72812-1

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Court of Appeals
Division I
State of Washington

No. 72812-1-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent,

v.

FREDERICK JAMES WILLIAMS, JR., Appellant.

BRIEF OF RESPONDENT

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B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether defendant's waiver of right to counsel was equivocal and invalid where defendant requested standby counsel when he requested to represent himself, where standby counsel was appointed, where defendant refused to be represented by defense counsel and where the court engaged in a thorough colloquy with defendant, including informing him that he did not have the right to standby counsel.

2. Whether the trial court abused its discretion in denying defendant's motion to sever the counts related to one sister from the other sister for trial where the counts were properly joined, the evidence regarding one sister was cross admissible as to the counts regarding the other sister, the witnesses would be the same for both trials and the defendant failed to establish manifest prejudice that outweighed the desire for judicial economy.

3. Whether the trial court abused its discretion in holding an in camera review, without defense counsel present, of the victims' school records held by the school district, and in denying a request for their disclosure, where the victims objected to the disclosure of the records, the victims have a privacy interest in the records and where the defendant failed to establish that the information in the records was material to the presentation of the defense.

4. Whether the defendant had a right to have his prior strike conviction proved to a jury beyond a reasonable doubt under the Sixth and Fourteenth Amendments where the Washington courts have repeatedly held otherwise.

C. FACTS

1. Procedural Facts.

On Oct. 21, 2009 Appellant Frederick Williams was charged with two counts of Child Molestation in the Second Degree, in violation of RCW 9A.44.086, two counts of Rape of a Child in the Second Degree, in violation of RCW 9A.44.076, for acts he committed on or about Sept 1st, 2006 to August 31st, 2008; and five counts of Rape of a Child in the First Degree, in violation of RCW 9A.44.073, and five counts of Child Molestation in the First Degree, in violation of RCW 9A.44.083, for acts he committed on or about February 22nd, 1999 to February 21st, 2003. CP 5-8, 13-16.

After conviction and remand for retrial from his first appeal, a third amended information was filed and Williams went to trial the second time on two counts of Child Molestation in the Second Degree, one count of Rape of a Child in the Second Degree, three counts of Rape of a Child in the First Degree, and four counts of Child Molestation in the First Degree. Supp CP __; Sub Nom. 283. He was found guilty by a jury of all charges and was sentenced again to life in prison as a persistent offender. CP 234-35, 238-255.

2. Substantive Facts.

Sometime before October 16th of 2009 and while she was in eighth grade, MW[1], told her friend MF that her uncle had sexually touched her, but asked her to keep it a secret. 3RP 209-12; 4RP 48-49[2]. Apparently MF told her mother which eventually resulted in the matter being referred by CPS to Det. Landis of the Blaine Police Department on Oct. 16, 2009. 3RP 209-10; 4RP 8. On Oct. 16, 2009, after Det. Landis had spoken with MF, Det. Landis and a CPS worker interviewed MW, who was 15 at the time of the interview, at Blaine High School. 3RP 212, 216; 4RP 11, 53. MW did not know why she had been called to the counselor's office, but Det. Landis did advise her why they were there before interviewing her. 3RP 212, 216-17. MW was very withdrawn and appeared scared during the interview. 3RP 218. MW was also difficult to understand due to a speech impediment. 3RP 218. During the interview, MW said she knew how her friend MF felt because her uncle got too touchy with her once in a while. 4RP 57. MW also stated she thought something had happened to her sister EW. 3RP 218.

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[1] Initials are being used throughout the brief in order to protect the privacy of the victims.
[2] 1RP refers to the report of proceedings for Jan. 9th, 23rd, 27th, Feb. 2nd, March 11th, 18th, April 8th, May 6th and October 9th of 2014; 2RP to those for October 17, 2014; 3RP for those October 21st -23rd, 2014; 4RP for October 27, 2014; 5RP for October 28, 2014; 6RP for October 29, 2014 and 7RP for October 30th and December 11th and 14th, 2014.

After interviewing MW, Det. Landis interviewed MW's older sister, EW, who also was not aware of why she had been called to the office and wasn't aware that her sister had been interviewed. 3RP 223, 5RP 339-40. EW, 18 at the time of the interview, initially was reluctant to talk, but after a while she couldn't stop talking, as if there had been a release. 3RP 223-24, 4RP 150; 5RP 341.

When EW got home from school that day she was still very upset and was sobbing, and her father, DW, asked her what was wrong. 5RP 395-96. EW was upset that her uncle, DW's brother, was going to get in trouble and that it was all coming out. 5RP 397. After EW told him about her interview with Det. Landis, DW asked where MW was and went to go look for MW. 5RP 397. MW also told DW what had been going on. 5RP 342-43.

After both girls had made disclosures about Williams, Det. Landis went to Williams' trailer to arrest him. 3RP 225. Before he was taken into custody, Williams said that he didn't hurt anyone and didn't leave his trailer. 3RP 228. Williams was informed that he was being arrested for Rape of a Child, and, once at the station, Williams asked who had said that. 3RP 228. Right after Det. Landis told Williams what EW and MW had said, Williams broke down and asked Det. Landis to shoot him, kill him. 3RP 228-33. When Landis explained he couldn't do that, Williams

asked Landis to give him Landis' gun so he could shoot himself, and Landis again said no. 3RP 229.

Sometime in 2000, DW and his family moved to a house on Blaine Road that was located on 39 acres, where they lived for five years until they moved out at the end of 2005, beginning of 2006. 3RP 242, 5RP 375-76. A few months after they moved in, Williams came to live at the Blaine Road address, moving a small trailer onto the property about 50-100 feet from the house. 5RP 376, 380. In November 2005 DW and his family were forced to vacate the Blaine Road property and moved in with DW's sister for about three weeks, but the sister asked DW and his wife TW to move out so that she wouldn't lose her HUD money. 5RP 384-85. After an incident at the sister's place in February 2006, the whole family moved in with Williams for a couple weeks into his trailer at a trailer park in Blaine. 3RP 249-51, 5RP 384-86. Williams had acquired this trailer, bigger than his first one, while living on Blaine Road. 3RP 253, 4RP 180, 5RP 385. After that DW's family moved into a house on F Street in Blaine, the place most of the family[3] was still living at the time of trial. 3RP 251-53, 5RP 387. When they moved into the F Street house, MW was in 5th grade and 11 years old and EW was turning 15. 3RP 251, 4RP 11, 14, 250.

[3] DW died in between the first and second trials. 3RP 251.

When Williams moved onto the Blaine Road property, DW told Williams in front of MW, EW and their older brother RW that if Williams were to touch his kids, he would kill Williams, and he told his children to tell him if something happened. 5RP 378. Williams was not to come to the house if he and his wife, TW, weren't home and Williams was not to be around the kids alone. 5RP 261, 381-83.

EW, who was born on Feb. 22, 1991, never told anyone about the sexual abuse until the day when she was called into the high school principal's office. 4RP 150, 339. Williams started abusing EW sometime when she was around eight or nine years old, after Williams had moved his trailer onto the Blaine Road property. 4RP 157-58, 180. EW said she would go visit Williams in his trailer when her parents were at the store because he let her play a computer game on his computer. 4RP 158-59. Sometimes she would ask him for money. 4RP 159. One time when she went to play on the computer, Williams told her she had to do one thing first. 4RP 167-68. He took his pants down and rubbed his penis in front of her and said, "you know you like it." 4RP 167.

Williams also had EW "flash" him, sometimes just lifting up her shirt, exposing her breasts, and other times taking her shirt off. 4RP 169. One time she wanted money to get ice cream, and Williams told her she had to flash first. 4RP 171. She lifted up her shirt, Williams grabbed her,

touched her and sucked on her breast area. 4RP 171. He sucked on her breast area other times too. 4RP 172. One time Williams kissed her, sticking his tongue into her mouth and telling her to stick hers out. 4RP 170. The touching usually happened when she wanted something. 4RP 171.

She remembered the incidents in which he took photos the most, Polaroid photos which he hid in a basket above his refrigerator. 4RP 157, 160. He took photos of her body parts, particularly between her legs when she was unclothed from the waist down. He told her that he wanted to draw her vagina because he was an artist. 4RP 160-61. One day he took three photos of her vagina. He told her how to pose for the photo: he took off her clothes and told her to lie back on the couch and open her legs. 4RP 161-62. During the photo sessions, he "cupped" her vagina with his hand. 4RP 163. Whenever he cupped her vagina, he also put his finger inside her vagina. 4RP 176-77. This happened at least twice and perhaps more than 10 times. 4RP 177. He also kissed her vagina twice when he touched it. 4RP 173.

The abuse usually occurred in Williams' trailer. 4RP 171. The only time it happened in the house was one day while DW was preparing dinner in the kitchen and Williams and she were watching a movie, Williams told EW to come to him. 4RP 164. While she was sitting on his

lap under a blanket, he rubbed her vagina with his hand on the outside of her clothing. 4RP 164-65.

Williams told EW to keep it a secret, not to tell anyone. 5RP 331-32. EW thought she had a special secret with Williams until she realized what they were doing was wrong when her mother and she were watching a crime show on television. Then she "felt sick to the bone." 4RP 174-76, 5RP 331. She kept the secret though because her dad had said that he would kill Williams if Williams ever touched the girls. 4RP 174-75. When EW got to middle school, she started avoiding Williams and pushing him away and hid in her room. 4RP 166.

Only one incident happened to EW after the family moved to the F. St. house in Blaine. That day after EW had come home from playing freshman volleyball, Williams walked in on EW while she was at the computer. 5RP 332-34. EW was sore from the volleyball and Williams started to massage her legs, which initially felt good. 5RP 333-34. Williams' hands, however, started to creep further up her legs towards her vagina. 5RP 334. EW pushed his hands away and went to her room, which unfortunately did not have a door on it. 5RP 334. Williams followed her into her room and, after she left her room, he followed her around the house, moping and sighing. 5RP 333-35. EW managed to stay away from Williams until DW got home, at which point she told DW that

Williams was "creeping her out" and she thought he had been drinking. 5RP 333-35.

DW had been concerned something inappropriate might be going on between EW and Williams because whenever Williams came over to the F. St. house, EW would immediately go upstairs and stay there until Williams left. 5RP 398, 474. She would leave the room even if she was in the middle of something. 5RP 474. This had gone on for about 6-7months before Williams was arrested. 5RP 474. A while before that, EW had told DW that Williams made her uncomfortable. 5RP 476. DW spoke to Williams and told him he was making EW feel uncomfortable. 5RP 476. Williams said he hadn't done anything to her, didn't know why EW was mad at him. 5RP 476. DW told him to apologize to EW and not to hound her. 5RP 476.

MW, who was born Sept. 1st, 1994, believed that the abuse happened quite a bit while she was in middle school, and all of it occurred after the family moved into the F Street house. 4RP 11, 20. RP 389-90. One time, when she was 11 or 12, Williams offered to rent her a Netflix DVD but the only way to do it was if she went with him to his trailer. 4RP 21, 24. They went to his trailer to get the movie, but they couldn't find the movie she wanted. 4RP 21-23. Williams started talking to her about kissing her. 4RP22-24. Williams told her to close her eyes, that it would

be easier, so she closed her eyes and Williams kissed her on the lips. 4RP 25. He tried to take her shirt off, but that made her feel uncomfortable, so she said something about Grandma, who had died a couple years before[4], being disappointed in them. 4RP 25-26. Williams took off her shirt, kissed her "boobs" and took all her clothes off. 4RP 27-28. He put his finger into her vagina and moved it around and then tried to put his penis inside, but it wouldn't fit. 4RP 28. Williams put his pants back on and then he licked her vagina, which made her feel very uncomfortable. She tried to tell him to stop by talking about Grandma. 4RP 29. Williams stopped, MW got dressed and he drove her home. 4RP 30.

Also during the incident, Williams took a surveillance type camera that was connected to his computer and used it to show her what her vagina looked like. 4RP 30-31. He told her the camera, that had been outside the trailer, only projected the image, that it didn't actually record, although she didn't know for sure it wasn't recording. 4RP 31-33. Williams told her to keep it a secret. 4RP 49.

The next incident that MW remembered happened when she was giving Williams' dog a bath at her house. 4RP 34. MW asked for help because she couldn't get the dog, a Rottweiler, into the tub. 4RP 34-35. Williams came into the bathroom and told her, "You just wanted me in

[4] MW believed that Grandma watched over them.4RP 26.

here." 4RP 34. He closed the door and asked her to take off her top, a little bathing suit top which she had put on because she was going to wash the dog. 4RP 37-38. She didn't take off her top, so he did. 4RP 38. He started touching her breasts, but it didn't last very long because other family members were in the house. 4RP 38-39. She put her shirt back on and finished washing the dog. Williams gave her $5 for washing the dog. 4RP 39-40. He had given her money before for washing the dog or taking the dog on walks. 4RP 40.

On another day, Williams came up to her room while she was listening to music. 4RP 41. He came in and started talking to her. 4RP 41. Williams wanted her to take her shirt off which he ended up taking off. 4RP 42. He touched her breasts for a few minutes and then left. 4RP 42.

This kind of thing happened other times. 4RP 43-44, 113, 144. She vaguely recalled another incident involving a computer, but she couldn't remember the details. 4RP 46-47, 74, 115-16. She thought there was another dog incident in which Williams pulled down her shorts. 4RP 97, 117-18. The incidents she remembered best were the three she testified about. 4RP 113, 143. She had purposefully tried to forget what Williams had done because it brought up memories she didn't want to think about. 4RP 19.

MW didn't tell anyone about Williams' abuse because she was embarrassed. 4RP 49. She also didn't want to get Williams into trouble because he was family and he'd said he'd rather die than go to jail. 4RP 49.

While Williams wasn't supposed to be alone with EW and MW, DW acknowledged there were a couple times when he had to enforce that rule while the family was living on Blaine Road. 5RP 382. One time while his wife was at work, DW came home and found Williams in the house and he told Williams that he couldn't be home alone with the kids, even if RW was there. 5RP 382. Another time, Williams came into the house to cook something as DW and his wife were leaving, but they told him he couldn't be in the house alone with the kids. 5RP 382.

When they lived on Blaine Road, TW, the girls' mother, was rarely home[5], and DW was frequently on the computer playing video games when he was home. 3RP 248, 254, 265-66, 272, 4RP 166. Williams showed up at the F Street house quite a bit, sometimes two to three times a week. 5RP 391. Although Williams wasn't supposed to come around when DW or TW weren't there, Williams didn't always abide by those limitations. 5RP 391-92. One day DW found Williams sitting on the couch with MW and EW watching television when he got home. 5RP 392.

DW took Williams into the kitchen and told him that he couldn't come over unless an adult was there, but DW did find Williams at the house four to five times during 2008 and 2009 when he and TW weren't there. 5RP 393, 484-85. DW also admitted there could have been times that Williams was there and he didn't know about it. 5RP 492. DW also found Williams and MW sitting on the couch with a blanket over them one time in the spring before Williams was arrested. 5RP 475.

Defense called a former employee of the Division of Child and Family Services and had interviewed EW in 2001. 6RP 554. In the interview, EW denied being hurt at home and denied seeing her brother get hurt. She did say her parents yelled and that made her sad. 6RP 556-57.

Defense also called Dr. John Yuille, a forensic psychologist, who testified the interviews Det. Landis conducted with EW and MW were flawed because a number of the questions were suggestive and could have affected the girls' memories. 6RP 416-22. He, however, was not able to give an opinion as to whether the girls had been susceptible to suggestion and admitted he could not say whether their memories had in fact been affected by the interviews. 6RP 431, 449.[6]

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[5] TW was employed full-time as a bartender and/or waitress while DW's employment varied. 5RP 378-79.

[6] Det. Landis testified on direct regarding his training as a child abuse investigator and the protocol for interviewing children. 3RP 202-05. He acknowledged that his interview

D. ARGUMENT

Williams asserts that his waiver of his right to counsel was not unequivocal because it was conditioned on his being provided standby counsel. While Williams invited the very error he asserts rendered his waiver invalid by specifically requesting that standby counsel be appointed, which it was, the court engaged in a thorough colloquy with Williams before reluctantly granting Williams' request to represent himself because Williams refused to be represented by defense counsel. At the time the court entertained Williams' request, Williams request was unequivocal, knowing, intelligent and voluntary.

Williams also asserts that the trial court erred in denying his motion to sever the counts regarding EW from those regarding MW because of the risk of accumulation of evidence and because the offenses were not cross admissible under ER 404(b). The trial court did not abuse its discretion in denying the severance motion because the counts had been properly joined for trial, the evidence was cross-admissible, the same witnesses would be called at each trial, and the jury was instructed to consider each count separately. The counts were cross admissible under ER 404(b) to show Williams' common design to take advantage of his nieces in order to sexually abuse them. Williams exploited his nieces'

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with MW had been different than others because she had been difficult to understand due

trust in him as an uncle and their age in order to manipulate them, and enticed them with offers of money or things they wanted, so that he could abuse them sexually. Defense pointed to no specific prejudice that would arise from trying the counts together, just that Williams would not get a fair trial because of the potential for the jury to aggregate the totality of the evidence and sexual nature of the charges. Williams failed to establish that joinder was so manifestly prejudicial as to outweigh the desire for judicial economy.

Williams also asserts that the trial court erred in denying his discovery request for the girls' school records, over their objection, and to permit his attorney to participate in the in camera review of those records. Williams' request was a discretionary discovery request because the records were held by a third party, not under the prosecutor's control. Given the privacy interest related to the records and the girls' assertion of that privacy interest, the trial court did not abuse its discretion in conducting a review of the records in camera. When defense counsel made his oral request to participate in the in camera review, the court had already reviewed the records and determined there were no discoverable records within them. In its ruling the court detailed the nature of the records that had been produced by the school district before denying

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to her speech impediment.3RP 218.

defense counsel's renewed request to review them himself. The trial court did not abuse its discretion in denying the discovery request for the victims' school records.

Finally, Williams claims under the Sixth and Fourteenth Amendments the State was required to prove to a jury beyond a reasonable doubt that Williams' prior conviction for Rape of a Child in the First Degree was a strike offense, which subjected him to a life sentence without parole as a persistent offender. The State was only required to prove Williams' prior strike offense by a preponderance of the evidence and was not required to prove it to a jury, as this Court held in State v. Witherspoon.[7]

1. Williams validly waived his right to counsel when he chose to go pro se.

A criminal defendant has a right to represent him or herself pursuant to the Sixth Amendment. Faretta v. California, 422 U.S. 806, 819-21, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). A defendant may waive his converse right to counsel and proceed pro se, but s/he must do so unequivocally. State v. DeWeese, 117 Wn.2d 369, 377, 816 P.2d 1 (1991); State v. Silva, 108 Wn. App. 536, 539, 31 P.3d 729 (2001). "This right is so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice." State v. Madsen,

168 Wn.2d 496, 503, 229 P.3d 714 (2010). The only grounds upon which a court may deny a request to proceed pro se are that the request is untimely, equivocal, involuntary, or "made without a general understanding of the consequences." Id. at 504-05. The validity of such a waiver is reviewed for an abuse of discretion. In re Rhome, 172 Wn.2d 654, 667, 260 P.3d 874 (2011).

A waiver of either the right to counsel or the right to represent oneself must be knowing, intelligent, and voluntary. Silva, 108 Wn. App. at 539, Faretta, 422 U.S. at 835. The focus of the waiver of the right to counsel inquiry is to ensure that a defendant is "aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" Faretta, 422 U.S. at 835; *accord*, City of Bellevue v. Acrey, 103 Wn.2d 203, 691 P.2d 957 (1984). While a colloquy is the preferred means of ensuring a valid waiver of the right to counsel, the court may look to evidence in the "record that shows the defendant's actual awareness of the risks of self-representation." Acrey, 103 Wn.2d at 211. If a colloquy is conducted, it should generally address the nature and classification of the charges, the maximum penalty upon conviction, as well as advise the defendant that there are technical rules that apply to the presentation of

[7] State v. Witherspoon, 180 Wn.2d 875, 329 P.3d 888 (2014).

evidence. Id. The validity of a waiver of the right to counsel depends upon the facts and circumstances of the individual case. There is no specific list of disadvantages that must be conveyed to the defendant for the waiver to be valid. DeWeese, 117 Wn.2d at 378. The validity of the waiver is determined based upon the defendant's knowledge at the time of the waiver. State v. Modica, 136 Wn. App. 434, 445, 149 P.3d 446 (2006), *aff'd*, 164 Wn.2d 83 (2008).

When an indigent defendant is dissatisfied with current counsel, but fails to provide the court with a legitimate basis for substitution of counsel, the court can require the defendant to choose between continuing with current counsel or proceeding pro se. DeWeese, 117 Wn.2d at 376. "If the defendant chooses not to continue with appointed counsel, requiring such a defendant to proceed pro se does not violate the defendant's constitutional right to be represented by counsel, and may represent a valid waiver of that right." Id. In determining whether a defendant's decision to waive the right to counsel is knowing and intelligent, the court may consider defendant's insistence that he not be represented by a particular attorney. U.S. v. Gallup, 838 F.2d 105, 110 (4th Cir. 1988). A defendant's clear and knowing request to proceed pro se is not rendered equivocal if it is motivated by something other than purely the desire to represent him or herself. Modica, 136 Wn. App. at 442.

a. invited error

Williams asserts that his waiver was not valid because he did not fully understand the magnitude of representing himself because the judge told him before he waived that he could have standby counsel. He, however, was provided standby counsel specifically at his request. The invited error doctrine "prohibits a party from setting up an error … and then complaining about it on appeal." In re Thompson, 141 Wn.2d 712, 723, 10 P.3d 380 (2000). This is a "strict rule." State v. Studd, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999). The doctrine requires some affirmative action on the part of the defendant. Thompson, 141 Wn.2d at 724. Generally, where the defendant takes knowing and voluntary actions to set up the error, the invited error doctrine applies; where the defendat's actions are not voluntary, it does not. In re Thompson, 141 Wn.2d at 724. The doctrine applies even in the context of constitutional error. Studd, 137 Wn.2d at 546, 548. This rule recognizes that "[t]o hold otherwise would put a premium on defendants misleading trial courts." State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

Williams asserts he wasn't aware of the "magnitude of the undertaking" of self-representation because the court informed him he could have standby counsel. This, however, was at Williams' request. While Williams initially requested to represent himself in January of 2014,

it was clear that Williams thought he could get another, specific attorney by doing so. 1RP 14-17, 24. It also was clear that his request to go pro se was not unequivocal at that point because he said he "partly and partly not" wanted to represent himself, and that was how the judge interpreted the request. 1RP 26, 36. However, months later on October 9th, defense counsel informed the court that he believed that Williams wanted to go pro se with himself as standby counsel. 1RP 136. Williams immediately told the court: "I would like to go pro se with standby counsel." 1RP 136. The judge then informed him he had no right to standby counsel, but confirmed with defense counsel that he was willing to serve as standby counsel, and explained the role of standby counsel to Williams. 1RP 137. After engaging in a colloquy with Williams regarding self representation, the judge asked him if he still wanted to give up his right to be fully represented by assigned defense counsel, and Williams answered "If I have standby counsel, I think I can do it." 1RP 146. After some discussion of ministerial matters, the judge again inquired of Williams and then found that his waiver was knowing, intelligent and voluntary but encouraged him to reconsider. 1RP 151-52. He further advised that defense counsel would only serve as standby counsel, not co-counsel at trial, that he would not question witnesses and that he had no right to co-counsel. 1RP 152-53.

During pre-trial motions Williams indicated he might need some assistance from standby counsel in arguing somee previously filed motions. 2RP 8-10. The judge indicated he was willing to have standby counsel argue those motions without deeming Williams to have waived or changed standby counsel's status, if Williams was comfortable with that, to which Williams responded: "Cool. Thank you, Your Honor." 2RP 11. At the end of the hearing, the judge again encouraged Williams to consider carefully about proceeding pro se, and if he changed his mind, he should not hesitate to inform the judge. 2RP 50-51.

At the beginning of trial, the prosecutor asked the court to address the standby counsel issue again, to ensure that Williams was happy with the level of assistance standby counsel was providing since standby counsel appeared to be acting more as counsel than standby. 3RP 160-64. The judge informed Williams that he could have as much or as little assistance from standby counsel as he wished, and informed him that if he didn't want the assistance, he just needed to say so, Williams responded: "We both are. I think it's mutual." 2RP 165.

Williams specifically requested that he be permitted to represent himself with defense counsel as standby counsel. The court essentially permitted Williams to dictate the scope of standby counsel's services until trial. Williams was clearly content with stanby counsel's assistance up

until trial. Soon after trial began, Williams relinquished his self representation and was represented for almost all of the trial by defense counsel. Williams asked for standby counsel as part of his request to go pro se. He was given standby counsel pursuant to that request. He invited any error regarding the validity of his waiver based on availability of standby counsel.

b. valid waiver

Even assuming the invited error doctrine doesn't apply to the waiver of the right to counsel, the trial court did not abuse its discretion in concluding that Williams' waiver was knowing, intelligent and voluntary. The record demonstrates that at the time Williams waived his right to counsel, Williams was aware that he wouldn't get substitute counsel and that he did not have a right to standby counsel, although the judge had indicated he was inclined to appoint defense counsel as standby counsel.

A defendant is not constitutionally entitled to appointment of standby counsel. State v. Fisher, 188 Wn. App. 924, 355 P.3d 1188 (2015). "Standby counsel's role is not to represent the defendant, however, but to provide technical information, and 'to be available to represent the accused in the event that termination of the defendant's self-representation is necessary.'" State v. Bebb, 108 Wn.2d 515, 525, 740 P.2d 829 (1987) (quoting Faretta, 422 U.S. at 834 n.46). A court may

appoint standby counsel over a defendant's objections to "explain court rulings and requirements to the defendant and to assure a defendant lacking in legal knowledge does not interfere with the administration of justice." State v. McDonald, 143 Wn.2d 506, 511, 22 P.3d 791 (2001).

As noted above, when Williams first made his request to go pro se in January, the judge ultimately concluded that it did not appear that was really what Williams wanted and did not grant it. 1RP 35-36. It appeared Williams wanted to substitute in a specific, private, attorney, even though he could not afford to hire him, and had been under the mistaken impression he could do so if he moved to fire his attorney and said he wanted to represent himself. 1RP 14-17, 24-27, 32-33. At that time defense counsel informed the court he thought standby counsel would be necessary due to the defense expert witness and that it would be "tremendously problematic" for Williams to go pro se without standby counsel. 1RP 18-19. The judge informed Williams that appointment of standby counsel was not something that was universally done, but it was done frequently. 1RP 19.

Over eight months later, Williams renewed his request to represent himself.[8] When Williams stated he wanted to represent himself with standby counsel, the judge informed him that he had no right to standby

counsel. After confirming that defense counsel was willing to serve as standby counsel, the judge informed Williams that standby counsel was not there to simply do whatever he wanted him to do, but was there to provide assistance, and in some cases to take over full representation if requested to do so. 1RP 136-37. The court engaged in a colloquy with Williams, reviewing with him whether he had ever studied law or represented himself before; what the maximum penalty, life without parole, was; and that he would be held to the same standards as an attorney, that the court could not advise him, and that he would be on his own, although he might have standby counsel available to him. 1RP 139-40. The judge also inquired whether he was familiar with jury selection procedure, the rules of evidence and criminal procedure, and that those rules governed how the trial would be conducted. 1RP 140-41.

The judge then inquired why Williams wanted to represent himself, to which he replied that he knew his case, that he didn't think defense counsel's representation was in his best interest. 1RP 142. The judge advised that he believed defense counsel understood Williams' case thoroughly[9] and he was a very good lawyer, and then asked if Williams really believed he was better off representing himself. 1RP 143. Williams

[8] Williams did interject during a hearing in April that he wanted to go pro se, but that was not the issue before the court at that time. 1RP 109.

[9] Defense counsel was the same counsel who had represented Williams in the first trial.

said yes, at that point in time. The judge then asked if anyone had made any promises or threats to get him to waive his right to counsel, to which Williams replied no. 1RP 143. The judge explained he thought Williams would be better off represented by a skilled, attorney like defense counsel and that he thought it was unwise for Williams to represent himself particularly given the seriousness of the charges, that while Williams knew the facts of the case, he did not know the law. 1RP 143-44. The judge stated Williams had the right to represent himself but he urged Williams to reconsider, as he did not believe that Williams would receive the best representation if he represented himself. 1RP 143-44.

After trying to talk about the facts of the case, Williams stated: "What I'm trying to say is that I don't feel that he is probable (sic) going to want to defend me. If you deny me pro se, I want another lawyer. I do not want Tom as my lawyer." 1RP 145. The judge then asked Williams if in light of the penalty he was facing and the difficulties he would face if he represented himself, he still wanted to give up his right to be represented fully by defense counsel. Williams replied, "If I have standby counsel, I think I can do it…" When asked if his decision was voluntary, Williams replied it was. 1RP 146. After encouraging him to reconsider, the judge eventually ruled:

> I'll find that you knowingly, voluntarily and, I suppose, intelligently[10], waived your right to have counsel represent you fully in this proceeding and permit you to represent yourself with Mr. Fryer as standby counsel.
>
> If you change your mind, and I hope you do, *he might be able to jump in and help you out*. But we are not going to, if you change your mind at the last minute, we are not going to continue this case, we are going to go ahead.

1RP 152 (emphasis added). Williams indicated he understood. 1RP 152. Both before and during trial, the judge continued to encourage Williams to reconsider representing himself. 2RP50-51; 3RP 165, 315. After one day's worth of trial testimony, Williams did in fact reconsider, and defense counsel represented him for the rest of the trial. 4RP 3-5.

The judge, who had also heard the first trial, clearly was reluctant to permit Williams to represent himself given the serious nature of the charges Williams faced. While Williams did originally indicate he wanted different counsel, he understood by the end of the hearing in January that was not an option unless he could demonstrate an actual conflict of interest. At the time Williams renewed his request to go pro se, many months later, he did not reference wanting another attorney as the reason for his request, only that he wished to go pro se. Williams did request to have standby counsel appointed when he requested to represent himself, but that does not mean he did not understand the enormity of the

[10] The judge felt no defendant could really make an intelligent waiver of the right to

undertaking or that his waiver was not knowing, intelligent and voluntary. The judge engaged in a thorough colloquy with Williams, advised him numerous times not to represent himself and Williams persisted in wanting to represent himself. He was aware of the penalty he faced, from the colloquy and having already been sentenced as a persistent offender. He was informed that he would be on his own and that he would be held to the same standards as an attorney even if standby counsel were appointed.

During the colloquy the judge did not inform Williams he would substitute in defense counsel whenever Williams wanted, but said "… sometimes an individual decides that they wish standby counsel to take over full representation, and if standby counsel is properly prepared, that's fine." 1RP 137. While the judge informed Williams that he was willing to appoint standby counsel, he also told Williams that there was no right to standby counsel. Moreover, defense counsel had already advised the court that standby counsel would need to be appointed in his opinion and standby counsel was appointed. It was not an abuse of discretion for the judge to appoint standby counsel, and nor an abuse of discretion for the judge to find, however reluctantly, that Williams' waiver was knowing, intelligent and voluntary.

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counsel. RP 152.

In a similar case, State v. Mehrabian, 175 Wn. App. 678, 308 P.3d 660 (2013), *rev. den.*, 178 Wn.2d 1022 (2013), the defendant also asserted on appeal that he had not unequivocally waived his right to counsel when he requested to represent himself with the assistance of standby counsel. After the defendant's first trial ended in a mistrial, the defendant requested to discharge his retained attorney and represent himself. Id. During the colloquy the defendant stated he understood he was not entitled to standby counsel and that he wanted to represent himself because he understood his case better than anyone else. Id. at 685-86. The judge ensured that the defendant was aware an attorney could be appointed for him, but the defendant said he didn't want a public defender. When the judge inquired whether he still wanted to represent himself knowing the penalties and despite the difficulties, the defendant affirmed that he did. Id. at 686-87. When the judge inquired again later, the defendant was less sure, and the prosecutor expressed concern that his request was not unequivocal. Id. at 687. The defendant then asked, repeatedly, to go pro se with his former private attorney as standby counsel. Id. The judge then granted the defendant's request to represent himself and appointed private counsel as standby counsel. Id. A couple weeks later, the private attorney requested to withdraw as standby counsel since he was not getting paid. Id. at 688. While the defendant preferred the attorney to remain as standby counsel,

he was fine with that as long as he had someone as standby counsel. The judge informed him he did not have a right to standby counsel at public expense, and told him to reconsider whether he wanted to continue to represent himself. Id. at 688. The defendant ultimately chose to continue to represent himself without standby counsel. Id.

On appeal the defendant claimed his request to represent himself was not unequivocal, characterizing his request as a "conditional waiver dependent upon the appointment of standby counsel." Id. at 691. Looking at the record as a whole, the court determined that the defendant's request had been unequivocal. Id. at 691-92. While the defendant had requested standby counsel, the court noted that the defendant had been informed that he did not have the right to standby counsel. The court concluded the trial court had not abused its discretion in finding a valid waiver of the right to counsel. Id.

2. The court did not abuse its discretion in denying the motion to sever because the evidence of sexual abuse of the girls was cross-admissible under ER 404(b) and EW's complaint arose out of the investigation of MW's disclosure.

Williams asserts the trial court erred in denying his motion for severance because he was prejudiced by the "accumulation of evidence" and because the counts were not cross admissible, the same motion he made at the first trial. The multiple counts involving the two sisters were

properly joined for trial and were cross admissible under ER 404(b). Defense failed to identify any specific prejudice and failed to establish manifest prejudice that outweighed the desire for judicial economy. The court did not abuse its discretion in denying the motion.

Williams' offenses were properly joined when filed, and he does not contend otherwise. Properly joined offenses may be severed if the court determines that severance will promote a fair determination of the defendant's guilt or innocence for each offense. CrR 4.4(b). A defendant seeking severance has the burden of demonstrating that joinder is so manifestly prejudicial as to outweigh concerns for judicial economy. State v. Russell, 125 Wn.2d 24, 135, 882 P.2d 747 (1994). The failure of the trial court to sever counts is reversible only upon a showing that the court's decision was a manifest abuse of discretion. State v. Bythrow, 114 Wn.2d 713, 717-18, 790 P.2d 154 (1990). "In order to support a finding that the trial court abused its discretion in denying severance, the defendant must be able to point to specific prejudice." Id. at 720.

In reviewing the denial of a motion to sever, the court must balance the potential prejudice against the following prejudice-mitigating factors: (1) the jury's ability to compartmentalize the evidence, (2) the strength of the State's evidence on each count; (3) the clarity of defenses as to each count; (4) the court's instruction to the jury to consider each

count separately; and (5) the cross-admissibility of the evidence of the offenses charged even if not joined for trial. State v. Kalakosky, 121 Wn.2d 525, 852 P.2d 1064 (1993). "The fact that separate counts would not be cross admissible in separate proceedings does not necessarily represent a sufficient ground to sever as a matter of law." Id. at 538.

a. cross admissibility under ER 404(b)

Williams' assertion that the trial court abused its discretion in denying his severance motion relies primarily upon the court's determination that the counts regarding EW would be cross admissible as to those regarding MW. Much of the evidence from each count was cross-admissible regarding the other counts. Williams used cameras with both girls to view their vaginas. Both girls related similar instances of abuse, vaginal touching, vaginal digital penetration and touching and kissing of their breasts. Williams used things the girls wanted as a means of ingratiating himself and manipulating them so he could abuse them. Williams also told them both to keep the abuse secret.

In order to admit evidence of other crimes or misconduct under ER 404(b), the court applies a four factor test:

> the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged and (4) weigh the probative value against the prejudicial effect.

State v. Kilgore, 147 Wn.2d 288, 292, 53 P.3d 974 (2002). A court's determinations regarding relevance and balancing of probativeness versus prejudice are reviewed for abuse of discretion. State v. Sexsmith, 138 Wn. App. 497, 505-06, 157 P.3d 901 (2007), *rev. denied*, 163 Wn.2d 1014 (2008). The probative value of ER 404(b) evidence is substantial in cases where the proof that the sex abuse occurred depends almost exclusively on the testimony of the child victim. Id. at 506.

Williams also faults the court for not conducting its ER 404(b) analysis on the record. Failure to conduct the ER 404(b) analysis on the record is harmless as long as the record shows that the court made a conscious decision to admit the evidence after weighing the consequences of its admission. State v. Carleton, 82 Wn. App. 680, 685, 919 P.2d 128 (1996). Failure to conduct the required balancing on the record is not reversible error where the record reflects that the trial court adopted the argument of one of the parties regarding balancing the probative value against the prejudice. Id. The record must be sufficient for "the reviewing court to determine that the trial court, if it had considered the relative weight of probative value and prejudice, would still have admitted the evidence." Id. at 686. While the judge did not put his analysis on the record, he had previously heard and ruled on the same motion before the first trial and relied upon the State's analysis in its memoranda. The

record is sufficient for this court's review[11]. 1RP 109-111, 3RP 169; CP 77-97. The court did consider the relative weight of probative value and prejudice and made a conscious decision to admit the evidence.

Evidence of misconduct is admissible to show common plan or scheme when an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes. State v. Lough, 125 Wn.2d 847, 855, 889 P.2d 487 (1995). Conduct is sufficiently similar when the similarity indicates design, not merely coincidence. Id. at 860. The misconduct and the charged crime "must demonstrate 'such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which' the two are simply "individual manifestations." Id. The court does not itself make a factual finding of common plan but rather decides whether the evidence is sufficient to allow a jury to conclude there was a common scheme or plan. Lough, 125 Wn.2d at 852. "Where a defendant is charged with child rape or child molestation, the existence of 'a design to fulfill sexual compulsions evidenced by a pattern of past behavior' is probative of the defendant's guilt." Sexsmith, 138 Wn. App. at 504.

[11] The specific probative value proffered at the first trial was a common design to molest young female relatives, although the focus of the ER 404(b) analysis was on the prior conviction in the first trial. First Trial Vol. I RP 141, 165-68.

In Gresham, the court found that prior sexual offenses had been appropriately admitted at trial, alternatively, pursuant to ER 404(b) and therefore admission of the evidence under RCW 10.58.090 was harmless error. State v. Gresham, 173 Wn.2d 405, 422-23, 269 P.3d 207 (2012). The charged victim was the granddaughter of the defendant. The incidents occurred during a trip to a relative's house, where the defendant was sleeping and involved fondling of the granddaughter's vagina and genitals, as well as the defendant's putting the granddaughter's hand on his penis. Id. at 414-15. The defendant's prior sex offenses involved sexual abuse of the defendant's nieces, another granddaughter and a child of close friends of the defendant's family. Id. at 415. Those incidences occurred usually after everyone had gone to bed, either in the defendant's home or in hotel rooms while on trips. Id. The abuse involved fondling of the vagina and/or performing oral sex on the child. Id. The charged victim was either seven or eight at the time of the offense and the age of the other victims ranged from 5 to 13 years old. Id. at 414-15. The court concluded that the evidence with respect to the other granddaughter and the child of close friends was markedly similar to the charged crime in that the defendant took a trip with young girls and fondled the girls' genitals at night while other adults were sleeping. Id. at 422. While the defendant had also performed oral sex on the other victims, that difference was "not so great

as to dissuade a reasonable mind from finding that the instances are naturally to be explained as 'individual manifestations' of the same plan." Id. at 423. It also found that the fact that the abuse of the nieces occurred in the defendant's home and not while on trips did not preclude the abuse from being individual manifestations of a common plan where other details of the offenses were markedly similar to the charged offense. Id.

Here, pursuant to Gresham, the acts committed against EW and MW were cross admissible because they demonstrated a design to fulfill Williams' sexual compulsions, and the acts regarding EW and MW were "individual manifestations" of that plan. The incidents happened in the same places, either in the girls' residence or in Williams' trailer. They were both his nieces. Both girls experienced abuse that involved the use of a camera to view or take pictures of their vaginas. Williams told EW he wanted to draw her vagina, had her take off all her clothes, took pictures of her vagina with a Polaroid camera and then touched her breasts and vagina, kissed her vagina and digitally penetrated it. Williams had MW remove her clothes and used a surveillance camera to show her what her vagina looked like. He kissed her breasts, licked her vagina, digitally penetrated her vagina, as well as attempting penile penetration. He would tell the girls that they would have to do something before they got something they wanted: e.g., he told MW that she would have to go with

him in order to rent a video as an excuse to get her to his trailer where he abused her; he told EW she would have to do one thing before she could play the computer game she wanted to play and then had her watch him rub his penis. He also paid MW to wash his dog and used that as an opportunity to molest her in the bathroom. He made EW allow him to suck her breasts before he gave her money to buy an ice cream. He told both girls to keep it a secret. Williams exploited his nieces' trust in him and their age and manipulated them so he could abuse them sexually.

State v. Ramirez, 46 Wn. App. 223, 730 P.2d 98 (1986), cited by Williams is distinguishable because in that case the State argued that the evidence of the other sexual offense was admissible to show intent to show sexual gratification and absence of mistake, and the court concluded that neither of those elements were a material issue in the case. Id. at 227. The case also involved unrelated victims. Id. at 224-25. Here, the admissibility of the ER 404(b) was predicated upon a common design to sexually abuse his nieces. The evidence was relevant and probative in order to establish that the incidents occurred where Williams denied that the incidents ever happened and argued that the girls' disclosure arose because of a flawed investigation. *See*, Sexsmith, 138 Wn. App. at 506 (where defense was general denial, court did not abuse its discretion in admitting evidence of prior acts of child rape and molestation where child

victim's credibility was central to the case). The counts therefore were cross admissible.

b. severance

The trial court did not abuse its discretion in denying severance. As to the first two factors, the counts relating to EW and relating to MW were equally strong and easily compartmentalized. Both EW and MW provided detailed descriptions of at least a few incidents and MW had disclosed to a friend before being interviewed by Det. Landis. They both described similar incidents in which Williams used equipment to photo-graph or view their vaginas. EW's testimony was also corroborated by her behavior towards Williams, her avoidance of Williams whenever he was at the house and her later disclosure to her parents that Williams made her uncomfortable. The abuse against MW was separated in time from EW's.

As to the third factor, Williams' defense with respect to the two girls was similar and interconnected. Williams asserted that the girls' statements contained inconsistencies and had been tainted by the flawed investigation. The only difference in defenses was that Williams also argued that EW's testimony was not reliable because it lacked sufficient detail and EW's statement that it occurred when she was 8 or 9 didn't match up with when Williams moved onto the Blaine road property. 5RP 643-71.

As to the fourth factor, the jury was instructed to consider each count separately. CP 221 (Inst. No.19). The to-convict instructions also delineated that each count relied upon a separate and distinct act. CP 221, 223, 225-31 (Inst. No. 20-21, 23-29). Jurors are presumed to have followed the court's instructions. Russell, 125 Wn.2d at 27. The instructions properly mitigated any prejudice to Williams by joinder of the counts. Moreover, the prosecutor was careful in closing to specify what the basis was for each of the counts regarding each girl and reminded the jury that they had to determine each count individually, and that their decision on one count could not control their decision as to any other count. 5RP 618-20, 622, 626-27, 629-32,634-37, 689.

Regarding the 5th factor, in addition to the offenses being cross admissible, the counts were factually intertwined. EW's disclosure occurred during the course of the investigation into MW's disclosure. Both parents would have been called to testify[12] in each girl's case regarding the living arrangements and Williams' access to the girls. In addition, Det. Landis and Joan Gaasland-Smith, who testified about how children disclose sexual abuse and reasons why they don't disclose, would have been called to testify in both cases. As argued by the prosecutor at

[12] DW's testimony from the first trial was read into the record, but without the references to his brother's prior conviction for first degree rape of a child, which had been admitted in the first trial under RCW 10.58.090.

the first severance hearing, in addition to the counts being cross-admissible, the victims were sisters, their interviews occurred on the same day, the witnesses would be the same, the same evidence would be introduced, and therefore judicial economy weighed in favor of joinder. First Trial RP Vol. I 165-66.

The court denied the severance motion after having concluded that the counts would be cross admissible under ER 404(b), relying upon the argument of the prosecutor and its prior rulings[13]. 1RP 110-11. Defense did not identify any specific prejudice from the joinder, but argued that sex offenses are highly prejudicial and these offenses were not cross admissible. 1RP 109-10. The trial court did not abuse its discretion in finding the defense had not demonstrated joinder was so manifestly prejudicial as to outweigh the need for judicial economy.

Even if the specific instances of abuse would not have been cross admissible, this does not as a matter of law provide a sufficient basis for the requisite showing by the defense that manifest prejudice would result from a joint trial. Bythrow, 114 Wn.2d at 720, *see also,* State v. Markle, 118 Wn.2d 424, 439, 823 P.2d 1101(1992) (court did not abuse its discretion in denying severance motion where joinder had been appropriate and nature of the acts committed against the girls, the method

of contact and sexual abuse, was similar, and where both girls were present during some of the acts).

State v. Harris, 36 Wn. App. 746, 677 P.2d 202 (1984) relied upon by Williams is distinguishable. In that case a new trial was ordered because the appellate court concluded the two counts of forcible rape involving two different victims should have been severed for trial. There, however, the appellate court found that the two sexual offenses would not have been cross admissible. *See e.g.*, State v. Price, 127 Wn. App. 193, 204, 110 P.3d 1171 (2005) (State v. Harris distinguishable because other incidents were admissible under ER 404(b) to show lack of accident). The prosecutor also repeatedly drew attention to the fact the two offenses had been committed within weeks of one another. Harris, 36 Wn. App. at 749. Moreover, since the issuance of Harris, the Supreme Court in Markle held that severance is not required as a matter of law even if the separate counts are not cross admissible.

3. The trial court did not abuse its discretion in conducting the in camera review without defense counsel present.

Williams asserts that the trial court erred in denying his request for the school records of the victims and denying his attorney's request to be present at the in camera review of those records. Williams failed to

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[13] The court also ruled Williams' prior conviction regarding another niece admissible, but

demonstrate that the school records were material to his preparation of a defense. The trial court had broad discretion to address Williams' discretionary discovery request and it did not abuse that discretion in reviewing the records without counsel present.

A trial court has wide discretion in ruling on issues related to discovery. State v. Linden, 89 Wn. App. 184, 189-90, 947 P.2d 1284 (1997), *rev. denied*, 136 Wn.2d 1018 (1998). A trial court's determination as to whether to hold an in camera review regarding a request for discovery of privileged records is discretionary. State v. Diemel, 81 Wn. App. 464, 467, 914 P.2d 779 (1996). The denial of a motion for discovery will not be disturbed on appeal absent a manifest abuse of discretion. State v. Yates, 111 Wn.2d 793, 797, 765 P.2d 291 (1988). Even if the trial court erred in denying a discovery request, a defendant must prove that the error was prejudicial. Linden, 89 Wn. App. at 190. Trial court error is not reversible unless the error materially affected the outcome of the trial. Id.

a. any issue regarding standing was waived

Williams asserts that the prosecutor did not have standing to object to his discovery request for the victims' school records. Williams failed to assert this below and therefore waived it. *See*, State v. Harner, 153 Wn.2d 228, 234, 103 P.3d 738 (2004) (issue of standing was waived where it was

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the State chose not to introduce that evidence at trial.

not raised below). Moreover, the discovery rules contemplate the State's involvement in certain discovery requests of information held by third parties. *See*, CrR 4.7(d) (if material held by others would be discoverable if held by the prosecution, the prosecuting attorney shall attempt to cause such material to be made available to the defendant); CrR 4.8(b)(2) (notice must be given to a party when another party intends on serving a subpoena for production of items belonging to an alleged victim. CrR 4.8 also permits a party to move to quash or modify a subpoena for production of items if the subpoena would require disclosure of protected matter or if the subpoena exceeds the scope of discovery permitted by the rules. CrR 4.8(b)(4). The court rules contemplate the State's standing to object to or move to modify subpoenas regarding victims in a criminal case.

b. the court did not abuse its discretion in denying the request for school records

Williams' discovery request was for the victims' school records, materials not held by law enforcement. A defendant seeking material outside the prosecutor's files must proceed under CrR 4.7(d) or (e). Under CrR 4.7(d) a prosecutor must attempt to cause information not in their files to be provided to the defendant if it would be discoverable if contained in the prosecutor's files. CR 4.7(d). If the request falls outside the parameters of CrR 4.7(d), a defendant can seek discretionary disclosure under CrR 4.7(e) "[u]pon a showing of materiality to the

preparation of the defense, and if the request is reasonable, the court in its discretion may require disclosure to the defendant of the relevant material and information …" CrR 4.7(e)(1). A court can condition or deny disclosure of reasonable requests for material information if it finds there is a substantial risk of embarrassment resulting from the disclosure which outweighs the benefit to the defendant. CrR 4.7(e)(2). In addition, a court is permitted to con-sider discovery requests in camera if a party's requests it. CrR 4.7(h)(6).

If a prosecutor is not obligated to provide the item of discovery under the court rules, the defense must show that the requested discovery is material to preparation of the defense in order to be entitled to it. CrR4.7(e)(1); State v. Blackwell, 120 Wn.2d 822, 828, 845 P.2d 1017 (1993). The mere possibility that an item might be helpful to the defense or might have affected the outcome of the trial does not establish that the item was material to the preparation of the defense. Blackwell, 120 Wn.2d at 828. In order to meet its obligation under CrR 4.7(e), the defense must "advance some factual predicate which makes it reasonably likely that the requested [discovery] will bear information material to his or her defense." Id. at 830. In order "to obtain an in camera review of privileged records a defendant must establish that the records are at least material." State v. Diemel, 81 Wn. App. 464, 468, 914 P.2d 779 (1996).

When defense counsel made the request for a subpoena duces tecum for school records, counsel told the court the exculpatory evidence he was seeking was documents regarding the victims' veracity in a school setting, that some school officials who were present when law enforcement contacted the girls for the interviews may have memorialized that contact, that there had been a fair bit of social services intervention and the school district might have been involved in that. 1RP 8, 11. He also indicated that it was incumbent upon him to "leave no stone unturned." 1RP 9. The prosecutor objected, noting it was an overly broad request, the girls didn't want their records released, and there might be counseling records within the records. 1RP 10. The judge indicated there would need to be an in camera review and set over the hearing. 1RP 11.

At the subsequent hearing, defense counsel also indicated he was interested in non-disclosures as well. 1RP 43-44. While he believed school records were deemed private by statute, he thought there would be exculpatory material because there had been exculpatory information in the CPS records. He wanted all school records except academic records. 1RP 46. The prosecutor continued to object to disclosure and requested an in camera review of the records if the court concluded that defense had met its burden to show there was material, discoverable information in the records. 1RP 47-52. The court ruled that it would issue the subpoena,

subject to an in camera review, noting the request had to be narrower than everything except grades. 1RP 53.

At the next hearing regarding the school records, defense counsel made a request to be present at the in camera review, however the court had already reviewed the records. 1RP 118-19. The court then summarized the large boxes of documents it had reviewed:

> [Regarding EW] I went through everything, read everything. I found documents related to her and concerning the evaluations of her hearing and vision, phonics and articulation, math skills, various types of forms assessments, um, things related to visual reasoning, such as shape recognition, puzzles, block patterns, assessments related to her writing skills and reading skills, um things declaring or stating her interest in sports, math and science. It's stated that she was generally self motivated and independent, had great recall of verbal exchanges and needed some degree of help in reading and was hard working.
>
> As to MW, um it was much the same kind of thing, and as for both children indications that they were characterized by their, … as being positive, hard working. The documents set forth each of their academic strengths and weaknesses, stated that each had, … some work that could be done in phonics and articulation of speech. And, um, in general other than that, the documents set forth education goals and objectives.

1RP 119-20. The judge clarified that he had found nothing that related to behavior or to "social backdrop," explaining he specifically had looked for that sort of information as requested by defense counsel, and concluded there was nothing discoverable in the documents. 1RP 120-21. Defense counsel then requested an opportunity to review the documents himself to

which the prosecutor objected arguing it would be a fishing expedition. 1RP 122. The judge denied counsel's request. 1RP 122.

The trial court did not abuse its discretion in subjecting the school records to an in camera review and denying the request for those records after reviewing them. The court was aware the victims objected to their school records being disclosed and that there may have been some school counseling records included within those records. The judge reviewed all the school records that had been produced, detailed the nature of the records for defense counsel and concluded there were no discoverable records within them. The in camera review was not an abuse of discretion given the victims' objections to the disclosure and the lack of a particularized showing of materiality of the records.

Williams asserts that no privilege attached to the school record documents. However, his request included any documents from the school "counselors" and he failed to contend that the school counselors did not fall within the parameters of RCW 18.19.060 regarding those counselors required to comply with the confidentiality requirements of RCW 18.19.180. Even if school counseling records weren't privileged, the court could certainly consider those privacy interests in considering the defense request for discretionary discovery under CrR 4.7(e). *See,* Kalokosky, 121 Wn.2d 547-48 (Washington's Victims of Sexual Assault

Act recognizes the privacy interests of sexual assault victims in their counseling records). Moreover, while the Federal Educational Records Privacy Act does not create a "privilege" per se for school records, it certainly contemplates a privacy interest in those records, and defense acknowledged such an interest. 20 U.S.C. §1232g. CrR 4.7(h)(6) specifically provides that the trial court can condition any showing of cause for denial or regulation of disclosure of discovery upon an in camera review. Before releasing school records, other courts have held the trial court must balance the defendant's identified need for the records against the privacy interests of the student, and if the defendant's needs outweigh the privacy interest, the court should conduct an in camera review of the records. *See, e.g.*, People v. Wittrein, 221 P.3d 1076, 1085 (Colo. 2009). Finally, as Williams failed to establish the materiality of the records, the trial court need not have even conducted an in camera review of the school records. *See*, State v. Mak, 105 Wn.2d 692, 705, 718 P.2d 407 (1986), *overruled on other grounds by* State v. Hill, 123 Wn.2d 641 (1994) (where defendant only established documents might contain evidence critical to his defense or might lead to other evidence, trial court was not required to conduct in camera review of police department's internal investigative files).[14]

[14] The records have been designated so that this Court may review them to determine

c. the court did not abuse its discretion in denying William's counsel's request to be involved in the in camera review

Williams asserts that the trial court erred in not permitting defense counsel to be present when it conducted its in camera review. At the point defense counsel made his verbal request, the judge already knew what the records contained, and, having been the judge on the first trial, had been well aware of the nature of the case and the defense when he examined the records. The judge did not abuse his discretion in denying the request.

Williams relies upon Zaal v. State, 602 A.2d 1247 (Maryland 1992), in asserting defense counsel was entitled to be present at the in camera review or to review the records himself, and that failure to permit that violated his due process rights. Zaal does not hold, however, that a trial court *must* permit defense counsel access to the in camera review of school records. It held that a trial court *may* provide such access after conducting a balancing of a student's privacy interest in school records and the defendant's identified need for such records. Id. at 87. It also held the court can conduct an in camera review itself. Id. Ultimately, it held the trial court in that case had misapplied the test for determining what evidence would be discoverable, as opposed to admissible, and, after its

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whether the trial court abused its discretion in denying discovery of those record should the Court determine an independent review of them is necessary. CP 332, Sealed Ex. 1.

own review of the school records, concluded it would be appropriate to allow counsel controlled access to the records upon remand. Id.

The trial court did not abuse its discretion in reviewing the school records itself in camera, particularly given the lack of a showing of materiality and that the request included counseling records. Moreover, reversal is not required where defense has not shown that the error was prejudicial, i.e., that the error materially affected the outcome of the trial.

4. The State was not required to prove Williams' prior strike to a jury beyond a reasonable doubt.

Williams contends that his federal constitutional rights under the Sixth and Fourteenth Amendments, to a jury trial and to proof beyond a reasonable doubt, were violated when the trial court, rather than a jury, found the existence of his prior strike offense. These arguments have been rejected repeatedly by Washington courts and most recently in State v. Witherspoon, 180 Wn.2d 875, 329 P.3d 888 (2014). Williams fails to address Witherspoon. The law continues to hold that a prior strike does not need to be proved to a jury beyond a reasonable doubt.

The court in Witherspoon addressed a similar argument that under Alleyne v. United States, __ U.S. __, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013) and Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), prior strike offenses must be tried to a jury and under the reasonable doubt standard. The court ultimately stated:

> … it is settled law in this state that the procedures of the POAA do not violate federal or state due process. Neither the federal nor state constitution requires that previous strike offenses be proved to a jury. Furthermore, the proper standard of proof for prior convictions is by a preponderance of the evidence.

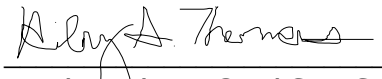
Witherspoon, 180 Wn.2d at 893. Williams does not distinguish Witherspoon or even reference it in his brief. Williams was not entitled to a determination of his persistent offender status by a jury beyond a reasonable doubt, and the trial court properly made the determination.

Even if the State were required to prove Williams prior rape of a child in the first degree conviction beyond a reasonable doubt, the State's evidence, produced at the first sentencing, met that burden. The State produced the judgment and sentence and plea statement for Williams' prior conviction, Williams did not contest that he was the person convicted of that offense, and testimony had been produced at the first trial from Williams' brother that he had been convicted of that offense. First Trial RP Vol VI 964; CP 325, Ex. 1, 2.

E. CONCLUSION

The State requests this Court deny Williams' appeal.

Respectfully submitted this 12th day of January, 2016.



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Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the mail a properly stamped and addressed envelope, or caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Appellant's attorney, addressed as follows:

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NAME **DATE** **1/12/16**