No. 30940-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

WILLIAM D. HARGROVE, Appellant.

BRIEF OF APPELLANT

Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

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convictions beyond a reasonable doubt? (Assignment of Error 2).

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II. STATEMENT OF THE CASE

On August 25, 2008, Mr. Hargrove was charged by information with count 1, first degree child rape of GH; count 2, first degree child molestation, GH; count 3, second degree child rape of GH; count 4, first degree child molestation, GH; count 5, first degree child rape of KDC; count 6, first degree child molestation, KDC; and count 7, first degree rape of GH. (CP 1-3). Mr. Hargrove waived jury trial. (CP 1648).

Judge Plese, who did not preside over the trial, heard testimony and admitted evidence of an uncharged sexual offense in 1995 against RL, then 10 years old, by Mr. Hargrove. (6/17/10 RP 1). An order was entered on August 30, 2010, allowing evidence of the RL incident under RCW 10.58.090 only. (CP 599-601).

Subsequently, that statute was found unconstitutional so Judge Sypolt, who presided at the trial, admitted the RL incident under ER 404(b). (1/9/12 RP 295-309; CP 1909-12).

Mr. Hargrove was the stepfather of KDC, born September 25, 1989. (1/9/12 RP 346, 348). KDC testified that starting from 1995, she was sexually abused by Mr. Hargrove. (*Id*. at 352-53). After her mother went to work, KDC would go into his room, take off her clothes, and give him oral sex. (*Id*. at 353). He touched her body, and rubbed his penis on her chest and vaginal area. (*Id*.). KDC would get tired masturbating Mr. Hargrove so he would finish, ejaculating on her stomach and chest, and thereafter getting toilet paper to clean her up. (*Id*. at 354). KDC said the penis-mouth and penis-hand contact was frequent and occurred at least once a week. (*Id*. at 355). The penis-vaginal area-chest-stomach contact had the same frequency. (*Id*. at 356). He did not put his penis into her vagina, but did put his fingers inside. (*Id*.). KDC said the abuse took place from the time she was six to 16 years old. (*Id*. at 357). She told no one about it when she was a child because she did not want to get him in trouble. (*Id*. at 358).

KDC nonetheless always cared about Mr. Hargrove and

considered him a father figure. (1/9/12 RP 358). She did not know similar things were happening with GH, her little sister. (*Id*. at 359-59). The abuse stopped around June 2006. (*Id*. at 362).

RL, born October 8, 1985, lived in Cheney in the same trailer park as Mr. Hargrove, KDC, and GH. (1/10/12 RP 434-36). She testified the incident with Mr. Hargrove took place when she was 10 years old and in the fourth grade. (*Id*. at 437). RL went to his home to see if KDC could play, but she was not there. (*Id*.). Mr. Hargrove said he wanted to talk to RL so she went inside, feeling nervous. (*Id*. at 438). He took her to the bedroom. RL was on her back on the bed with her pants pulled down and her shirt off. (*Id*.). He started touching all over her body. His hands were on her chest, breasts, stomach, and vagina. (*Id*.). She was terrified. (*Id*. at 439). After he was done, she went to go home and he told her if she told anyone her family would be killed. (*Id*.). RL ran home fast, but did not tell her mother what happened as she loved her and did not want her hurt. (*Id*. at 440). RL did not tell anyone until about a year later. (*Id*. at 440-41). A police report was made around July 2001. (*Id*. at 448).

GH, born September 16, 1994, lived in the Cheney trailer

park with her mother, Kim Hargrove, Mr. Hargrove, and KDC. (1/10/12 RP 460, 462). When she was about six years old, they moved to Oregon for three years. (*Id*. at 463). GH testified the "sexual harassment" started in Oregon when she was six or seven. (*Id*. at 467). In his bedroom, Mr. Hargrove asked her to come in, whereupon he took off his pants and took off her shirt, underwear, and socks. (*Id*. at 468). He also took off his underwear and shirt. (*Id*.). With GH on the bed, he started touching her with his hands on her chest, stomach, and outside the vaginal area. (*Id*.). Mr. Hargrove went to the bathroom and got a roll of toilet paper, holding his penis in his hand. (*Id*. at 469). GH told him to let her go and he gave up and did let her go. (*Id*.).

GH testified such incidents happened a lot and continued to take place in Washington when they moved back. (1/10/12 RP 469, 470). After returning, Mr. Hargrove put his penis inside her vagina. (*Id*. at 471). He also had her take his penis in her hand and pump it. (*Id*.). He wanted her to put his penis in her mouth, but she refused. (*Id*. at 472). GH said this took place every two weeks and then almost every week. (*Id*. at 473). Her vagina was penetrated by his penis and fingers. (*Id*. at 474). She said he

would ejaculate on her back, belly button, and inside her and then get up to get toilet paper he used to clean himself and GH. (*Id*. at 474-75). The incidents stopped when GH, then 13 years old, went to visit her mother, Kim, in Maine in July 2008. (*Id*. at 475). Although she did not tell anyone about it, GH was mad and downright disgusted about her father. (*Id*. at 479). On August 2, 2008, while in Maine, she wrote a note to her mother telling her about the abuse. (*Id*. at 508).

Detective Matthew Pumphrey of the Cheney Police Department investigated the case involving GH in August 2008. (1/10/12 RP 540-41). She told the detective the abuse started after the family moved back to Cheney from Oregon. (*Id*. at 555).

Counsel for Mr. Hargrove presented his case with the main defense being a conspiracy theory hatched by Kim Hargrove to get KDC and GH to accuse her ex-husband of sexual abuse so she could get custody of the girls, which she did not have when she left the marriage and went to Maine. (1/11/12 RP 627, 649). No genitourinary examination was done on GH after the abuse allegations were revealed in the August 2, 2008 note to her mother. (*Id*. at 673-74; 1/17/12 RP 1029).

The court found Mr. Hargrove guilty of counts 1 through 6 as charged, acquitted him in count 7 of first degree rape, but found him guilty of the lesser included offense of second degree child rape. (1/25/12 RP 1154-81; CP 1893-1908, 1913-22). The court also found counts 3 and 7 were "coterminous" so Mr. Hargrove would be sentenced on count 3. (5/11/12 RP 1220-22). Rejecting the defense argument on same criminal conduct that would have reduced the offender score to six from 9+, the court sentenced Mr. Hargrove under RCW 9.94A.507 to a minimum term of 240 months and a maximum of life on count 1, a minimum of 149 months and a maximum of life on count 2, a minimum of 210 months and a maximum of life on count 3, a minimum term of 87 months on count 4, a minimum term of 210 months on count 5; and a minimum term of 149 months on count 6. (CP 1898). This appeal follows.

III. ARGUMENT

A. The court erred by admitting evidence under ER 404(b) of alleged bad acts or other crimes by Mr. Hargrove against RL.

1. Judge Sypolt, the successor judge, did not have the authority to enter findings of fact and conclusions of law based on evidence he did not hear at the RCW 10.58.090 hearing before

Judge Plese, the predecessor judge.

After an RCW 10.58.090 hearing, Judge Plese, who did not preside at the trial, entered an order allowing evidence of prior sex offense. (CP 599-601). She had heard testimony at a June 17, 2010 hearing from RL, the alleged victim of an uncharged sex offense when she was 10 years old; Melonie Strey, RL's sister; Martin L, RL's father; and Terry Thompson, a private investigator who was present as a witness at an interview with RL on February 26, 2010. (6/17/10 RP 1).

RL, born October 8, 1985, lived in a trailer park in Cheney, Washington. (6/17/10 RP 26, 28). She knew KDC, who lived in the trailer park with her mother, stepfather, and half-sister, GH. (*Id*. at 28). When she was 10 and in the fourth grade in 1995, RL said an incident took place involving Mr. Hargrove at his house. (*Id*. at 30, 38). She went there to see if KDC was home and could play. (*Id*.). RL said Mr. Hargrove answered the door, which he usually did not do, and asked her to come inside. (*Id*. at 31). She was uneasy so he "walked over to me, and just was kind of like it's going to be okay, and then then was just come with me and kind of grabbed my arm." (*Id*. at 32). He pulled her toward the bedroom, where RL

said this took place:

> He laid me down face up on the bed and then kind of just held me there so I couldn't move. So he' s holding me, and then he took my pants and underwear off and my shirt and he began rubbing his hands on my vagina and up my body and on my breasts, and he put his face in those areas, well, and at this point, I started shaking, and I was visibly upset and tears were coming out, and he just told me to think about, you know, things that make me happy like my grandparents' farm and just to talk about them. So I did and just waited until he was done. (*Id*. at 32-33).

Mr. Hargrove told her not to tell anybody or he would find and kill them. (*Id*. at 33). Right after the incident, RL could not tell her mother what happened. (*Id*. at 34-35). Although continuing to live in the trailer park until the sixth grade, RL just stayed away from the Hargrove house. (*Id*. at 35).

When she was in fifth grade, RL told her sister what happened and then told her mother and father. (6/17/10 RP 35). Later in 2001 after counseling, RL made a police report. (*Id*.). But no criminal charge was filed. (*Id*. at 108).

Judge Plese found the incident involving RL was admissible under RCW 10.58.090, a statute since found unconstitutional in

State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2012). (6/17/10 RP 130-34). In its order entered on August 30, 2010, the judge allowed the evidence under RCW 10.58.090 only and ER 404(b) was not considered. (1/6/12 RP 275; CP 599-601). As noted by the *Gresham* court, RCW 10.58.090 irreconcilably conflicts with ER 404(b). 173 Wn.2d at 413, 430-31.

Since the order allowing evidence of prior sex offense under RCW 10.58.090 could not stand, Judge Sypolt, who presided over the trial, then determined on the State's motion that the incident involving RL was nonetheless admissible under ER 404(b) to show a common scheme or plan. (1/9/12 RP 301-09; CP 1909-12). Interestingly enough, Judge Sypolt, who did not preside over the RCW 10.58.090 hearing and thus neither observed the witnesses' demeanor nor had the opportunity to assess the evidence presented first hand, nonetheless proceeded to make his own findings of fact and conclusions of law admitting the evidence under ER 404(b). This, the judge could not do. *State v. Bryant*, 65 Wn. App. 547, 549, 829 P.2d 209 (1992).

Judge Plese heard the testimony of the witnesses and was in a position to determine the credibility and weight of such

evidence. She found the incident admissible only under RCW 10.58.090. But Judge Sypolt, who did not hear the testimony elicited at that hearing, entered findings of fact supporting his decision to admit the incident involving RL under ER 404(b), which was not at issue before Judge Plese. In *Bryant*, 65 Wn. App. at 549, the court stated:

> The rule is well-settled that a successor judge is without authority to enter written findings of fact on the basis of testimony heard by a predecessor judge. . .
>
> The rule is applied even where the prior judge had entered an oral decision . . . or a memorandum decision. . . (cites omitted).

Finding this rule consistent with court rules, the court further noted:

> Taken together, the case law and civil and criminal rules set forth the rule that a successor judge only has the authority to do acts which do not require finding facts. Only the judge who has heard the evidence has the authority to find facts. 65 Wn. App. at 550.

The rule is applicable here. The predecessor judge, Judge Plese, heard the evidence and only she had the authority to find facts. *Id*. The successor judge, Judge Sypolt, did not hear the testimony and only had the authority to do acts which did not require findings

of fact. *Id*. at 549-50. He thus erred by entering findings on testimony he did not hear. The remedy is to strike Judge Sypolt's findings and conclusions admitting the ER 404(b) evidence and remand to Judge Plese for entry of findings and conclusions on the issue or for a new ER 404(b) hearing. *Id*. at 551. Thereafter, a new trial must be held.

2. The court erred by admitting evidence of ER 404(b) bad acts and other crimes by Mr. Hargrove against RL on the basis of a common scheme or plan.

Even if it is assumed that Judge Sypolt had the authority to enter findings of fact supporting his order admitting ER 404(b) evidence of the RL incident, the court erred because it was inadmissible in any event.

ER 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Such evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id*. The trial court must presume evidence of prior bad acts are inadmissible and decide in

favor of the accused when the case is close. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Evidence of a common scheme or plan may be used to show whether the charged incidents actually occurred or whether the victim was fabricating or mistaken. *State v. Lough*, 125 Wn.2d 847, 862, 889 P.2d 487 (1995). Evidence used for the purpose of proving a common plan or scheme is admissible only if (1) the State can show the prior acts by a preponderance of the evidence; (2) the evidence is admitted for the purpose of showing a common plan or scheme; (3) the evidence is relevant to prove an element of the crime charged; and (4) the evidence is more probative than prejudicial. *Lough*, 125 Wn.2d at 852-53.

Review of a trial court's interpretation of an evidence rule is de novo. *DeVincentis*, 150 Wn.2d at 17. Review of the trial court's decision to admit or exclude evidence is for abuse of discretion. *State v. Kennealy*, 151 Wn. App. 861, 886-87, 214 P.3d 200 (2009).

Unlike *Kennealy*, however, the State did not prove a common scheme or plan here. To do so, the evidence must show:

Evidence of a single plan that is used " ' repeatedly

> to commit separate, but very similar, crimes, ‘ “ is admissible to show a common scheme or plan if it contains common features and a substantial degree of similarity such that the acts can be “ ‘ explained as caused by a general plan of which [the charged crime and the prior misconduct] are the individual manifestations.’ “ . . . In such a case, “the similarity is not merely coincidental, but indicates that the conduct was directed by design.” . . . But substantial similarity between the acts does not require uniqueness, and courts generally permit evidence of prior sexual misconduct in child sexual abuse cases. (cites omitted). 151 Wn. App. at 887.

Mr. Hargrove was not in a position of trust with RL, who also was not a family member. On the other hand, he did have a position of familial trust as stepfather and father of KDC and GH respectively. The one incident in 1995 with RL did not involve any grooming or design or pattern to gain her trust. It was a crime of opportunity and did not demonstrate any scheme or plan to molest children. The circumstances of the RL incident were dissimilar to those with KDC and GH and no ongoing abuse occurred. There are more uncommon features than common ones. That being so, there was no reason for the court to allow evidence of the RL incident as no common scheme or plan was shown by the State.

An abuse of discretion occurs when the decision is manifestly unreasonable or based on untenable grounds or

reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The court erred by concluding:

> 3. The purpose for the admission of [RL's] testimony is to show a common scheme or plan. Uniqueness is not required for a common scheme or plan, rather, only common features and a substantial degree of similarity are needed.
>
> 4. In the present case, [RL] lived in the same trailer park as [KDC] and GDH. Defendant Hargrove knew [RL] and had gained her trust as [KDC's] stepfather. This trust enabled Defendant Hargrove isolation with all these girls away from public view. (CP 1911).

RL's testimony shows that Mr. Hargrove had not gained her trust at all and RL felt uneasy around him the day of the incident. Aside from the descriptions of the sexual abuse, there is no evidence of any common scheme or plan to isolate the girls from public view. The very acts alleged would hardly have been committed before the public. The abuse involving KDC and GH took place at their home where they lived. RL was allegedly abused at Mr. Hargrove's home by happenstance when she came by to play with KDC. The incident with RL was not conducted by design. *Kennealy*, 151 Wn. App. at 887. In these circumstances, the court abused its discretion by admitting the RL incident under ER 404(b) on the basis of common scheme or plan because the

State failed to prove it. The RL incident was erroneously admitted for the purpose of demonstrating Mr. Hargrove's character in order to show activity in conformity with that character. *Gresham*, 173 Wn.2d at 427. The court abused its discretion as its decision to admit the ER 404(b) evidence was based on untenable grounds or reasons. *Junker*, 79 Wn.2d at 26.

The prejudicial effect of the evidence also outweighed Its probative value. In its oral decision, the court stated:

> [S]imilar acts of sexual abuse of children are generally very probative of a common scheme or plan and the need for such proof is unusually great in child sex abuse cases. . . And, again, the high probative value arises because of, again, secrecy surrounding child sex abuse, vulnerability of alleged or actual victims, the, again, frequent absence of physical evidence to bolster an inference that child sexual abuse has occurred, the public opprobrium connected to such allegations and accusations, a victim's unwillingness to testify, which may very well appear counterintuitive to some, nonetheless that is a factor that courts have identified, and difficulty with determining credibility of a child witness. (1/9/12 RP 306-07).

Then commenting on the "plausible theory" of a conspiracy by the defense and KDC's "precocious sexual knowledge because she had possibly been molested by another individual," the court

articulated its real reason for finding the probative value outweighed the prejudicial effect – "the need for the State to present evidence of a common scheme or plan becomes significantly greater." (*Id*. at 307, 308). In a bench trial, the judge thus permitted presumptively inadmissible evidence so the State could prove its case. There can be no greater prejudice to Mr. Hargrove than was acknowledged by the court itself. The probative value of the RL incident was far outweighed by its unfairly prejudicial effect. *State v. Sexsmith*, 138 Wn. App. 497, 505-06, 157 P.3d 901 (2007), *review denied*, 163 Wn.2d 1014 (2008). The court abused its discretion and erred by admitting this evidence.

The error was not harmless. The question is whether, " ' within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.' " *State v. Cunningham*, 93 Wn.2d 823, 613 P.2d 1139 (1980). In its oral decision finding Mr. Hargrove guilty of the sex offenses, the court referred at length to the RL incident and relied on it to find guilt. (1/25/12 R:P 1155, 1168-71). The court's written findings reflect that reliance on the ER 404(b) evidence as well. (CP 1916, findings 22-26). In light of Mr. Hargrove's defense theory of a

conspiracy between his ex-wife, KDC, and GH to allege sexual abuse so the mother could gain custody of the girls, the RL incident involving a non-family member was clearly prejudicial to that defense and, absent this erroneously admitted evidence relied on by the court, the outcome of the trial would have been materially affected within reasonable probabilities. *See Gresham*, 173 Wn.2d at 433. Accordingly, it cannot be said the improper admission of the ER 404(b) evidence was harmless error. Mr. Hargrove is entitled to a new trial.

Furthermore, *State v. Gower*, 179 Wn.2d 851, 321 P.3d 1178 (2014), demonstrates that consideration by the judge of inadmissible ER 404(b) evidence is neither harmless error nor subject to the presumption that the judge in a bench trial does not consider inadmissible evidence in rendering a verdict. *See State v. Read*, 147 Wn.2d 238, 242, 53 P.3d 26 (2002). Just as in *Gower*, the judge here determined there was a greater need for evidence of the RL incident so the State could prove its case (1/9/12 RP 308); and the State argued the evidence was necessary to rebut the defense conspiracy theory and this was a credibility case (*Id*. at 296-97). 179 Wn.2d at 857-58. Like *Gower*, the judge also gave

significant weight and consideration to the testimony of RL. *Id*. at 858. Finally, as in *Gresham*, "the admission of prior sex offense evidence was not harmless when credibility was a primary issue in the case and testimony regarding the prior sex offense featured prominently at trial." *Id*. The trial court's admission of the RL incident under ER 404(b) was reversible error. Mr. Hargrove's convictions must be reversed and the case remanded for further proceedings.

B. The State's evidence was insufficient to support the convictions beyond a reasonable doubt.

In a challenge to the sufficiency of the evidence, the question is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences from it. *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010).

Although questions of credibility are determined by the trier of fact, the existence of facts cannot be based on guess, speculation, or conjecture. *State v. Hutton*, 7 Wn. App. 726, 728,

502 P.2d 1037 (1972). Even when the evidence is viewed in a light most favorable to the State, the defense elicited facts establishing its theory of the case, *i.e.*, a conspiracy hatched by Kim Hargrove to regain custody of KDC and GH, to such a degree that the State could not prove guilt beyond a reasonable doubt. To find guilt, the trier of fact thus had to resort to guess, speculation, or conjecture. This, it cannot do. *Id*.

The words of the court in rendering its verdict are telling:

> . . . In about June 2008, shortly before these allegations surfaced, [KDC] was angry at defendant, and this was a result, according to [KDC's] testimony, of Mr. Hargrove, the defendant, siding with the friend of [KDC], Amy Wells. The defense seeks to, again, assert an inference from that that the anger was otherwise as a part of the conspiracy alleged by the defense, one of the defense themes of the case. . .
>
> So with this chronology generally in mind, the Court observes and recognizes that the defense theme here is that of a conspiracy, and that is, in essence, that the mom, Kimberly Hargrove, enlisted the aid and cooperation of her daughters, [KDC] and [GH], to accomplish some things, one of which was to obtain – reobtain custody of [GH] in Maine and thereby reduce child support obligation. And as part of this, there was encouragement or pressure put upon the two daughters to fabricate allegations of

sexual abuse. And it turns out the allegations went back a number of years.

Additionally, another motivation for the conspiracy may have been to exact some sort of revenge on the defendant. It is clear that Kimberly Hargrove has great animus towards the defendant, doesn't like him in the least bit, hates him, despises him – any of those verbs will do – and that also as a part of the conspiracy it's urged that the mom, Kimberly, encouraged or cajoled [KDC] to have her former friend, [RL], essentially support the sexual abuse allegations of [GH] and [KDC] with her own allegations, as indicated, from 1995 when [RL] was about ten years or so old.

Also, as a part of the defense, numerous inconsistencies were pointed to and urged that they be accepted by the Court. And essentially these go to where, when, with whom, and how were the variety of allegations occurring or where did they – how did these happen as to where, when, how, and with what. . .

There's also a rather large laundry list of other inconsistencies that have been pointed to by the defense, among which are the evidence of the computer use by Kimberly looking up entries on child abuse, looking up child-custody issues, an allegation that there was an attempt to contact [RL], at the least, and as said, made contact and, again, urge [RL] to assist in the conspiracy.

Additionally, there are assertions that police investigation was deficient or inappropriate. For example, there was inappropriate use of leading

questions; additionally, there were inconsistent statements made to authorities. An example of that is statements of [KDC] made to the police, Detective Waterland and Mr. Gutierrez in Oregon, and comparing that to testimony in court. And indeed, [KDC] did admit that she had lied to the authorities when in Oregon.

Also, there's a theme among the other aspects of the conspiracy that Kimberly Hargrove actually abandoned the girls and really wasn't interested in reducing or eliminating child support, perhaps getting credits back for child support that she allegedly owed to defendant. And this is supported by, mainly, court documents as testified by counsel, Mr. Rick Kayne.

There's also reference to the Xanga entries which, as indicated, are essentially postings online which portray, for those interested in cyberspace, what [KDC] was thinking or what experiences she was having at a particular time. And, it's urged that, since [KDC] had said nothing bad about her stepfather, the defendant, that that absence of negative entries supports the fact that nothing happened of the sort alleged by [KDC].

And I would point out, again, I would call counsel's attention to my earlier remark that counsel have done a very thorough job here. And I would observe that the defense has prepared and presented a detailed, very well-thought-out set of defenses, as I described, and defense theories, and it has been a thorough portrayal and careful job of advancing these plausible defense theories. (1/25/12 1157-61).

The reason for setting forth in detail the court's recitation of

the underlying facts and comments about the defense theories is that it recognized they were "plausible" and that raises the question whether guilt was proven beyond a reasonable doubt. (*Id*. at 1161). "Plausible" means "credible." American Heritage Dictionary (4th ed. 2001). The court determined these defense theories were indeed plausible, so it necessarily found them credible as is its province as the trier of fact. In these circumstances, however, the court could not have found guilt beyond a reasonable doubt because its finding the defense credible was sufficient reason to prevent the State from meeting its high burden. *Cf*. WPIC 4.01.

The definition of reasonable doubt is in WPIC 4.01:

> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt. If, after such consideration, you do not have an abiding belief in the truth of the charge, you are not satisfied beyond a reasonable doubt.

The definition and considerations for the jury are equally applicable to the court as trier of fact in a bench trial. Here, the court determined the defense was credible and, coupled with its error in

admitting the ER 404(b) evidence involving RL, it could not have had an abiding belief in the truth of the charges. *See State v. Bennett*, 161 Wn.2d 303, 317-18, 165 P.3d 1241 (2007). Accordingly, the convictions must be reversed and the charges dismissed.

C. The trial court erred by finding counts 1 and 2 did not constitute the same criminal conduct; counts 3, 4, and 7 did not constitute the same criminal conduct; and counts 5 and 6 did not constitute the same criminal conduct, thus resulting in an improper offender score of 9+ rather than 6.

Mr. Hargrove was convicted in count 1 of first degree rape of a child, GH; count 2 of first degree child molestation, GH; count 3, second degree rape of a child, GH; count 4, second degree child molestation, GH; count 5 first degree rape of a child, KDC; count 6, first degree child molestation, KDC; and count 7, second degree rape of a child, GH. (CP 1893-1908,1919-21). The court found that counts 3 and 7 were "coterminous" and Mr. Hargrove was sentenced on count 3. (5/11/12 RP 1220-22). The conviction on count 7 was for a lesser included offense. (CP 1893-94, 1897).

The defense argued counts 1 and 2 were the same criminal

conduct; counts 3, 4, and 7 were the same criminal conduct; and counts 5 and 6 were the same criminal conduct. (5/11/12 RP 1212-13). The basis for the request was that each group of counts involved the same time period, the same victim, and the same course of conduct. (*Id*.). The offender score would thus be six, rather than 9+ as calculated by the State.

The court declined the invitation:

> Okay. Well, counsel, I do have to disagree respectfully, with [defense counsel] on the same-course-of- conduct argument. I don't see that that would apply here, in that, again there were numerous separate events testified about over this long span of time by each of the respective victims, to summarize that, and as a result I would disagree with that argument. So the standard ranges then are as [the State] has referenced. (5/11/12 RP 1221).

RCW 9.94A.589(1)(a) provides in part 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. "Same criminal conduct" means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. *Id*.

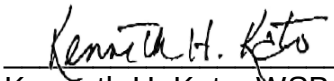
Each particular group of counts involved the same time

period and place and involved the same victim. Also, the offender's intent must not change from one crime to another. *State v. Adame*, 56 Wn. App. 803, 810, 785 P.2d 1144, *review denied*, 114 Wn.2d 1030 (1990). The intent here did not change as from child rape to child molestation since the State's evidence pointed to an intent to rape and, when unsuccessful, molestation occurred. The intent was the same and the only thing different was the circumstance that led one crime to another. So viewed, each of the three groups of counts constituted the same criminal conduct so Mr. Hargrove had an offender score of 6, not 9+. RCW 9.94A.525(17). The case should be remanded for resentencing.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Hargrove respectfully urges this court to reverse his convictions and dismiss all charges or, in the alternative, remand for new trial.

DATED this 5th day of June, 2014.



Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

CERTIFICATE OF SERVICE

I certify that on June 5, 2014, I served a copy of the brief of appellant by first class mail, postage prepaid, on William D. Hargrove, # 355412, PO Box 2049, Airway Heights, WA 99001; and by email, as agreed, on Mark E. Lindsey at kowens@spokanecounty.org .