 390 (2000) (quoting ***State v. Lord***, 117 Wn.2d 829, 867, 822 P.2d 177 (1991)). "Defendants have the right to present a defense, but do not have the right to introduce evidence that is irrelevant or otherwise inadmissible." ***State v. Thomas***, 123 Wn. App. 771, 98 P.3d 1258 (2004); *see also* ***State v. Aguirre***, 168 Wn.2d 350, 362–363, 229 P.3d 669 (2010).

Several courts have grappled with the appropriate standard of review when a defendant claims his constitutional right to present a defense has been violated, predicated upon the trial court's determination regarding the admissibility of evidence. For example, in ***State v. Howard***, 127 Wn. App. 862, 113 P.3d 511 (2005), defendant was convicted of first degree robbery and first degree burglary. *Id.* at 865. On appeal, defendant argued that, because the trial court excluded evidence of testimony that another individual participated in the robbery, defendant's constitutional

right to present a defense was denied. *Id.* at 866. Division One of the Court of Appeals found that the proper standard of review was for an abuse of discretion, reasoning:

> A criminal defendant has a constitutional right to present a defense consisting of relevant, admissible evidence. In order to be relevant, and therefore admissible, the evidence connecting another person with the crime charged must create a train of facts or circumstances that clearly point to someone other than the defendant as the guilty party. The evidence must establish a nexus between the other suspect and the crime. The defendant has the burden of showing that the "other suspect" evidence is admissible. The admission or refusal of evidence lies largely within the sound discretion of the trial court and is reviewed only for an abuse of discretion.

Id. at 866 (internal citations omitted). The court began its analysis by qualifying the constitutional right to present a defense upon a defendant's ability to present *relevant, admissible evidence.*[8] *Id.* at 866; *see also* ***State v. Strizheus***, 163 Wn. App. 820, 829, 262 P.3d 100 (2011) ("It is well settled [...] that the right to present a defense is not absolute") (citing ***Montana v. Egelhoff***, 518 U.S. 37, 42, 116 S.Ct. 2013 (1996)). In other words, in determining whether the defendant was even allowed to raise the constitutional issue upon which *de novo* review would be granted, the court first deferred to the discretion of the trial court as to the admissibility of evidence.

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[8] The court proceeded to analyze the issue for an abuse of discretion, and ultimately concluded that "[t]he court did not abuse its discretion in refusing to allow [co-conspirator] to testify once the record was more fully developed." *Id.* at 515.

Similarly, in ***State v. Sublett***, 156 Wn. App. 160, 198, 231 P.3d 231 (2010), defendant argued that his constitutional right to present a defense was denied when the trial court excluded evidence of testimony of a victim's former neighbor. This court explained that the proper standard of review was for an abuse of discretion, reasoning:

> A criminal defendant has a constitutional right to present relevant, admissible evidence in his defense. The United States Supreme Court has stated, 'Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.' But the right of a criminal defendant to present evidence is not unfettered and the refusal to admit evidence lies largely within the sound discretion of the trial court.. We review a trial court's decision to admit or refuse evidence under an abuse of discretion standard.

Id. at 198 (internal citations omitted). As in ***Howard***, the court qualified the defendant's constitutional right to present evidence in his behalf upon its relevance; that is, upon a discretionary determination made by the trial court.

Compare ***Howard*** and ***Sublett***, *supra*, with the approach taken by the Washington State Supreme Court in ***State v. Iniguez***, 167 Wn.2d 273, 217 P.3d 768 (2009). In ***Iniguez***, the defendant's conviction for first degree robbery had been reversed by Division Three, which held that the "more than eight-month delay between arrest and trial was presumptively

prejudicial and violated Iniguez's constitutional right to a speedy trial."[9] *Id.* at 277. The Supreme Court granted the State's petition for review, reversed the Court of Appeals, and held that there was no constitutional speedy trial violation. *Id.* at 277. The Supreme Court noted that both parties disagreed as to the proper standard of review. *Id.* at 281. The State argued that the trial court's decision to grant a continuance and deny a severance should be reviewed for an abuse of discretion; and in an amicus curiae brief, the Washington Association of Criminal Defense Lawyers (WACDL) argued that a constitutional question of speedy trial rights is reviewed *de novo*. *Id.* at 281. The court agreed with both sides, but concluded that the proper standard of review was *de novo*:

> Both sides are, in a sense, correct. It is true that we review the denial of a severance motion for an abuse of discretion. ***State v. Dent***, 123 Wash.2d 467, 484, 869 P.2d 392 (1994). Similarly, we review a decision to grant or deny a continuance for an abuse of discretion. ***State v. Flinn***, 154 Wash.2d 193, 199, 110 P.3d 748 (2005). However, a court 'necessarily abuses its discretion by denying a criminal defendant's constitutional rights.' ***State v. Perez***, 137 Wash. App. 97, 105, 151 P.3d 249 (2007). And we review de novo a claim of a denial of constitutional rights. *See* ***Brown v. State***, 155 Wash.2d 254, 261, 119 P.3d 341 (2005); *see also* ***United States v. Wallace***, 848 F.2d 1464, 1469 (9th Cir.1988). Because Iniguez argues his constitutional speedy trial rights were violated, our review is de novo.

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[9] Although the underlying issue in ***Iniguez*** pertains to the granting of a continuance rather than the admissibility of evidence, it is analogous to ***Howard*** and ***Sublett*** in that it addresses the standard of review regarding a matter typically reserved to the discretion of the trial court.

Id. at 280. The court did not make any statement limiting its ruling to the facts at hand or to alleged time for trial violations. Consequently, this case has since been broadly interpreted to grant *de novo* review so long as the defendant merely alleges any constitutional violation of the right to present a defense. *See e.g.*, ***State v. Jones***, 168 Wash.2d 713, 719, 230 P.3d 576 (2010) (relying upon ***Iniguez*** for the proposition that "We review a claim of a denial of Sixth Amendment rights de novo."); ***State v. McCabe***, 161 Wn. App. 781, 786, 251 P.3d 264 (2011); ***State v. Smith***, 165 Wn. App. 296, 325, 266 P.3d 250 (2011)).

Despite reviewing ***Iniguez*** *de novo*, the Washington Supreme Court took a slightly different approach in determining which standard of review applied in ***State v. Aguirre***, 168 Wn.2d 350, 362–363, 229 P.3d 669 (2010). In ***Aguirre***, defendant argued that the trial court erred in its application of the rape shield statute, limiting defendant's cross-examination of the victim regarding the details of her alleged relationship with another man. *Id.* at 362. The court explained that the proper standard of review was for an abuse of discretion, reasoning that:

> The rape shield statute clearly limits the ability of either party to introduce at trial evidence of the past sexual behavior of the complaining witness. Although Aguirre does have a constitutional right to present a defense, the scope of that right does not extend to the introduction of otherwise inadmissible evidence. The admissibility of evidence under the rape shield statute, in turn, 'is within the sound discretion of the trial court.'

> Again, it was well within the trial court's sound discretion to conclude that the testimony that the defense sought to elicit during cross-examination was inadmissible under RCW 9A.44.020(2) as evidence of the victim's past sexual behavior.

Id. at 362–363 (internal citations omitted).[10] This analysis properly emphasizes the trial court's role in determining the admissibility of evidence and correctly identifies the scope of a defendant's constitutional right to present a defense. Importantly, the court's analysis in ***Aguirre*** is consistent with United States Supreme Court law. *See* ***Montana v. Egelhoff***, 518 U.S. 37, 42, 116 S.Ct. 2013 (1996) ("[T]he proposition that the Due Process Clause guarantees the right to introduce all relevant evidence is simply indefensible.").

In the present case, as in ***Aguirre***,[11] the defendant has a constitutional right to present relevant and admissible evidence. Just as the admissibility of evidence under the rape shield statute was within the discretion of the trial court in ***Aguirre***, here, the granting of a motion in limine to preclude evidence is also within the discretion of the trial court. *See* ***State v. Powell*** 126 Wn.2d 244, 258, 893 P.2d 615 (1995). The trial

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[10] Unlike ***Iniguez***, the court in ***Aguirre*** specifically addressed the scope of a defendant's constitutional right to present a defense in the context of an evidentiary ruling of the trial court.

[11] As well as in ***Howard***, ***Sublett***, and ***Egelhoff*** (cited *supra*).

court concluded that evidence of Glenn Whitworth's sex offender status was not relevant and therefore not admissible. 2 RP 95. Defendant has failed to show that the trial court's decision was manifestly unreasonable or based on untenable grounds when the record amply demonstrates that the evidence was irrelevant. *See supra* pp. 10–14. Because the trial court did not abuse its discretion, defendant does not reach a constitutional issue upon which *de novo* review can be granted.

Furthermore, defendant was permitted to present a complete defense. Defendant called witnesses and cross examined those called by the State. 2 RP 76, 3 RP 233, 4 RP 422. Defendant related to the jury differences between D.O.'s recollection of the sexual abuse during her forensic interview and her testimony at trial. 3 RP 265–266. Defendant was allowed to introduce evidence, over the State's objection, that D.O. had been sexually abused by T.M. and that he could be responsible for the injury to her hymen. 2 RP 106. The defense repeatedly established that D.O. had a desire to move out of the house in Bonney Lake and live with her mother. 3 RP 264, 384; 4 RP 431, 442, 517. Defendant's mother testified that "[D.O.] stated that she wanted to be with her mother constantly." 3 RP 384. Defendant's father testified that "it seemed like [D.O.] always wanted to be with her mom." 4 RP 431, 441–442. Defendant testified that D.O.'s desire to live with her mother was "huge"

and that he "[didn't] blame her" for wanting to move. 4 RP 517. D.O. herself even testified during cross examination that, while living at the house in Bonney Lake, she wanted to live with her mother. 3 RP 264. The defense characterized T.M. as a violent actor, one whose actions provided additional incentive for D.O. to lie about sexual abuse in order to leave the Bonney Lake house (T.M. had difficulty controlling his temper, punched defendant and hit D.O.). 4 RP 430, 478–479. The trial court's refusal to admit Glenn Whitworth's sex offender status did not prevent defendant from presenting a complete defense.

2. THE TRIAL COURT DID NOT ERR IN ADMITTING THE TAPE OF D.O.'S FORENSIC INTERVIEW.

a. Defendant fails to identify where in the record he has preserved the issue for appeal that the recording was cumulative.

A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; ***State v. Guloy***, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. ***Guloy***, 104 Wn.2d at 421. A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. ***State v. Thetford***, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); ***State v. Hettich***, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993).

Here, defendant has not preserved the issue for appeal. During the pre-trial hearing defendant argued against the admissibility of the video recorded forensic interview with respect to whether the ***Ryan***[12] factors had been met. 1 RP 62–66. When the State presented the video recorded interview for admission at trial, defense counsel stated that "I should just make the record subject to the Court's previous ruling on the issues we discussed outside the presence of the jury." 2 RP 218. Defense counsel was referencing the child hearsay hearing in which defendant challenged the admissibility of the recorded interview as to whether it met the ***Ryan*** factors. 1 RP 62–66.

On appeal, however, defendant argues against the admissibility of D.O.'s video recorded interview on grounds that the evidence is

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[12] ***State v. Ryan***, 103 Wn.2d 165, 175–176, 91 P.2d 197 (1984) outlined nine factors to be considered in determining the reliability of a statement for purposes of the child hearsay statute:

1. Whether the declarant has an apparent motive to lie;
2. Whether the declarant's general character suggests trustworthiness;
3. Whether more than one person heard the statements;
4. Whether the statements were made spontaneously;
5. Whether the trustworthiness is suggested from the timing of the statement and the relationship between the declarant and the witness;
6. Whether the statement contains express assertions about past facts;
7. Whether cross-examination could show the declarant's lack of knowledge;
8. The remoteness of the possibility that the declarant's recollection is faulty; and
9. Whether the surrounding circumstances suggest that the declarant misrepresented the defendant's involvement.

Id. at 175–176. Since ***Ryan*** was decided, courts have essentially removed factors six and seven from consideration. ***State v. Leavitt***, 111 Wn.2d 66, 75, 758 P.2d 982 (1998); ***State v. Strange***, 53 Wn. App. 638, 647, 769 P.2d 873 (1989).

cumulative in nature. Brief of Appellant, 23. This is the first time defendant has raised any issue regarding the alleged cumulative nature of D.O.'s video recorded interview. The admissibility of the video recording was discussed pre-trial insofar as it was permitted under the child hearsay statute and was sufficiently reliable in light of the ***Ryan*** factors. 1 RP 62–66. Not only did defense counsel fail to object that the evidence was cumulative, defense counsel used the video tape as a way of pointing out inconsistencies between it and D.O.'s testimony. 3 RP 265–266. During defense counsel's closing argument, he advised the jury to watch the recording three separate times ("I hope you watch the video again." 4 RP 552; "[…]it's something to pay attention to in the video […] and I hope you do, view it again." 4 RP 554; "I guess it's a long way of saying look at all these evidence and please watch the video again if you feel like you need to […]." 4 RP 560.). On appeal, defendant seems to take a completely different stance, claiming that "The statements D.O. made to Patricia Muhaulo-Stephens [sic] were purely cumulative to what she had to say live at trial *and were in no way necessary for the jury to scrutinize.*" Brief of Appellant, 23 (emphasis added). The objection defendant raises on appeal is not based upon the same grounds that he raised below, and is thus precluded from review by this court. *See* ***Thetford***, 109 Wn.2d at 397.

b. The trial court did not abuse its discretion by admitting the tape of D.O.'s forensic interview given that such evidence was admissible under the child hearsay statute.

The child hearsay statute, RCW 9A.44.120, provides that statements made by a child under the age of ten that describe any act or attempted act of sexual contact performed with or on the child by another is admissible in evidence if:

> (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
> (2) The child either: (a) Testifies at the proceedings; or (b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

RCW 9A.44.120. The statute was enacted to "[A]lleviat[e] the difficult problems of proof that often frustrate prosecutions for child sexual abuse." ***State v. Jones***, 112 Wn.2d 488, 493–494, 772 P.2d 496 (1989). A trial court's admission of statements under the child hearsay statute should not be reversed absent a showing of manifest abuse of discretion. ***State v. Woods***, 154 Wn. 2d 613, 623, 114 P.3d 1174 (2005) (quoting ***State v. Jackson***, 42 Wn. App. 393, 396, 711 P.2d 1086 (1985)); *see also* ***State v. Beadle***, 173 Wn.2d 97, 265 P.3d 863 (2011). A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on

untenable reasons or grounds." ***State v. C.J.***, 148 Wn.2d 672, 686, 63 P.3d 765 (2003).

In the present case, the requirements of RCW 9A.44.120 are met. D.O. was under the age of ten when she provided statements of sexual abuse to D.M. and Ms. Mahaulu-Stephens. 1 RP 55, 69. The court conducted a child hearsay hearing and, over the defense's objections, concluded that the statements were reliable. 1 RP 70. Finally, D.O. testified at trial. 3 RP 235–273. The court thus properly admitted the hearsay statements per RCW 9A.44.120.

D. CONCLUSION.

For the reasons listed above, the State respectfully asks this court to affirm defendant's conviction and sentence.

DATED: November 13, 2012

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Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11/13/12 Johnson
Date Signature

PIERCE COUNTY PROSECUTOR

November 13, 2012 - 11:12 AM

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