

63478-0

63478-0

NO. 63478-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DANIEL JOHNSON,

Appellant.

2010 JUN -2 PM 2:41

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA CAHAN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the trial court acted within its discretion in admitting evidence of appellant Daniel Johnson's previous sex offenses under RCW 10.58.090.

2. Whether Johnson has not shown that the admission of evidence under RCW 10.58.090 violated the federal or state ex post facto clauses.

3. Whether Johnson has failed to establish that the legislature's enactment of RCW 10.58.090 violated the separation of powers.

4. Whether the trial court properly sentenced Johnson as a persistent offender on his convictions for first-degree rape of a child and first-degree child molestation.

B. STATEMENT OF THE CASE

1. JOHNSON'S SEXUAL ABUSE OF M.B.

M.B. was born on July 23, 2000. RP 1064.¹ Her parents, Jason Baker and Havalah Hocking, never married. RP 731-32, 731-32, 1064-65. Beginning when M.B. was 18 months old, her

¹ The report of proceedings consists of 12 volumes. Pages are sequentially numbered throughout the volumes.

father took custody of her and acted as her primary parent.

RP 732.

From 2003 to approximately 2006, M.B. and her father lived at a house on 9th Avenue Southwest in Seattle. RP 1068, 1095. M.B.'s paternal grandmother Deborah Montgomery, M.B.'s maternal great-uncle Mike Ragan,² and M.B.'s great-grandmother Marilyn Montgomery also lived in the house. RP 549-51, 1069-70. M.B.'s mother and her infant son occasionally stayed at the residence. RP 735. M.B.'s father and grandmother worked nights, leaving Ragan to look after M.B. during the day. RP 556, 1072-73.

Appellant Daniel Johnson, who was in his late 50s, lived next door. RP 557-58, 1074-75, 1434. He frequently socialized and drank with Ragan. RP 557-58, 623, 662-63. Both men were alcoholics. RP 623. Johnson also befriended M.B.; she would occasionally visit him at his residence. RP 562, 738.

Sometime in late 2004 or early 2005, Johnson was evicted from his residence and moved into the garage in M.B.'s house. RP 674, 1077-79, 1479. Johnson converted the garage into a

² Ragan was also Montgomery's boyfriend during this time. RP 548, 657-58.

bedroom and had access to the rest of the house. RP 567-69, 626-27, 1082.

M.B. spent considerable time in Johnson's room. RP 575-76, 1083. Johnson would invite her to watch cartoons and play video games. RP 576, 744, 836-39, 1083. He would give her ice cream. RP 836. Once a week, Johnson would take M.B. out to a movie. RP 582, 840, 1088. He asked her to call him "Grandpa." RP 573-74.

Unbeknownst to the adults, Johnson was sexually abusing M.B. On multiple occasions when she visited him in his room, Johnson had M.B. sit on his belly and forced her to engage in anal intercourse. RP 844-47; Ex. 5 at 17, 22-24, 47. Other times, Johnson forced M.B. to perform oral sex. RP 847-48; Ex. 5 at 19, 47. M.B. described a white "salty" substance that came out of his penis, which she spit out. RP 848; Ex. 5 at 25, 31. At least one time, when Johnson took M.B. out to a movie, he placed his hand inside of her shirt and fondled her chest. RP 849; Ex. 5 at 16, 20-21.

Johnson showed M.B. child pornography on his computer. She saw pictures and a video of a girl named "Jessica."

RP 867-68; Ex. 5 at 34-39. In the video, Jessica was wearing a dress and took off her underpants. Ex. 5 at 34-36.

Johnson told M.B. not to tell anyone or he would go to jail. RP 849; Ex. 5 at 16, 34.

In retrospect, there were clues that things were amiss. When M.B. was in Johnson's room, he always kept the door shut and frequently locked it. RP 576-78, 676, 1086. Sometimes, when Ragan would come get her, there would be a long delay before Johnson unlocked and opened the door. RP 684-85, 697.

One time, after M.B. exited Johnson's room, she told Ragan that her "pee-pee hurts." RP 698. Another time, after M.B. left Johnson's room, she told Ragan that she was hurt, pulled down her pants and showed him what appeared to be blood on her underpants. RP 700-01.

Though M.B. had been potty trained by the age of three, she began to frequently wet her pants after Johnson moved into the house. RP 585, 752, 1089-90. One time, M.B. was bleeding as she passed a stool. RP 1092.

When M.B.'s grandmother told M.B. that she should never keep secrets from her parents, Johnson interjected and told her,

"except the one between us." RP 583. Johnson later told the grandmother that this secret concerned a birthday present for M.B.'s father. RP 584.

M.B. frequently sat on Johnson's lap. RP 571, 702. When M.B.'s father suggested that M.B. was too old to do so, Johnson disagreed and stated that his own daughter still sat on his lap. RP 572-73.

Despite this odd behavior, M.B.'s father was not suspicious; he believed that Johnson was simply a "lonely old guy" who enjoyed the company of kids. RP 1084.

In 2006, M.B. and her family moved into a new house and away from Johnson. RP 1095. Johnson continued to take her out to the movie theater. RP 1097. In July of 2007, Johnson invited himself to M.B.'s seventh birthday party and then took her out to visit with his niece. RP 1098-99. Later that day, Johnson called M.B.'s father and asked if she could spend the night with him. RP 1100. M.B.'s father instructed Johnson to bring her home. RP 1100.

2. THE DISCLOSURE OF THE ABUSE AND THE POLICE INVESTIGATION.

On November 20, 2007, M.B. and her father were watching a news report about AIDS, and she asked him about the disease. RP 1101. After her father explained that it was transferred by sexual intercourse, M.B. stated that she thought she might have AIDS. RP 1102. When her father told her she could not because she never had sex, M.B. responded, "No, I did. I had sex with Dan." RP 1102. M.B.'s father contacted the police. RP 945, 1174.

Seattle Police Department Detective Jess Pitts investigated the case. RP 1289-91. He arranged for Carolyn Webster, child interview specialist, to interview M.B. on December 4, 2007. RP 801-03, 1292; Ex 3 and 5. In the interview, M.B. gave a detailed account of the sexual abuse, including the viewing of the child pornography. Ex. 3 and 5.

On December 7, 2007, Seattle police detectives contacted Johnson at his residence and subsequently arrested him. RP 977-83, 1298-1305. Later that day, the police obtained a search warrant for Johnson's residence and seized numerous computers, hard drives, laptops, and CDs. RP 1306-35.

The next day, on December 8, 2007, while in the King County Jail, Johnson called his son, Steve Johnson, and asked him to remove the hard drives from Johnson's various computers, to destroy CDs in his dresser drawer, and to remove items under his pillow and bed. RP 1131-36; Ex. 21. Steve did not comply with his father's request. RP 1137-38. This call was recorded. Ex. 21.

On January 16, 2008, pediatric nurse Joanne Mettler examined M.B. RP 881. Though M.B. repeatedly told Mettler that she did not want to talk about what had happened, she mentioned that Johnson had videos of children on his computer and that "he stucked his hand up my shirt. He's a horrible man." RP 896-97. Mettler noted that M.B.'s genital area appeared normal. RP 897-910. Mettler explained that injuries in this area heal quickly and the vast majority of the time she observed no injuries in children reporting sexual abuse. RP 905-08.

The police subsequently found an enormous amount of child pornography on the hard drives of Johnson's computers and on his CDs. RP 925-33, 1200-34, 1368-69, 1383-92. Among other things, one video was a "how to" sexually abuse a child. RP 1391. Consistent with M.B.'s reports, there was a file with the title

"Jessica" containing images of a girl not wearing underpants.

RP 1375-79.

3. JOHNSON'S PREVIOUS SEX OFFENSES.

In the mid-1980's, Johnson molested three of his daughter's friends. He pled guilty to five sex offenses involving the girls.

A.H. lived in Johnson's neighborhood and was best friends with Johnson's daughter. RP 1045. Beginning in the second grade, A.H. spent a great deal of time over at Johnson's home; he was very generous and would give presents to A.H. RP 1047-50.

Johnson frequently talked about sex with A.H., and he watched a pornographic movie with her. RP 1051-53. He kept stacks of pornographic magazines in the house, which A.H. could easily see. RP 1050-51.

A.H. spent the night at Johnson's house two or three times a month, and Johnson made her and his daughter sleep in the same bed with him. RP 1054-56. One night, she felt Johnson poking her in her bottom, and he grabbed her hand and tried to place it on his penis. RP 1057. The next morning, she noticed white crusty splotches on her nightgown. RP 1058.

Another time, as Johnson held a door open for A.H., he grabbed her breast as she walked by and commented that it felt like rocks. RP 1059.

S.M. was another friend of Johnson's daughter and lived a few blocks away. RP 1011. Johnson acted as a second father to her; he was nice to her and would buy her candy and soda. RP 1012, 1033.

When S.M. was 11 and 12 years old, she spent time at Johnson's house. RP 1028-29. Several times, Johnson showed her pornographic movies. RP 1015-16. He told her that he had several books about sex and suggested that if she ever wanted to learn about sex, he could teach her. RP 1017.

Approximately six times, S.M. spent the night at Johnson's house, sleeping in his bedroom. RP 1030. One time, she woke up in the middle of the night, and Johnson was fondling her breasts and moved his hand to her vaginal area. RP 1032-33. On another night, Johnson got into bed naked and pressed his erect penis against her bottom. RP 1035.

J.W. was another friend of Johnson's daughter and lived across the street. RP 991. She also was exposed to Johnson's collection of pornographic magazines and pornographic movies.

RP 994-97. Beginning when she was six years old, J.W. occasionally spent the night at his house, sleeping in the same bed with Johnson's daughter. RP 999. Several times, after she went to bed, Johnson entered the bedroom and digitally penetrated her vagina. RP 1001, 1004.

A.H., S.M. and J.W. were all friends. After sharing their similar experiences with Johnson, they disclosed the abuse to their parents and the police. RP 1006, 1036-37, 1060-61.

On March 28, 1986, the police arrested Johnson. RP 1152. After his arrest, he called his son, Steve, and asked him to get rid of a bag of pictures hidden inside his television. RP 1142. Steve retrieved the bag and saw that it contained pictures of two naked girls. RP 1143. Steve knew the two girls. RP 1143-44. He burned the pictures. RP 1145.

Johnson was charged with multiple sex offenses. He pled guilty to indecent liberties (A.H.), second-degree statutory rape (J.W.); first-degree statutory rape (J.W.) and indecent liberties (S.M.). RP 1165-66, 1589-90.

Johnson later wrote to S.M. and apologized to her for the abuse. RP 1041. "I had a problem that I was not able to take

control of. I needed help but couldn't bring myself to go and get it. It took a lot of courage for you to speak out." RP 1041.

4. THE CHARGES AND THE TRIAL.

On December 11, 2007, the State charged Johnson with two counts of first-degree rape of a child and one count of first-degree child molestation. CP 1-2. The State later added four counts of possessing depictions of minors engaged in sexually explicit conduct. CP 13-16.

The matter went to trial in February of 2009. Prior to trial, the State moved to admit evidence relating to Johnson's prior sex offenses. Supp. CP ____ (Sub. No. 58). The State made an offer of proof about the anticipated testimony of Johnson's prior victims and submitted their prior statements and more recent interviews. Pretrial Ex. 5, 6, 8, 9, 10, 17, 18.

Johnson moved to exclude the evidence of his prior sex offenses and challenged the constitutionality of RCW 10.58.090. RP 422-27. The trial court rejected these challenges and admitted the evidence. RP 430-31, 494-97.

Prior to the testimony of the witnesses relating to Johnson's prior sex offenses and at the conclusion of trial, the court gave the following instruction:

Evidence regarding any prior offenses, standing alone, is not sufficient to prove the defendant guilty beyond a reasonable doubt of the crimes charged in this case. As you consider this evidence, bear in mind that the state has the burden of proving each and every element of the crimes charged beyond a reasonable doubt and this evidence does not reduce the state's burden.

The defendant is not on trial for any prior offenses testified to in this case. Whether the defendant was charged with a crime, convicted of, or served a sentence concerning the prior offenses testified to, is not to be considered.

CP 68; RP 987, 1007, 1043.³

Johnson testified in his defense. RP 1433. He testified that he did not molest or rape M.B. RP 1524-25. He also denied that he "sexually offend[ed]" J.W., A.H. or S.M. in the 1980s. RP 1461, 1555, 1583. He claimed that he pled guilty in order to take advantage of a plea bargain and avoid a long prison sentence. RP 1475.

³ This instruction was based upon one proposed by Johnson. CP 53; RP 956-60, 974-75.

Johnson admitted that he downloaded "a lot" of child pornography onto his computer and that his interest in child pornography dated back decades. RP 1512, 1620-21, 1662. He acknowledged that he asked his son to destroy the nude photographs of children that he had hidden inside his television. RP 1605-08. When asked why he had the photographs, he responded "bad choices." RP 1608.

The jury found Johnson guilty on all counts as charged. CP 92-98.

As the result of his prior sex offense convictions, Johnson qualified as a persistent offender. The court sentenced Johnson to life in prison on his child rape and child molestation convictions. CP 143. The court imposed a standard range sentence on one conviction for possessing depictions of minors engaged in sexually explicit conduct.⁴ CP 142. This appeal follows.

⁴ The jury convicted Johnson of four counts of possessing depictions of minors engaged in sexually explicit conduct. However, prior to the sentencing hearing, the Washington Supreme Court held that the unit of prosecution for this crime "is one count per possession of child pornography, without regard to the number of images comprising such possession or the number of minors depicted in the images possessed." State v. Sutherby, 165 Wn.2d 870, 882, 204 P.3d 916 (2009). Accordingly, the trial court sentenced Johnson on only one count. RP 1877-78.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF JOHNSON'S PREVIOUS SEX OFFENSES.

Johnson claims that the trial court erred in admitting the evidence of his prior sex offenses under RCW 10.58.090. He argues that the court failed to properly consider one of the statute's non-exclusive factors – the necessity of the evidence. This claim is without merit. While the court expressed uncertainty about how to weigh this factor, the court clearly considered the necessity of the evidence before admitting it. The trial court acted well within its discretion in admitting evidence of Johnson's prior sex offenses.

This Court reviews a trial court's decision whether to admit evidence under RCW 10.58.090 for an abuse of discretion. State v. Scherner, 153 Wn. App. 621, 656, 225 P.3d 248 (2009). An abuse of discretion occurs only when no reasonable person would have ruled as the trial court did. State v. Atsbeha, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001).

Under RCW 10.58.090, in a sex offense case, evidence of the defendant's commission of another sex offense is admissible subject to the court's balancing of factors under ER 403. RCW 10.58.090(1). Under the statute, the court considers the following

non-exclusive factors when deciding whether to exclude evidence of the defendant's other sex offenses under ER 403:

When evaluating whether evidence of the defendant's commission of another sexual offense or offenses should be excluded pursuant to Evidence Rule 403, the trial judge shall consider the following factors:

- (a) The similarity of the prior acts to the acts charged;
- (b) The closeness in time of the prior acts to the acts charged;
- (c) The frequency of the prior acts;
- (d) The presence or lack of intervening circumstances;
- (e) The necessity of the evidence beyond the testimonies already offered at trial;
- (f) Whether the prior act was a criminal conviction;
- (g) Whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; and
- (h) Other facts and circumstances.

RCW 10.58.090(6).

Individual factors are not dispositive. As this Court has noted:

RCW 10.58.090 does not instruct the court on how to weigh the articulated factors. It only states the trial court must consider all of the factors when conducting its ER 403 balancing test. The ultimate decision on admissibility or exclusion remains with the court.

Scherner, 153 Wn. App. at 658.

Here, the trial court considered each of these factors on the record and concluded that the probative value of the evidence outweighed any unfair prejudice. RP 497-502. This conclusion was a reasoned decision and not an abuse of discretion.

Johnson does not challenge the court's analysis of the various factors. Instead, he complains that the trial court expressed uncertainty as to how to apply one factor -- "[t]he necessity of the evidence beyond the testimonies already offered at trial." He notes that the trial judge stated that she was uncertain "what a court is supposed to do with it" and that she was "not going to use this factor." RP 500-01.

The trial judge's uncertainty is understandable given that the statute was new at the time of trial and no published cases discussed the factors. A review of the record reveals the court did consider the necessity of the evidence before admitting it. As this Court has noted, an evaluation of the "the necessity of the evidence" under this factor is akin to a weighing of the need for the

evidence under ER 403. Schnerer, 153 Wn. App. at 652. Here, the court expressly weighed the probative value of the evidence against the danger of unfair prejudice. RP 501-02, 520-21. The court concluded that the evidence was probative and not unduly prejudicial. Id. Accordingly, as a practical matter, the trial court did consider this factor in determining whether to admit the evidence.

Even if the trial court somehow erred in not considering the "necessity" factor, any error does not require reversal. Under a similar evidentiary rule, ER 404(b), a trial court's failure to properly weigh the probative value against its prejudice is harmless when the record is sufficient for the reviewing court to determine that had trial court properly weighed the relevant factors, it would still have admitted the evidence. State v. Carleton, 82 Wn. App. 680, 686, 919 P.2d 128 (1996). Here, a consideration of *all* the relevant factors establishes that the trial court would have admitted the evidence had it expressly weighed the "necessity" of the evidence.

First, as the trial court noted, the evidence established Johnson's prior acts of molestation and his rape and molestation of M.B. were "strikingly similar." RP 497. All of the victims were young girls. In all instances, Johnson entered into a trusted relationship with the victim and took advantage of the child when

visiting him in his residence. He used pornography to desensitize the child. The court noted that "[t]his is the strongest factor for the prosecution." RP 497.

With respect to the closeness in time between the prior acts and the current offense, the court noted this was the strongest factor for the defense. RP 499. Nearly 16 years had passed between Johnson's release from prison and his rape of M.B. However, RCW 10.58.090, like the corresponding federal rules, contains no time limit beyond which prior sex offenses are inadmissible. The federal courts have repeatedly held that prior sex offenses committed decades earlier were admissible.⁵ Similarly, in State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003), the Washington Supreme Court held that evidence of the defendant's prior sex offense, occurring 15 years earlier, was admissible under ER 404(b) in the defendant's trial for rape. Despite the lapse in time, the court held that the evidence of the prior misconduct was relevant to show that he had previously

⁵ See United States v. Kelly, 510 F.3d 433, 437 (4th Cir. 2007) (rejecting argument that prior sex offense was inadmissible because it occurred more than 20 years ago); United States v. Benally, 500 F.3d 1085 (10th Cir. 2007) (affirming admission of testimony of two victims sexually assaulted 40 years earlier and a third victim sexually assaulted 21 years earlier), cert. denied, 128 S. Ct. 1917 (2008); United States v. Gabe, 237 F.3d 954, 959-60 (8th Cir. 2001) (upholding district court's admission of evidence of sexual molestation committed 20 years earlier).

victimized another girl in a markedly similar way under similar circumstances. 150 Wn.2d at 13. Consistent with these authorities, the trial court properly found that this factor was not dispositive.

The frequency of the prior acts supported their admission. The evidence established that Johnson had molested several different girls on multiple occasions.

There were no intervening circumstances between Johnson's prior acts of molestation and his rape of M.B. The court found that this factor did not come into play in the case. RP 499.

Johnson's prior acts of sexual molestation resulted in numerous criminal convictions. The trial court, noting that Johnson had entered guilty pleas in which he admitted to the crimes, found that this factor favored admission. RP 501.

The trial court also weighed the probative value of the evidence against the danger of unfair prejudice and found that given the similarity of the offenses and the central issue of credibility, this factor supported admission. RP 501-02, 520-21.

The only factor that Johnson discusses is the necessity of the evidence. He argues that this factor weighed against admission of the evidence, citing the other evidence of his guilt. However, as

is typical in child rape cases, the primary evidence was M.B.'s testimony and her prior statements. There were no other witnesses to the crimes and no forensic evidence. Johnson denied raping and molesting M.B. "Generally, courts will find that probative value is substantial in cases where there is very little proof that sexual abuse has occurred, particularly where the only other evidence is the testimony of the child victim." State v. Sexsmith, 138 Wn. App. 497, 506, 157 P.3d 901 (2007). The "necessity" factor supported admission of the evidence.

A consideration of the factors in RCW 10.58.090 reveals that the trial court properly admitted the evidence. Johnson's challenge should be denied.

2. JOHNSON HAS NOT ESTABLISHED THAT RCW 10.58.090 IS UNCONSTITUTIONAL.

Johnson claims that RCW 10.58.090 is unconstitutional. As a general principle applicable to all of Johnson's constitutional claims, this Court must presume that RCW 10.58.090 is constitutional. State v. Lanciloti, 165 Wn.2d 661, 667, 201 P.3d 323 (2009). Johnson bears the burden of showing the statute is

unconstitutional beyond a reasonable doubt. State v. Shafer, 156 Wn.2d 381, 387, 128 P.3d 87 (2006).

Specifically, Johnson argues that RCW 10.58.090 violates the federal and state ex post facto clauses and the state separation of powers clause. This Court has previously rejected these claims. Scherner, 153 Wn. App. at 635-48; State v. Gresham, 153 Wn. App. 659, 665-73, 223 P.3d 1194 (2009). Johnson does not discuss or acknowledge either of these decisions. For the reasons set forth in those decisions, this Court should reject Johnson's claims and affirm his convictions.

a. RCW 10.58.090 Does Not Violate The Ex Post Facto Clauses.

Johnson argues that the admission of evidence under RCW 10.58.090 violated the federal and state ex post facto clauses. The United States and Washington Constitutions both contain ex post facto clauses. U.S. Const. art. 1, § 10; Const. art. 1, § 23. "The ex post facto clauses prohibit states from enacting any law that (1) punishes an act that was not punishable at the time the act was committed, (2) aggravates a crime or makes the crime greater than it was when committed, (3) increases the punishment for an act

after the act was committed, and (4) changes the rules of evidence to receive less or different testimony than required at the time the act was committed in order to convict the offender." State v. Angehrn, 90 Wn. App. 339, 342-43, 952 P.2d 195 (1998) (citing Collins v. Youngblood, 497 U.S. 37, 42, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990)).

Johnson claims that the admission of evidence under RCW 10.58.090 in his trial violated this fourth category.⁶ However, few rules of evidence have been found to fall under this category. The Washington Supreme Court has held that a new rule of evidence that allows for the admission of previously prohibited witness testimony does not violate the ex post facto clause.

In State v. Clevenger, 69 Wn.2d 136, 141, 417 P.2d 626 (1966), Clevenger was charged with committing incest and indecent liberties on his three-year-old daughter. His wife was permitted to testify due to an amendment to the spousal privilege statute, passed after the commission of the crime, which created an exception for crimes committed against one's child. The

⁶ Johnson claims that his "first trial" occurred before the effective date of RCW 10.58.090. Brief of Appellant at 13-14. This is not correct. There was only one trial, and it occurred nearly a year after the statute went into effect.

Washington Supreme Court rejected Clevenger's ex post facto challenge to the amended statute, explaining:

[A]lterations which do not increase the punishment, nor change the ingredients of the offence [sic] or the ultimate facts necessary to establish guilt, but - leaving untouched the nature of the crime and the amount or degree of proof essential to conviction - only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury, can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offence [sic] charged.

69 Wn.2d at 142 (quoting Hopt v. Utah, 110 U.S. 574, 590, 4 S. Ct. 202, 28 L. Ed. 262 (1884)).

Similarly, in State v. Slider, 38 Wn. App. 689, 688 P.2d 538 (1984), the Court of Appeals upheld the admission of child hearsay under the recently enacted child hearsay statute, RCW 9A.44.120. The court held that the application of the statute did not run afoul of the ex post facto clauses because the statute "did not increase the punishment nor alter the degree of proof essential for a conviction[.]" Id. at 695; see also State v. Ryan, 103 Wn.2d 165, 179, 691 P.2d 197 (1984) (rejecting ex post facto challenge to child hearsay statute).

In contrast, Ludvigsen v. City of Seattle, 162 Wn.2d 660, 174 P.3d 43 (2007), the Washington Supreme Court concluded that amendments to the Washington Administrative Code (WAC) effectively reduced the quantum of evidence necessary to convict a defendant of driving while intoxicated. Under the relevant municipal ordinance, the City was required to prove the defendant failed a valid breath test. A 2004 amendment to the WAC relieved the City of a previous requirement that, in order to establish a valid breath test, it prove that the breath test machine's thermometer had been properly certified. Addressing an ex post facto challenge to this amendment, the court framed the issue as "whether the WAC amendments changed ordinary rules of evidence or changed the evidence necessary to convict Ludvigsen of a DWI." Id. at 671-72. The court concluded that the amendments had changed the evidence necessary for a conviction:

[U]nder the per se prong, the validity of the breath test is a part of the prima facie case the government must prove. The City redefined the meaning of a valid test and thereby changed the meaning of the crime itself.... The subsequent change reduced the quantum of evidence to establish a prima facie case and to overcome the presumption of innocence.

Id. at 672-73 (footnotes omitted).

RCW 10.58.090 did not reduce the quantum of evidence necessary to establish a prima facie case. The elements of the crime remain the same, and the quantum of proof required to satisfy those elements remains the same. It is similar to the statutory amendments at issue in Clevenger and Slider; it allows for the testimony of witnesses who otherwise might not have been permitted to testify.⁷

Consistent with the above authorities, this Court recently rejected an ex post facto challenge to RCW 10.58.090. In Gresham, the Court explained:

RCW 10.58.090 does not alter the facts necessary to establish guilt, and it leaves unaltered the degree of proof required for a sex offense conviction. It only makes admissible evidence that might otherwise be inadmissible. For this reason, RCW 10.58.090 is like the statute at issue in Clevenger: the State still has to prove beyond a reasonable doubt all the elements of the charged crime—here, child molestation in the first degree—regardless of whether evidence was admitted under RCW 10.58.090. Because RCW 10.58.090 does not alter the quantum of evidence necessary to

⁷ Courts in other jurisdictions have rejected ex post facto challenges to statutes similar to RCW 10.58.090. See State v. Willis, 915 So.2d 365, 383 (La. Ct. App. 2005) (rejecting ex post facto challenge and holding that Louisiana statute "did not alter the amount of proof required in the Defendant's case as it merely pertains to the *type of evidence* which may be introduced."); People v. Pattison, 276 Mich. App. 613, 619, 741 N.W.2d 558 (Mich. Ct. App. 2007) (rejecting ex post facto challenge to Michigan law).

convict, it does not violate the constitutional prohibitions against ex post facto laws.

153 Wn. App. at 673; see also Scherner, 153 Wn. App. at 635-43.

Johnson does not discuss Gresham or Scherner, let alone show that they were wrongly decided. He has failed to establish that admission of evidence under RCW 10.58.090 violated the ex post facto clauses.

b. The State Ex Post Facto Clause Does Not Provide Greater Protection Than The Federal Clause.

Johnson argues that the ex post facto clause in article 1, section 23 of the Washington State Constitution provides greater protection than the ex post facto clause in the United States Constitution. However, the state constitutional provision is worded virtually identically to its federal counterpart, and Washington courts have never interpreted it differently. This Court should reject Johnson's claim that the admission of evidence under RCW 10.58.090 violated the state constitution's ex post facto clause.

To determine whether a state constitutional provision provides greater protection than its federal counterpart, the court considers the six nonexclusive factors identified in State v. Gunwall,

106 Wn.2d 54, 720 P.2d 808 (1986). The six factors are: (1) the state provision's textual language; (2) significant differences between the federal and state texts; (3) state constitutional and common law history; (4) existing state law; (5) structural differences between the federal and state constitutions; and (6) matters of particular state interest or local concern. Id. at 61-62.

An examination of the Gunwall factors does not support Johnson's claim that the ex post facto clause in article 1, section 23 provides greater protection than the federal clause. With respect to the first and second factors, the language of the two provisions is virtually identical. The federal ex post facto clause provides that "[n]o State shall... pass any Bill of Attainder, ex post facto Law or Law impairing the Obligation of Contracts." U.S. Const. art. 1, § 10. The Washington State Constitution similarly states that "[n]o bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed." Const. art. 1, § 23. The Washington Supreme Court has held that where language of the state constitution is similar to that of the federal constitution, the state constitutional provision should receive the same definition and interpretation given to the federal provision. In re Detention of Turay, 139 Wn.2d 379, 412, 986 P.2d 790 (1999).

With respect to the third and fourth factors, state constitutional and common law history and existing state law, Washington courts have never interpreted the state ex post facto clause differently from its federal counterpart. Early in the state's history, the court looked for guidance to United States Supreme Court decisions concerning ex post facto claims. See Lybarger v. State, 2 Wash. 552, 557, 27 P. 449 (1891) ("As to the question whether or not the law now in force... is an *ex post facto* law we will quote and abide by the classified definition of Chief Justice Chase in Calder v. Bull.").

Over the last 100 years, the Washington courts have regularly cited the United States Supreme Court's interpretation of the federal ex post facto clause when considering claims brought under article 1, section 23. State v. Ward, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994); State v. Edwards, 104 Wn.2d 63, 70, 701 P.2d 508 (1985); Johnson v. Morris, 87 Wn.2d 922, 923-28, 557 P.2d 1299 (1976). Washington caselaw provides no support for Johnson's claim that the state constitutional provision is interpreted more broadly.

The fifth Gunwall factor, the differences in structure between state and federal constitutions, does not support a broader

interpretation of the state constitutional provision. Both the federal and state ex post facto clauses were intended to be restrictions on a *state's* power to enact certain laws.

The sixth Gunwall factor requires consideration of whether the matter is of particular state or local concern. The goals of the ex post facto clauses of both constitutions appear to be equally important, locally and nationally.

In his Gunwall analysis, Johnson relies primarily upon an Oregon decision, State v. Fugate, 332 Or. 195, 26 P.3d 802 (2001). In Fugate, the Oregon Supreme Court held that the Oregon State Constitution's ex post facto clause was violated by retroactive application of "laws that alter the rules of evidence in a one-sided way that makes conviction of the defendant more likely." Fugate, 332 Or. at 213. In so holding, the court acknowledged that its decision was inconsistent with the decisions of the United States Supreme Court concerning the ex post facto clause. Id. As authority for its different interpretation, the Oregon court relied upon an 1822 decision by the Indiana Supreme Court, Strong v. State, 1 Blackf. 193 (Ind. 1822).

However, a review of Strong reveals that it provides no support for interpreting the Washington constitution's ex post facto

clause differently from the federal counterpart. The issue in Strong was not a change in the rules of evidence but whether a change in punishment – from stripes (whipping) to confinement in the State prison – constituted an ex post facto violation. The Indiana Supreme Court noted that an ex post facto violation could occur when the law "retrench[ed] the rules of evidence, so as to make conviction more easy." Id. But as support for this proposition, the court cited federal caselaw.

When the Indiana Supreme Court later considered an ex post facto challenge to a new rule of evidence, it did not cite Strong, but looked to federal caselaw for guidance. Marley v. State, 747 N.E.2d 1123, 1130 (Ind. 2001). Consistent with Washington caselaw, the Indiana Supreme Court recognized that the ex post facto clause was not violated by a change to a rule of evidence that allowed for the testimony of witnesses who previously would not have been permitted to testify. Id.

Accordingly, Fugate and relevant Indiana caselaw do not support a broader interpretation of the Washington State Constitution's ex post facto clause. The Oregon court's decision was based upon dicta from an 1822 Indiana decision, and that portion of the Indiana decision was, in turn, based upon federal

caselaw. Because Johnson has provided no persuasive evidence that the framers of the Washington State Constitution intended that the ex post facto clause have a different meaning than its federal counterpart, this Court should hold that the admission of the evidence under RCW 10.58.090 did not violate article 1, section 23.

c. The Legislature's Enactment Of RCW 10.58.090 Does Not Violate The Separation Of Powers.

Johnson argues that the legislature's enactment of RCW 10.58.090 violates the separation of powers doctrine. This Court also rejected this claim in Gresham and Scherner, and Johnson does not address or distinguish those decisions. The Court should once again reject this argument.

The doctrine of separation of powers comes from the constitutional distribution of the government's authority into three branches. State v. Moreno, 147 Wn.2d 500, 505, 58 P.3d 265 (2002). The purpose of the doctrine is to prevent one branch of government from aggrandizing itself or encroaching upon the "fundamental functions" of another. Id. (citing Carrick v. Locke, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)). "Though the doctrine is designed to prevent one branch from usurping the power given to

a different branch, the three branches are not hermetically sealed and some overlap must exist." City of Fircrest v. Jensen, 158 Wn.2d 384, 393-94, 143 P.3d 776 (2006). "The question to be asked is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another." Carrick, 125 Wn.2d at 135.

The courts have long recognized the legislature's authority to enact rules of evidence.⁸ The Washington Supreme Court has recognized that "rules of evidence may be promulgated by both the legislative and judicial branches." Fircrest, 158 Wn.2d at 394. The Court has acknowledged that its own authority to enact rules of evidence derives, in part, from a statute, RCW 2.04.190, and has held that "[t]he adoption of the rules of evidence is a legislatively delegated power of the judiciary." Id.

As a historical matter in Washington, the legislature and the courts have shared the responsibility for enacting rules of evidence. Prior to the enactment of the Rules of Evidence in 1979, the trial

⁸ See State v. Sears, 4 Wn.2d 200, 215, 103 P.2d 337 (1940) (the legislature has the power to enact laws which create rules of evidence); Slider, 38 Wn. App. at 695-96 ("Our Supreme Court has also recognized (implicitly) the Legislature's authority to enact evidentiary rules when it analyzed the rape shield statute.").

courts applied rules of evidence based upon statutes and common law. See generally 5 R. Meisenholder, Washington Practice (1965). A Judicial Council Task Force, which included representatives of both the legislature and the judiciary, drafted the current rules of evidence. 5 K. Tegland, Washington Practice, Evidence Law and Practice, at V-XI (2nd ed. 1982). To this day, numerous statutes supplement the Rules of Evidence on various issues.⁹ The legislature has enacted a number of statutes that relate particularly to evidence and testimony in sex offense cases.¹⁰

Since the enactment of the evidence rules, the courts have repeatedly rejected claims that the legislature's enactment of an evidentiary rule violated the separation of powers. In State v. Ryan, supra, the Washington Supreme Court rejected the claim that the legislature's enactment of the child hearsay statute, RCW 9A.44.120, violated the separation of powers. In doing so, the court held that "apparent conflicts between a court rule and a statutory

⁹ See, e.g., RCW 5.45.020 (business records); RCW 5.46.010 (copies of business and public records); RCW 5.60.060 (evidentiary privileges); RCW 5.66.010 (admissibility of expressions of apology, sympathy, fault).

¹⁰ RCW 9A.44.020 (rape shield); RCW 9A.44.120 (child hearsay statute); RCW 9A.44.150 (child witness testimony concerning sexual or physical abuse).

provision should be harmonized, and both given effect if possible."

Id. at 178.

More recently, in Fircrest, the defendant challenged a statute that provided that breath test results were admissible if the State satisfied a certain threshold burden. The statute was passed in response to a Washington Supreme Court decision holding breath tests were inadmissible if they failed to comply with certain procedures in the WAC. 158 Wn.2d at 396-97. The court held that the statute did not violate the separation of powers:

The legislature has made clear its intention to make BAC test results fully admissible once the State has met its prima facie burden. No reason exists to not follow this intent. The act does not state such tests must be admitted if a prima facie burden is met; it states that such tests are *admissible*. The statute is permissive, not mandatory, and can be harmonized with the rules of evidence. There is nothing in the bill, either implicit or explicit, indicating a trial court could not use its discretion to exclude the test results under the rules of evidence. The legislature is not invading the prerogative of the courts nor is it threatening judicial independence. SHB 3055 does not violate the separation of powers doctrine.

Id. at 399.

Here, the legislature, which retains authority to enact rules of evidence, did not invade the prerogative of the courts by enacting RCW 10.58.090. The statute carves out a narrow exception to

ER 404(b), a rule that already contains numerous other exceptions. The statute provides that the trial court still has discretion to exclude the evidence after applying balancing factors under ER 403. The statute can be harmonized with the existing evidence rules, and the court can give effect to both. As this Court noted when rejecting the claim that the legislature's enactment of RCW 10.58.090 violated the separation of powers:

In sum, RCW 10.58.090 evidences the legislature's intent that evidence of sexual offenses may be admissible, subject to the modified ER 403 balancing test. But the legislation also leaves the ultimate decision on admissibility to the trial courts based on the facts of the cases before them. This is consistent with past legislative amendments to the rules of evidence and does not infringe on a core function of the judiciary.

Schnerer, 153 Wn. App. at 648; see also Gresham, 153 Wn. App. at 665-70. The Court should reject Johnson's separation of powers challenge to the statute.

3. JOHNSON'S PRIOR SEX OFFENSES WERE ALSO ADMISSIBLE UNDER ER 404(b).

Even if the trial court erred in admitting the evidence of Johnson's prior sex offenses under RCW 10.58.090, any error was harmless because the evidence was also admissible under

ER 404(b) as evidence of a common scheme or plan.¹¹ A trial court's ruling on the admissibility of evidence will not be disturbed on appeal if it is sustainable on alternative grounds. Thomas v. French, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983). Here, the evidence established that Johnson employed a common scheme in satisfying his sexual desire for young girls by befriending them, exposing them to pornographic material and then molesting them. Because the evidence of his prior sex offenses would have been admissible under ER 404(b), any error in admitting the evidence under RCW 10.58.090 was harmless.

ER 404(b) provides in pertinent part that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Evidence of a defendant's past acts of molestation may be admissible under ER 404(b) to show a common scheme or plan where the prior acts demonstrate a single plan used repeatedly to

¹¹ As an alternative to RCW 10.58.090, at trial the State argued that Johnson's prior sex offense evidences were admissible under ER 404(b). Supp. CP ____ (Sub. No. 58 at 40-45).

commit separate but very similar crimes. Sexsmith, 138 Wn. App. at 504. 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.” State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995).

“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 (quoting DeVincentis, 150 Wn.2d at 17-18). The degree of similarity must be substantial, but the level of similarity does not require the evidence of common features to show a unique method of committing the crime. DeVincentis, 150 Wn.2d at 20-21. “[T]he trial court need only find that the prior bad acts show a pattern or plan with marked similarities to the facts in the case before it.” Id. at 13.

Here, there was a marked similarity between Johnson's molestation of M.B. and his sexual abuse of A.H., S.M. and J.W. The victims were young girls whom Johnson befriended by giving

them ice cream or gifts. He exposed them to pornography in order to desensitize them to the sexual abuse. He then molested the girls when visiting his room or house. Based upon this evidence, Johnson's prior sex offenses would have been admissible under ER 404(b), and therefore, any error in admitting the evidence under RCW 10.58.090 was harmless.

4. THE TRIAL COURT PROPERLY SENTENCED JOHNSON AS A PERSISTENT OFFENDER.

Johnson challenges his sentencing as a persistent offender on his first degree child rape and first-degree child molestation convictions. He argues that the trial court's finding of his prior convictions violated his federal constitutional rights to due process and to a jury trial. This argument is without merit. The Washington courts have repeatedly rejected the claim that the State is required to submit a defendant's prior convictions to a jury and prove them beyond a reasonable doubt.

In Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), the United States Supreme Court held

that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490 (italics added). The "prior conviction" exception stemmed from the Court's earlier decision in Almendarez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998).

Despite this explicit language, defendants have argued that Apprendi conferred a right to a jury trial in persistent offender sentencings; i.e., that the State must prove the relevant prior convictions to a jury beyond a reasonable doubt. State v. Wheeler, 145 Wn.2d 116, 119, 34 P.3d 799 (2001), cert. denied, 535 U.S. 996 (2002). The Washington Supreme Court has rejected this argument: "Unless and until the federal courts extend Apprendi to require such a result, we hold these additional protections [charging prior "strike" convictions in an information and proving them to a jury beyond a reasonable doubt] are not required under the United States Constitution or by the Persistent Offender Accountability Act

(POAA) of the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW." Id. at 117.¹²

Johnson suggests that the United States Supreme Court's decision in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), altered this law as it applies to prior convictions, in that it extended the constitutional protections to facts that elevate a sentence above the standard range. Again, the Washington Supreme Court has rejected this argument. In State v. Thiefault, 160 Wn.2d 409, 418, 158 P.3d 580 (2007), another POAA case, the defendant cited Blakely as well as Apprendi in support of his argument that he had a right to a jury determination of his prior conviction. Rejecting this argument, the court reiterated: "This court has repeatedly rejected similar arguments and held that Apprendi and its progeny do not require the State to submit a defendant's prior convictions to a jury and prove them beyond a reasonable doubt." Thiefault, 160 Wn.2d at 418.

¹² See also In re Personal Restraint of Lavery, 154 Wn.2d 249, 256, 111 P.3d 837 (2005) ("In applying Apprendi, we have held that the existence of a prior conviction need not be presented to a jury and proved beyond a reasonable doubt."); State v. Smith, 150 Wn.2d 135, 139-56, 75 P.3d 934 (2003), cert. denied, 541 U.S. 909 (2004) (rejecting claim that federal and state constitution required a jury trial for determining prior convictions at sentencing).

Johnson argues that this Court should reconsider the prior conviction exception, citing Justice Thomas's concurring opinion in Apprendi. The Washington Supreme Court has already rejected this precise argument and observed that it is bound to follow the United States Supreme Court's established precedent on the issue. State v. Jones, 159 Wn.2d 231, 240 n.7, 149 P.3d 636 (2006).

Based on this unbroken line of cases, this Court recently rejected an argument identical to Johnson's:

Consistent with Blakely and Apprendi, the Washington Supreme Court "has repeatedly rejected" the argument that due process requires the fact of a prior conviction to be submitted to a jury and proved beyond reasonable doubt for sentencing purposes. State v. Thiefault, 160 Wn.2d 409, 418, 158 P.3d 580 (2007).

Because of the exception for "the fact of a prior conviction," there is no violation of the Sixth Amendment or the Due Process Clause of the Fourteenth Amendment when a judge determines by a preponderance of the evidence that a defendant has two prior "strikes" for purposes of the Persistent Offender Accountability Act.

State v. Langstead, ___ Wn. App. ___, 228 P.3d 799, 801 (2010).

Johnson's argument is clearly foreclosed given the decisions in Wheeler, Thiefault, and Langstead.

Finally, in addition to the "prior conviction" exception, there is a second reason to reject Johnson's claim that the trial court

violated his constitutional rights to due process and to a jury trial. Under the Sixth Amendment, only findings of fact that increase a defendant's punishment beyond the relevant statutory maximum for the crime must be admitted by the defendant or found by a jury beyond a reasonable doubt. Blakely, 542 U.S. at 303. Here, the trial court's finding of Johnson's prior convictions did not increase his punishment beyond the relevant statutory maximums for first-degree child rape and first-degree child molestation.

With respect to Johnson's convictions for first-degree child rape and first-degree child molestation, absent his prior convictions, he was subject to sentencing under former RCW 9.94A.712. Under that statute, the trial court imposes a maximum term consisting of the statutory maximum sentence for the offense and a minimum term. Former RCW 9.94A.712(3). In State v. Clarke, 156 Wn.2d 880, 134 P.3d 188 (2006), the Washington Supreme Court held that the relevant statutory maximum sentence under Blakely for a sex offender subject to sentencing under former RCW 9.94A.712 is the statutory maximum for the crime set forth in RCW 9A.20.021.

The relevant statutory maximums for first-degree child rape and one count of first-degree child molestation are life in prison. RCW 9A.20.021. Accordingly, the trial court's finding of Johnson's

prior convictions did not increase Johnson's relevant statutory maximum and did not violate Blakely.

For all the foregoing reasons, Johnson's challenge to his sentence should be rejected.

D. CONCLUSION

For the reasons set forth above, the State respectfully requests that this Court affirm Johnson's convictions.

DATED this 2^d day of June, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Gregory Link, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. DANIEL JOHNSON, Cause No. 63478-0-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame
Name
Done in Seattle, Washington

6/2/10
Date