30940-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

WILLIAM D. HARGROVE, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

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# BRIEF OF RESPONDENT

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2. Insufficient evidence supported the guilty verdicts of First Degree Rape of a Child, First Degree Child Molestation, and Second Degree Rape of a Child.
3. The trial court erroneously failed to find that the verdicts in Counts I and II concerning victim G.H.; III, IV and VII concerning victim K.D.C.; and, V and VI concerning victim G.H. constituted the same criminal conduct for purposes of calculating defendant's offender score.

## II. ISSUES PRESENTED

1. Did the trial court abuse its discretion when it relied upon the record made during a pretrial hearing presided over by a different judge?
2. Did the trial court abuse its discretion by admitting evidence pursuant to ER 404(b)?
3. Did insufficient evidence support the defendant's convictions?
4. Did the trial court abuse its discretion by not finding that the crimes charged in Counts I and II; III, IV and VII; and, V and VI constituted the same criminal conduct?

## III. STATEMENT OF THE CASE

The respondent accepts appellant's statement of the case for purposes of this appeal only.

## IV. ARGUMENT

### A. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF DEFENDANT'S UNCHARGED SEXUAL ABUSE OF ANOTHER VICTIM PURSUANT TO ER 404(B).

Defendant contends that the trial court erred in admitting evidence of defendant's sexual abuse of R.L. because: (1) a judge does not have authority to enter findings and conclusions based upon a record over which that judge did not preside; and, (2) the State failed to prove the existence of a common scheme or plan pursuant to ER 404(b).

#### 1. The Trial Court Properly Exercised Its Discretion in Admitting Evidence of Defendant's Sexual Abuse of an Uncharged Victim Based Upon the Record of the Case.

Defendant claims that the trial court lacked the authority to enter factual findings and legal conclusions pursuant to ER 404(b) based upon a hearing over which it did not preside. Defendant notes that a pretrial hearing was held with regard to whether the defendant's sexual abuse of R.L. would be admitted into evidence pursuant to the then valid provisions of RCW 10.58.090. Based upon the record created during that hearing, the court entered an order that the evidence of the uncharged sexual abuse of R.L. by defendant would be admissible under RCW 10.58.090.

Defendant sought discretionary review of the trial court's RCW 10.58.090 order with this Court. The matter was then stayed for two years pending the Supreme Court's decision in *State v. Gresham*, 173 Wn.2d 405, 269 P.3d 207 (2012). After the Supreme Court held that RCW 10.58.090 was unconstitutional, the trial court conducted a hearing to determine whether the evidence of the R.L.-incident was admissible under ER 404(b).

Defendant argues that the trial court could not legally base its findings and conclusions regarding admissibility of the R.L. evidence under ER 404(b) upon the record specifically created for the decision of whether that evidence was admissible pursuant to RCW 10.58.090. Unfortunately, the defendant did not make that argument to the trial court at the time it was called upon to determine admissibility of the evidence under ER 404(b). In fact, defendant did not object to the trial court's use of the evidence produced during the pretrial RCW 10.58.090 hearing in its decision vis-à-vis admissibility under ER 404(b). Instead, the defense argued that the R.L.-incident evidence should be excluded because it was purely propensity evidence offered to prove that defendant acted in conformity with the character of a child sex abuser. RP 299-300.

The defense's failure to object to the trial court's reliance upon the record created during the pretrial hearing effectively waived this argument

on appeal because the defendant deprived the trial court of the opportunity to correct the claimed error. Rule of Appellate Procedure ("RAP") 2.5(a) provides that appellate courts will not entertain issues not raised before the trial court. The rule promotes the policy of encouraging the efficient use of judicial resources by Appellate Courts refusing to sanction a party's failure to note an error at trial which the trial court, if afforded the chance, might have been able to correct. The timely objection to the trial court would thus avoid an appeal based upon said error and the possibility of a new trial. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). Here, defendant made no such objection to the trial court, yet now seeks to avoid the consequences of his choice by claiming that the trial court committed reversible error. Apparently, defendant did not object to the trial court's use of the evidence produced during the RCW 10.58.090 hearing because he believed that the court would acquit him based upon his having proved his conspiracy theory. Defendant's tactical choice does not elevate the claimed error to one of constitutional magnitude to thereby avoid the effect of RAP 2.5(a). Defendant's gamble that the trial court would accept his conspiracy theory does not justify relieving him of the consequences of his choices to commit these violent crimes against K.D.C. and G.H.

Assuming, *arguendo*, that defendant can raise this issue on appeal, the reliance upon the analysis in *State v. Bryant*, 65 Wn.App. 549, 829

P.2d 209 (1992), is, respectively, misplaced. In *Bryant,* the Court Commissioner executed written findings and conclusions without any reference to having reviewed the record upon which those were based. The *Bryant* court carefully analyzed the interactions of the case law and court rules in ruling that "a successor judge only had the authority to do acts which do not require finding facts. Only the judge who has heard evidence has the authority to find facts." *Id.,* at 550 (citing CrR 6.11 and CR 63). Notwithstanding this analysis, it is also well settled that a successor judge can make factual findings based upon the original record of a hearing when the parties agree to allow the successor judge to rely upon that record. *See, In re Marriage of Crosetto,* 101 Wn.App. 89, 99, 1 P.3d 1180 (2000). Here, the record reflects that the defense did not contend that the trial court lacked the authority to render its decision regarding the admissibility of the R.L.-incident evidence; rather, the focus was on the nature of the evidence. RP 298-300. In fact, the record reflects that the defense stipulated with the State to the trial court's consideration of the evidence developed at the RCW 10.58.090 hearing in lieu of testimony of those witnesses at trial. RP 513-515. The trial court even conducted a colloquy with the defendant regarding the stipulated evidence as constituting a waiver of his right of confrontation. The defendant agreed to the stipulation. RP 515. The reasonable inference from such a

record is that the parties agreed that the trial court could rely upon the record created by the predecessor judge in rendering its decision regarding admissibility under ER 404(b). Finally, the trial court specifically noted that "the Court has the State's offer of proof on what happened in the [R.L.] instance. Additionally, the Court has in mind the testimony of [R.L.] before another superior court trial department some time ago.…" RP 302. Clearly, the trial court did not base its determination of the admissibility of the R.L.-incident solely upon the record created by Judge Plese.

2. The Trial Court Properly Exercised Its Discretion in Admitting Evidence of Defendant's Sexual Abuse of an Uncharged Victim (R.L.) Pursuant to ER 404(b).

Appellant claims that the trial court erred by admitting evidence of the R.L.-incident because the State failed to prove the existence of a common scheme or plan. It is important to note that ER 404(b) only prohibits the admission of evidence of other crimes or bad acts when such is offered to prove the character of a person to show action in conformity with such behavior. Otherwise, ER 404(b) explicitly provides for the admission of such evidence for other purposes, including proving motive, identity, or a common scheme or plan. Here, the State sought admission of the R.L.-incident evidence to show that defendant's actions vis-à-vis

G.H. and K.D.C. were part of a common scheme or plan of action by which he perpetrated his sexual abuse of his child victims.

As noted, the defense argued that the R.L.-incident evidence was only being offered to prove defendant's conformity with that propensity evidence. However, the trial court properly applied ER 404(b). RP 301-309; CP 1909-1912. The trial court noted that before it can admit evidence under ER 404(b), it must (1) find by a preponderance of the evidence that the prior misconduct occurred, (2) identify the purpose for admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value of the evidence against its prejudicial effect. RP 301-302. *See, State v. Fisher,* 165 Wn.2d 727, 745, 202 P.3d 937 (2009). Only after completing the general determination of the admissibility of the R.L.-incident evidence did the trial court examine it to determine whether it qualified for admission under the common scheme or plan exception of ER 404(b). RP 301-309. The trial court then went through the four-step inquiry required by *State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995). RP 301-309.

To admit evidence pursuant to the common scheme or plan exception of ER 404(b), the trial court must conduct a four-part analysis whereby the prior acts must be "(1) proved by a preponderance of the

evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial." *Lough, supra,* at 852, 889 P.2d 487. Here, the trial court applied the required analysis, then examined the evidence in light of the holding in *State v. DeVincentis,* 150 Wn.2d 11, 74 P.3d 119 (2003), before concluding that the R.L.-incident was admissible pursuant to the common scheme or plan exception to ER 404(b). RP 301-309.

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. *State v. Darden,* 145 Wn. 2d 612, 619, 41 P.3d 1189 (2002). That standard is well-recognized. *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 482 P.2d 775 (1971). The court's ruling regarding admissibility may be affirmed on any grounds adequately supported by the record. *State v. Costich,* 152 Wn.2d 463, 477, 98 P.3d 795 (2004). A trial court abuses its discretion when it relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *State v. Lord,* 161 Wn.2d 276, 284, 165 P.3d 1251 (2007). Here, the trial court carefully identified the basis for its ruling. Moreover, in rendering its findings and conclusions, the trial court specifically ruled that: "[R.L.]'s testimony was admitted pursuant to ER 404(b) for the limited purpose of

showing a common scheme or plan." CP 1913-1922. Finally, the invitation to use the trial court's oral comments to thereby impeach the validity of its findings and conclusions should be declined.

> [A] trial judge's oral decision is no more than a verbal expression of his informal opinion at that time. It is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned. It has no binding effect, unless formally incorporated into the finding, conclusions, and judgment.

*Ferree v. Doric Co.*, 62 Wn.2d 561, 566-567, 383 P.2d 900 (1963).

Accordingly, the defendant has failed to show that the trial court's evidentiary ruling constituted an abuse of discretion.

B. SUFFICIENT EVIDENCE SUPPORTED THE TRIAL COURT FINDING THAT THE CHARGED OFFENSES HAD BEEN PROVED BEYOND A REASONABLE DOUBT.

Defendant contends that insufficient evidence supported the verdicts finding defendant guilty of the charged crimes. Defendant claims that sufficient facts were elicited at trial to establish his conspiracy theory such that the trial court had to resort to guess, speculation, or conjecture to find guilt. App. Brf., at p. 20. Nevertheless, if the trial court had found the defense theory credible, it would have acquitted defendant.

The standard for adjudging the sufficiency of the evidence to support a verdict is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could find that each element of the offense

has been proved beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). In reviewing the sufficiency of the evidence in a criminal case, the reviewing court must draw all reasonable inferences from the evidence in favor of the State and interpret those inferences most strongly against the defendant. *State v. Lopez*, 79 Wn. App. 755, 768, 904 P.2d 1179 (1995); *State v. Hagler*, 74 Wn. App. 232, 235, 872 P.2d 85 (1994). Application of that standard requires affirming the separate convictions found by the trial court pursuant to the verdicts rendered.

Here, the evidence amply supported the trial court's determination that the defendant committed the charged offenses. The evidence included G.H.'s testimony that: the defendant was more than three years older than she and they were never married (RP 461-462); the sexual abuse occurred in Washington state when she was nine or ten years old (RP 470); the sexual abuse occurred every two weeks initially, then increased to weekly (RP 473); the sexual abuse included the defendant forcing G.H. to masturbate, perform oral sex on him, or being vaginally penetrated penally and digitally (RP 470-475); defendant would almost always ejaculate either on or inside her (RP 474-475); when she was twelve years old, the defendant threatened her with a kitchen knife to force his sexual abuse on her (RP 477-479, 535). The defendant's use of a deadly weapon against one of the victims, on one occasion, truly *enhanced* her fear of the

circumstance and the serious nature of defendant's threats of future reprisals if she disclosed the sexual abuse.

K.D.C. testified that: the defendant was more than three years older than she and they were never married (RP 347); the sexual abuse started when she was in kindergarten (RP 352-353); the sexual abuse included oral sex, masturbation, penal contact with, and digital penetration of, her vaginal area (RP 353-357); the sexual abuse occurred at least once a week (RP 355-357); and defendant would regularly ejaculate during the sexual abuse (RP 354, 356). K.D.C. testified that she was sexually abused by the defendant weekly when she was six, seven, eight, nine, ten, and eleven years of age. RP 357. K.D.C. testified that the oral form of the defendant's sexual abuse was on such a regular basis that it was like doing a "chore." RP 361-362. K.D.C. considered being sexually molested by the defendant "more like a chore." RP 409. Finally, K.D.C. testified that the defendant's sexual abuse of her only stopped when she was sixteen years old and said, "No."

Accordingly, there was ample evidence from which the trial court could find beyond a reasonable doubt that the defendant committed the charged offenses beyond a reasonable doubt.

## C. THE TRIAL COURT PROPERLY FOUND THAT THE CONVICTIONS DID NOT QUALIFY AS SAME CRIMINAL CONDUCT PURSUANT TO RCW 9.94A.589(1)(A)

Defendant contends that trial court erroneously calculated his offender score under the Sentencing Reform Act of 1981 ("SRA"). Defendant argues that the trial court should have consolidated his seven convictions into three groups based upon the claim that the grouped convictions constituted the same criminal conduct. The trial court did not abuse its discretion in concluding to the contrary.

RCW 9.94A.589(1)(a) excludes from the offender score calculation any current offense that is found to "encompass the same criminal conduct." This phrase is defined in the statute as requiring three factors: (1) the crimes require the same criminal intent; (2) the crimes are committed at the same time and place; and (3) the crimes involve the same victim. Offenses do not constitute the same criminal conduct and must be counted separately in the offender score unless each of the RCW 9.94A.589(1)(a) three factors are present. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). The legislature intended that the courts construe RCW 9.94A.589(1)(a) narrowly to thereby disallow most assertions of same criminal conduct. *State v. Wilson*, 136 Wn.App. 596, 613, 150 P.3d 144 (2007). The governing law on this matter can be found in *State v. Dunaway*, 109 Wn.2d 207, 743 P.2d 1237 (1987). There the court determined that offenses did not constitute the

same criminal conduct if, objectively viewed, the criminal intent changed from one crime to the other. *Id.*, at 215. Often such an analysis must include determining "whether one crime furthered the other and if the time and place of the two crimes remained the same." *Id.*, at 215. "Intent, in this context, is not the particular *mens rea* element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime." *State v. Adame*, 56 Wn.App. 803, 811, 785 P.2d 1144 (1990).

Child molestation and child rape have different statutory intent elements. *State v. Saiz*, 63 Wn.App. 1, 4, 816 P.2d 92 (1991). Child molestation includes the element of sexual contact, which requires proof that the contact was made for the purpose of sexual gratification. *Id.*, at 4. However, child rape is a strict liability offense because it has no *mens rea* element which requires proof of knowledge or intent. *State v. Deer*, 175 Wn.2d 725, 731, 287 P.3d 539 (2012), *cert. denied*, 133 S.Ct. 991, 184 L.Ed.2d 770 (2013). Child rape statutorily requires sexual intercourse, yet not necessarily sexual gratification. *Saiz, supra*, at 4.

A trial court's decision of what constitutes the same criminal conduct is reviewed for an abuse of discretion or misapplication of the law. *State v. Graciano*, 176 Wn.2d 531, 141 P.3d 54 (2006). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *Junker*, *supra*, at 26.

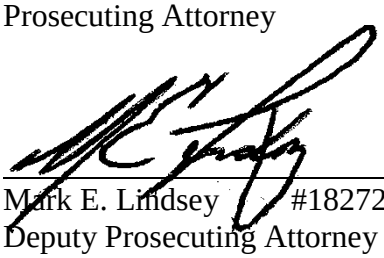
Here, the trial court certainly had tenable grounds to support finding that none of the offenses qualified for consideration as same criminal conduct for purpose of calculating defendant's offender score. Although the crimes occurred at the same time and place, and involved the same victim, the crimes most importantly involved different criminal intents. None of the crimes, objectively viewed, had the same criminal intent. Count I – the first degree child rape of G.H. – specifically involved the act of sexual intercourse and strict liability; yet, Count II – the first degree child molestation of G.H. – specifically involved the act of sexual contact which includes proof of sexual gratification. Clearly, child molestation and child rape are not the same criminal conduct as a matter of law. Moreover, child molestation is not a lesser-included offense of child rape. The same analysis applies to Counts III and IV – the second degree child rape and second degree child molestation of G.H. Again, the same analysis applies as well to Counts V and VI – the first degree child rape and first degree child molestation of K.D.C. Finally, Count VII – the second degree child rape of GH – the charging period is not the same as that for Counts III and IV. Accordingly, the trial court properly exercised its discretion to find the crimes were separate conduct and calculate the offender score as a nine-plus for sentencing defendant on the convicted crimes.

## V. CONCLUSION

For the reasons stated above the defendant's convictions and sentences should be affirmed.

Dated this 29 day of July, 2014.

STEVEN J. TUCKER
Prosecuting Attorney



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

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| STATE OF WASHINGTON,<br><br>Respondent,<br>v.<br><br>WILLIAM D. HARGROVE,<br><br>Appellant, | NO. 30940-1-III<br><br>CERTIFICATE OF MAILING |

I certify under penalty of perjury under the laws of the State of Washington, that on July 29, 2014, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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