

67194-4

67194-4

No. 67194-4-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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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether admission of defendant's prior sex conviction under RCW 10.58.090 materially affected the verdict where the prior conviction was admitted alternatively under ER 404(b) as evidence of defendant's common scheme or plan to molest his young nieces and where the prior conviction was used by defense to show that the family was aware of defendant's prior sex conviction and therefore limited the defendant's opportunities to be alone with the girls.
2. Whether the trial court abused its discretion admitting the defendant's prior conviction for rape of a child in the first degree as evidence of common scheme or plan under ER 404(b) where the State's proffer showed that the defendant had previously fondled another young niece's vagina and digitally penetrated her vagina while he was alone with her on a couch at her house and where the current offenses also involved digital penetration and fondling of two other young nieces' vaginas either at their house or in his trailer near their home, one time on a couch, and where defendant told all three nieces not to tell anyone.
3. 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.
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.

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 86-89¹, 142-45.

A month before trial on Feb. 16th, 2011, defense counsel filed a motion for severance. CP 121-28; Supp CP ___, Sub Nom. 96. His motion was heard on March 14th before voir dire and the start of the trial. Supp CP ___; Sub Nom. 106C, 116-18; RP 161-65, 223. The severance motion was denied. RP 168.

¹ The First Amended Information was filed on March 16, 2011 and amended the time period for the first four counts to all state 1st day of Sept. 2006 to the 31st day of August 2008. CP 86-89.

During trial, upon defense motion and agreement of the prosecutor, four counts, counts IV, VIII, IX and XIV, were dismissed for insufficient evidence. RP 647-52. A jury found Williams guilty of all the remaining counts. CP 41-43. Later the court determined that Williams was a persistent offender with respect to counts III, V, VI, VII, X, XI, XII and XIII and imposed a sentence of life without the possibility of parole regarding those counts and a standard range sentence on the other two counts. CP 25-26; RP 970; Supp CP, Sub Nom. 150².

2. Substantive.

Sometime, up to a year, before October 16th of 2009, MF³ told her friend MW, a girl who was 14 to 15 years old at the time, about how her father had sexually abused her. RP 383, 432-33, 592-93, 632-34, 641. MW told MF that something similar had happened to her.⁴ RP 431, 634. MF then told her mother and eventually her counselor about what MW had said, which resulted in the matter being investigated by Det. Landis of

² The Agreed Order Amending the judgment and sentence clarified that life without the possibility of parole was imposed on the counts for which Williams was found to be a persistent offender.

³ Initials are being used throughout the brief in order to protect the privacy of the victims.

⁴ Williams asserts that there was a “cascading series of allegations that suspiciously suggested each child was mimicking another,” but there is nothing in the record to support that. Appellant’s Brief at 4, 9. There was no evidence produced that MW’s disclosure mimicked that of MF’s and EW never spoke to MW about being sexually abused before she disclosed that in the interview. The defense didn’t argue that the girls were mimicking one another, but instead argued that the flawed interviews could have tainted the girls’ disclosures because they were suggestive and that the girls were unreliable witnesses. RP 914-40.

the Blaine Police Department. RP 432-33, 592-93, 634-35. On Oct. 16, 2009, Det. Landis and a CPS worker interviewed MW, who was 15 at the time of the interview, at Blaine High School. RP 383, 595-96. MW, normally a talkative girl, was very quiet during the interview and appeared reluctant to disclose what had happened to her. RP 568, 594-97. MW was also difficult to understand during the interview given her speech pattern. RP 629. After interviewing MW, Det. Landis interviewed MW's older sister, EW. RP 241, 599. EW, 18 at the time of the interview, was more forthcoming than MW about what had happened to her, particularly once she realized that MW had disclosed that MW had been abused as well. RP 487, 599.

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. RP 280-81. EW was upset that her uncle was going to get in trouble and that it was all coming out. RP 292. After EW told him about her interview with Det. Landis, DW asked where MW was and went to go look for MW. RP 292.

When Det. Landis went to Williams' trailer to arrest him, Williams, who had previously been convicted of a rape of a child in the first degree, asked who had filed the charges and what they had said. RP 251-52, 605. After Det. Landis told him he was being charged with rape

of a child, but not the degree, Williams told Landis there was no way it was him, that he didn't do anything wrong, he hadn't hurt anyone and had stayed clean and out of trouble. RP 616. Landis didn't tell Williams who had filed the report or the nature of the allegations until Williams was at the police station. RP 605-06. Right after Det. Landis informed Williams of the specific allegations, in particular that they involved his nieces EW and MW, Williams put his hands over his face and broke down. RP 606, 622, 630. Distraught, he asked Det. Landis to shoot him, and when Landis explained he couldn't do that, he asked Landis to give him Landis' gun so he could shoot himself, and Landis again stated he couldn't do that. RP 606-07. Williams repeatedly asked Landis to kill him. RP 606.

Williams' prior conviction of rape of a child in the first degree involved another niece who was five years old at the time of the offense. RP 251-52. Williams had admitted to his brother, DW, the father of EW and MW, that he had inserted his finger into his niece's vagina. RP 239, 252. After Williams was released from prison, he was supervised for two years by DOC. RP 253-54. Before Williams was released from prison DW went through a four hour class with DOC regarding supervising Williams.⁵ RP 255-56.

⁵ The testimony regarding Williams being supervised by DOC and DW's subsequent supervision of Williams came in without objection.

After Williams was released from DOC supervision, DW permitted him to come live at DW's place on Blaine Road which was located on 39 acres.⁶ RP 253, 256. DW did so because he felt an obligation to Williams, who was his younger brother, Williams had nowhere else to go, and Williams swore to him that it would never happen again, that he would never go back to prison again. RP 256-57, 263. Williams had also been determined to be a level one offender, not likely to reoffend.⁷ RP 256-57. DW told Williams that he wouldn't lie for Williams and felt he could keep an eye on Williams if he lived close by. RP 257.

The trailer Williams moved onto the Blaine Road property was located about 50-100 feet from the house. RP 240-42, 256. In November 2005 DW and his family were forced to vacate the Blaine Road property and moved in with their 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. RP 268-69. 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 which he had moved to Peace Portal Way. RP 269-70, 579.

⁶ The family had moved to the Blaine Road property sometime in January or February of 2000 because there had been a controversy about Williams moving into the Titan Terrace community where the family had been living. RP 242-45, 558.

⁷ This testimony also came in without objection.

After that DW's family moved into a house on F Street in Blaine, the place the family was still living at the time of trial. RP 272. When they moved into the F Street house, MW was in 5th grade and 11 years old and EW was turning 15. RP 383, 385, 494.

When Williams moved onto the Blaine Road property, DW informed his children, MW, EW and their older brother RW, what Williams had done. RP 258. He told Williams in front of his children that if Williams were to touch his kids, he would kill Williams, and he told his children to tell him if something happened. RP 258. 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. RP 261, 558-59.

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. RP 487-88, 496, 539, 550. Williams started abusing EW when she was eight years old, after Williams had moved his trailer onto the Blaine Road property. RP 500-01. He started by giving EW attention and money and asking her to do "stuff," for example he gave her money if she would lift up her shirt. RP 500-02. One time when Williams wanted EW to take off her clothes he told her, "If I do something for you, you do something for me." RP 511-112. He would give her money when he could. RP 511. Over time, Williams started kissing and touching

EW's breasts and eventually had her take her pants off and put his finger in her vagina and kissed her vagina. RP 502. He frequently told her, "Don't tell. It's our little secret." RP 521.

Williams' abuse continued until EW was nine years old when she realized that what Williams was doing was wrong when she and her mother were watching an episode of the television show "Law and Order" that was about rape of a child. RP 502-03, 521. EW didn't want to tell her father so she avoided Williams instead. RP 503, 506. After she started avoiding Williams, Williams tried to make her feel bad, so she started staying in her room more often. RP 523, 568.

The abuse usually occurred in Williams' trailer, about 20 steps from the house. RP 493, 504. The only time it happened in the house was on a cold winter day when Williams was sitting next to EW on the living room couch watching television. RP 504, 506. EW thought her father was probably on the computer, her mother working and MW upstairs at the time. RP 504. Williams rubbed his fingers on the outside of her vagina while they were sitting under some blankets to keep warm. RP 504-05. Williams had done this before to her in the trailer as well. RP 506.

EW didn't remember a specific "first time" the touching happened, but said the physical touching and the taking off of her pants were around the same time. RP 507-08. Williams touched her both inside and outside

of her vagina, sometimes with one hand, sometimes with both. RP 509. When Williams kissed her below the waist, he “would just go up for it” and “charge into it.” RP 510. This occurred when she didn’t have her pants on and sometimes Williams put his tongue inside her vagina. RP 516-17. This occurred more than once. RP 518.

EW specifically remembered one incident when she was in Williams’ trailer and he took out a Polaroid camera (“one of those cameras where you take a picture and the picture comes out”) and started taking pictures of her naked. RP 514. He told her to spread her legs so that he could take pictures of her vagina and told her he was doing this so that he could draw a vagina. RP 514. He then hid the pictures behind the back of the refrigerator. RP 514, 541. He didn’t touch her that day, just took the pictures. RP 515. Williams never showed her those pictures, but he did show her pictures on the computer of naked girls at the beach. RP 541-42.

Another time while she was playing on Williams’ computer inside his trailer, Williams took off his pants to flash her and she saw his penis, but ignored him and no touching occurred that day. RP 519-20. He told her, “you know you like it.” RP 521. Other times Williams did ask her to touch his penis, but EW never did. RP 545-46. He also asked her to give him a “blow job” but she didn’t know what that meant, and it didn’t happen. RP 546.

All the incidents involving EW happened at the Blaine Road property except for one incident that happened at the F Street house after she had been playing volleyball when she was in 9th grade⁸. RP 527, 529. While she was at the computer, Williams started giving her a massage and started rubbing her legs, but when his hands got close to her vagina, EW pushed him away and went up to her room. RP 527. He followed her into her bedroom, so she left, but he continued to follow her around the house. She thought the incident ended when she locked herself in the bathroom. RP 528.

Later EW told her mother that Williams made her feel uncomfortable and that she didn't like the way Williams had touched her legs, although she did not describe it as a sexual touching. RP 529, 537, 567, 574. Although EW and her mother had finally been getting closer, her mother didn't ask her any specifics about this "unwanted physical contact," and EW never told her anything about what Williams had done to her when she was younger. RP 537-38. EW told her mother that she didn't want to tell her father because she was concerned about what he would do to Williams, but TW did tell DW. RP 528, 567, 574. DW spoke to Williams and told him he was making EW feel uncomfortable. RP 297. Williams said he hadn't done anything to her, didn't know why EW was

⁸ This was not one of the charged counts. RP 906-07, 911-13.

mad at him and offered to apologize. RP 297. DW told him not to hound EW and to not follow her if she walked away from him. RP 297.

MW, who was born Sept. 1st, 1994, believed the abuse started when she was in 6th grade. RP 383, 394. All of the abuse happened after they had moved into the F Street house. RP 389-90. The first time it happened was when she went with Williams to get a movie at his trailer. RP 391, 429. Williams had asked MW and EW if they wanted to get a Netflix movie while he was over at the F Street house. RP 392. Williams then drove MW to his trailer to get the movie, but once they got there MW couldn't find the movie she wanted. RP 393-94. Williams took all her clothes off and touched her "boobs" and then started touching her vagina, putting his fingers both inside and outside her vagina. RP 396-97, 402. Williams took his pants off and pulled down his underwear and tried to insert his penis into her vagina, but it wouldn't fit so he put his pants back on. RP 396-400. At some point during the incident, MW tried to get Williams to stop by telling him that Grandma Sue, who was dead, would be looking down and wouldn't be happy with what he was doing. RP 396-97. Also during the incident, Williams took a video camera that was connected to his television set and put it next to her vagina so she could see what it looked like. RP 401. He told her the camera didn't actually film anything because that part of it didn't work. RP 402. After it was

over she told him she wanted to go home. RP 399. She didn't tell anyone about the incident because she was embarrassed, and Williams told her not to tell anyone because he would have to kill himself before police talked to him. RP 434-35.

The next incident that MW remembered occurring happened when she thought she was almost 13 years old and she was giving Williams' dog a bath at her house. RP 404-05. MW was wearing a bathing suit style tank top and a pair of shorts. RP 405. MW had some difficulty picking up the dog, who was quite heavy, and putting her into the bathtub, so she called out for someone to come help her. RP 404-06. When Williams came into the bathroom, he told MW that she had called for help just so that he, Williams, would help her, which wasn't true. RP 406. In fact, MW didn't feel good when she saw her uncle come into the bathroom. RP 406. Once in the bathroom, Williams started to take off her top, but stopped and closed the door. RP 407. Then while he stood next to her, he pulled the strap on her top all the way down and started touching her breasts. RP 407-08. He did this for a few minutes until something happened that caused him to stop, but MW couldn't remember what stopped him. RP 408-09.

The next incident MW remembered happened in Williams' car when she was alone in the car with him when she was 13. RP 409, 413.

During the ride Williams felt around her vagina on the outside of her pants with his hand, and then put his hand under her pants and touched her vaginal area over her underwear. RP 410-11. She tried to move closer to the door on her side of the car, but he was still able to reach her. RP 412.

Another incident happened while MW was on the computer, which was located in an area off the living room, at a time when her father, mother and brother weren't home. RP 415-16. Instead of leaving upon hearing that DW wasn't home, Williams came up behind MW and started rubbing her breasts with both hands over her clothes. RP 416, 418. When she told him that her sister was home, he stopped. RP 417.

Williams came over another time when MW's parents and brother weren't home and went into MW's bedroom ostensibly to see if anyone was home. RP 419-20. MW told Williams that her father wasn't home and that her sister was asleep. RP 420, 424. Williams then came up behind her as she was standing in her bedroom and rubbed her breasts over her clothes. RP 424-26. She told Williams to stop, and she thought it stopped when her sister opened her door. RP 426-27.

MW didn't tell anyone about Williams' abuse because she was embarrassed and ashamed. RP 434. She also didn't want to get Williams into trouble because he was family and she thought it would be hard on her father. RP 436-37. She also thought people would think she was a

liar. RP 437. She did think about telling her mother, but then decided not to, and didn't tell anyone until she told her best friend MF a little about what Williams had done.⁹ RP 430-31, 437-38.

While Williams was not 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. RP 261-62. 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 in the house with the kids, even if RW were there. RP 262. 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. RP 262.

According to EW her mother was rarely home while they lived on Blaine Road, her father was always on the computer, and the children took care of themselves. RP 521. Williams' abuse of EW would usually happen during the summer when EW was on break from school and her father wasn't aware that she was going over to Williams' trailer. RP 525-26.

⁹ MW also testified that she told her mother after telling MF, sometime during the summer. RP 455. She testified that after EW told their mom about Williams making her uncomfortable that she told her mom that Williams made her uncomfortable too when her mother asked her, although she told defense counsel that she told her mom about Williams touching "her boobs." RP 477-82, 483-84.

When TW went to work¹⁰, DW would be at home with the kids. RP 558-59. While TW trusted DW, DW was hooked on an online computer game and didn't constantly monitor the situation. RP 524, 573. While living at the F Street house, DW sometimes worked long shifts and traveled out of the area, and TW worked two jobs with variable shifts. RP 272-74. The girls were home alone a lot of times at that house. RP 573.

Williams showed up at the F Street house quite a bit, sometimes two to three times a week. RP 275. Although Williams wasn't supposed to come around when DW or TW weren't there, that rule didn't last the entire time and Williams didn't always abide by those limitations. RP 275-76. One day DW found Williams sitting on the couch with MW and EW watching television when he got home. RP 276. DW took Williams into the kitchen and told him that he couldn't come over unless an adult were there, but DW did find Williams at the house four to five times during 2008 and 2009 when he and TW weren't there. RP 277. DW told Williams he couldn't be doing that. RP 297. DW also found Williams and MW sitting on the couch with a blanket over them one time in the spring before Williams was arrested. RP 294.

¹⁰ TW was employed full-time as a bartender and/or waitress while DW's employment varied. RP 259, 264.

While living at F Street RW, EW and MW were fairly active in sports, and DW asked Williams sometimes to drive the girls places if he couldn't. RP 278, 414, 542. Sometimes this would involve dropping one girl off at one field and the other at another field, and sometimes he would pick EW up when she was alone. RP 279, 565. Williams got angry once when EW insisted MW ride with them because she was uncomfortable being alone with Williams. RP 543. EW never rode alone with Williams after an incident at his trailer regarding Williams' rental of DVDs for EW. RP 543, 545. EW had thought she could rent two DVDs, but Williams told her when they were at his trailer that she was supposed to have rented only one and that it would "cost her." RP 543-44. Then he asked her to lift up her shirt. RP 544. EW said no and left the trailer, and Williams drove her back to the F Street house. RP 544-545. EW told her father that she didn't want to ride alone in a car with Williams after that. RP 545.

Despite the restrictions on Williams being alone with the girls, DW was concerned that something might be going on because about six to seven months before Williams was arrested, he noticed that EW would go upstairs immediately when Williams came over. RP 294. She would do this even if she were in the middle of watching a television show or baking, and she would stay upstairs until Williams left. RP 294.

Defense called a witness who had been with the Division of Child and Family Services in February of 2006 and had interviewed DW's family while they had lived with Williams that couple of weeks in 2006. RP 656-661. She interviewed them because there had been a report about the incident that caused the family to move out of DW's sister's house and in with Williams, a registered sex offender. RP 662. While the CPS worker knew that Williams was a sex offender, she did not realize that his prior conviction was for raping his five year old niece. RP 670. When the CPS worker interviewed EW, EW told her she knew why her uncle had been in prison and said that she wasn't having any difficulties with him. RP 663-65. The worker, however, did not ask about any past problems. RP 672, 679. DW, TW and MW told the CPS worker that the girls were never alone with Williams while they were living with him in the trailer. RP 665-66.

Defense called another CPS worker who interviewed EW in 2001. RP 833-34. During that interview, EW denied being afraid at home, and denied having been hurt by her father and denied seeing her brother get hurt. RP 836. She did say that her parents yelled and that made her sad. RP 836.

Defense also called Dr. John Yuille, a forensic psychologist, who testified that the interview Det. Landis had conducted with EW and MW

at the high school was flawed because a number of the questions were suggestive and could have affected the girls' memories¹¹. RP 768-69, 771-72. He, however, was not able to give an opinion as to whether the girls were susceptible to suggestion and whether their memories had in fact been affected by the interviews, and acknowledged in general the older a child is the less susceptible they are to suggestion. RP 782, 789, 799.

D. ARGUMENT

Williams asserts that the admission of his prior conviction for rape of a child in the first degree was erroneous because RCW 10.58.090 violates the separation of powers and because its admission was in violation of the statute's prerequisites. The State concedes, pursuant to the Washington Supreme Court's recent decision in State v. Gresham¹², that the trial court erred in admitting Williams' prior conviction under RCW 10.58.090. However, the trial court also admitted the evidence related to the prior conviction under ER 404(b) as common scheme or plan evidence. Williams asserts this trial court ruling was also erroneous

¹¹ Det. Landis testified in rebuttal that he had been trained under the Washington State guidelines for interviewing children, that MW had been more difficult to interview than EW because she was less talkative, was very vague and difficult to understand, kept her head down and used hand gestures to communicate. RP 842-45.

¹² In State v. Gresham, ___ Wn.2d ___, 269 P.3d 207 (2012), the Washington Supreme Court determined that RCW 10.58.090 violated the separation of powers because the statute conflicted with the court's rule-making authority and specifically ER 404(b). *Id.* at ¶31-40.

arguing that the court's findings were inadequate and the record insufficient to establish a common scheme or plan. The State's offer of proof regarding Williams' prior conviction for rape of a child in the first degree demonstrated that Williams had a common scheme or plan to molest his nieces, that Williams committed markedly similar acts of misconduct, inserting his finger into the vagina of his young nieces and fondling their vaginal areas, under similar circumstances, when he was alone with his nieces while they were sitting together on a couch at the niece's home and at other times when he had an opportunity or created an opportunity to be alone with them at their house or his trailer. While the trial court did not make extensive explicit findings, the trial court adopted the prosecutor's argument regarding the ER 404(b) factors and the RCW 10.58.090 factors, some of which overlap with those under ER 404(b). Therefore the record is adequate for this Court's review and the court's failure to make explicit findings is harmless. As Williams' prior rape of a child conviction was admissible under ER 404(b), the court's error in admitting it under the less stringent standard of RCW 10.58.090 was harmless.

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 evidentiary accumulation" and the sexual nature of

the allegations. Williams waived the right to raise this issue on appeal because he didn't renew his motion at or before the close of evidence, as required by CrR 4.4(a)(2). Even if Williams had not waived this issue, 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 and the same witnesses would be called at each trial and the jury was instructed to consider each count separately. Williams' defense to the charges did not differ dependent upon the victim related to the counts: he denied the allegations and asserted that the girls' statements were unreliable and tainted by the flawed investigation. Defense pointed to no specific prejudice that would arise from trying the counts together, just that the Williams would not get a fair trial because of the potential for the jury to aggregate the totality of the evidence. Williams failed to establish that joinder was so manifestly prejudicial as to outweigh the desire for judicial economy and therefore the court did not abuse its discretion in denying his severance motion.

Finally, Williams claims under the Sixth and Fourteenth Amendments the State was required to prove to a jury beyond a reasonable doubt that Williams had a prior conviction for a strike offense, thereby subjecting 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. Langstead.¹³ Moreover, the existence of Williams' prior conviction for rape of a child in the first degree, a strike offense, was never contested. Although not necessary, the State's evidence did suffice to prove Williams' prior strike offense beyond a reasonable doubt.

1. The evidence of Williams' prior first degree rape of a child conviction was admissible under ER 404(b) and the court's admission alternatively under RCW 10.58.010 was harmless error.

Williams asserts that the court's findings were not adequate to admit Williams' prior conviction under ER 404(b) and specifically that the evidence was insufficient to admit the conviction to show a common scheme or plan. The court's failure to make explicit findings was harmless because the court adopted the State's argument regarding the factors under ER 404(b) and RCW 10.58.090, thus making the record adequate for review. The State's proffer showed that Williams' prior conviction was relevant to show Williams' common scheme or plan to molest his young nieces by fondling and penetrating their vaginas particularly where Williams' denied all the allegations.

¹³ State v. Langstead, 155 Wn. App. 448, 228 P.3d 799, *rev. denied*, 170 Wn.2d 1009 (2010).

a. Court properly admitted the prior conviction under ER 404(b)

As long as the court correctly interprets the evidence rule, a trial court's decision to admit or exclude the evidence is reviewed for abuse of discretion. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

A court's determinations regarding relevance and balancing of probativeness versus prejudice under ER 404(b) 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). ER 404(b) provides:

Evidence 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.

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). Courts generally find the probative value of ER 404(b) evidence to be substantial in cases where the proof that the sex abuse occurred depends almost

exclusively on the testimony of the child victim. Sexsmith, 138 Wn. App. at 506.

The ER 404(b) analysis is to be conducted on the record, however failure to do so 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.

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). Such evidence is admissible when it shows that a person committed “markedly similar acts of misconduct against similar circumstances.” *Id.* at 856. Conduct is sufficiently similar when the similarity indicates design, not merely coincidence. *Id.* at 860. While the prior act and charged conduct must be “markedly and

substantially similar, the commonality need not be a ‘unique method of committing the crime’.” Gresham, ___ Wn.2d ___, 267 P.3d 207 (2012) ¶19, *citing*, State v. DeVincentis, 150 Wn.2d 11, 19-21, 74 P.3d 119 (2003). 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. A significant lapse in time is not a determinative factor in the court’s analysis of the ER 404(b) factors. *Id.* at 505.

In Gresham, the court found that the 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. Gresham, 269 P.3d 207, ¶20-22. In that case the charged victim was the granddaughter of the defendant and 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 ¶2,3. 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. ¶4. Those incidences occurred usually after everyone had gone to bed, either in the defendant's home or in hotel rooms while on trips. ¶4. 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. ¶2, 4. 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. ¶20. It found that 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. 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 the other details of the offenses were markedly similar to the charged offense. ¶ 20.

Here, the prior sexual offense was Williams' conviction for rape of a child in the first degree of his five year old niece by digital penetration in 1991. The State's offer of proof included the probable cause affidavit for the prior conviction as well as the related pre-sentence investigation

(“PSI”), the plea statement and the judgment and sentence for the conviction. Supp. CP ___, Sub Nom 116; PT Ex. 1, 2, 3, 4. In the PSI, it stated that Williams agreed with the official version of the offense, which was the affidavit of probable cause. Ex. 3 at 2. The probable cause affidavit indicated that Williams confessed that he had fondled the vaginal area of his five year old niece, that this occurred while they were sitting on the living room couch while he was babysitting her, that he had put his finger inside the outer lips of her vagina for 15-20 minutes, that when she told him it hurt, he stopped and told her to keep it between themselves. PT Ex. 1. He also admitted that the same type of touching had happened several other times while he was babysitting this niece and that he had told the niece not to say anything about it. PT Ex. 1. One of those times also occurred on a living room couch. *Id.* Williams in his plea statement admitted that he had put his finger in the niece’s vagina. PT Ex. 2.

Here, Williams’ prior conviction for first degree rape of a child was properly admitted under ER 404(b) even though its admission under RCW 10.58.090 was not proper under Gresham. First, there was no question that the prior sexual abuse had occurred because it was a conviction and defense counsel acknowledged that. RP 122, 140. Second, the prosecutor sought to introduce the evidence based on common scheme or plan, that Williams had a common scheme or design to molest his

young female relatives, as well as pursuant to RCW 10.58.090. RP 115, 120.

In addressing the factors regarding admissibility under RCW 10.58.090, the prosecutor essentially addressed all of the ER 404(b) factors. The prosecutor's argument regarding the similarity of offenses under RCW 10.58.090(6) essentially addressed his ER 404(b) relevance argument regarding common scheme or plan. The prosecutor noted the similarity of the prior conviction to the current offenses, that both the prior and current abuse involved rubbing of the vaginal area and digital penetration of Williams' young nieces' vaginas, that some of the instances occurred in both the former and current victims' homes, sometimes on a couch, and that they were close in time if the period Williams spent in prison were discounted.

Under both RCW 10.58.090 and ER 404(b), the court determines whether the evidence is unduly prejudicial under ER 403, *i.e.*, balances the probative value against undue prejudice. The prosecutor asserted that the conviction was probative of Williams' design to rape and molest children and that the probative value of the prior conviction was not outweighed by undue prejudice given the defendant's prior conduct in molesting up to five other children. RP 118-19. The prosecutor indicated that the evidence he sought to admit at trial regarding the prior sex abuse would be limited

to the plea statement and Williams' admissions to his brother about that offense. RP 127, 135.

In ruling, the court explicitly relied upon the prosecutor's analysis in admitting the prior conviction under ER 404(b) and RCW 10.58.090. RP 153-54. The court specifically noted the similarity of the prior offense to those charged, that the victims were young female relatives and one of the incidents occurred on the couch.¹⁴ RP 154. The court specifically limited the evidence within the PSI that could be presented and excluded other evidence regarding Williams' sexual abuse of other young relatives of his. RP 155, 158, 160.

The trial court did not abuse its discretion in admitting Williams' prior sex conviction under ER 404(b). As noted by the prosecutor, Williams' prior sex offense was markedly similar to the current offenses: Williams took advantage of his access to his young nieces and used those opportunities to abuse them sexually, by rubbing their vaginas and digitally penetrating them. In addition, Williams told all three nieces not to tell anyone, to keep what he had done to them secret. While not all of the offenses occurred within the home, or specifically on the couch, and

¹⁴ The court appeared to have had some technical difficulty and was unable to recite to everything he highlighted in his notes because of some malfunction of equipment. RP 154

the abuse of EW and MW included touching of their breasts and kissing of their breasts and vagina, these differences are not so great, as they weren't in Gresham, "as to dissuade a reasonable mind from finding that the instances are naturally to be explained as 'individual manifestations' of the same plan."

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 implicating every element of the offense, court did not abuse its discretion in admitting evidence of prior acts of child rape and molestation where child sex abuse victim's credibility was central to the case). This probative value outweighed any undue prejudice particularly where the trial court limited the evidence that could be admitted to the plea statement and statements Williams made to his brother.

While the trial court did not engage in an explicit analysis under ER 404(b), it did indicate that it was relying upon the State's analysis which provides this court with a sufficient record for review. While the prosecutor could have been more explicit in differentiating between his analysis under ER 404(b) and RCW 10.58.090, some of the factors required the same consideration, in particular the similarity of offenses

and the balancing of probative value versus prejudice. It is clear from the record that the court did not disregard the balancing it was required to perform and took careful consideration in deciding whether and how much evidence regarding the prior conviction should be admitted. The failure of the trial court to do an explicit balancing on the record is harmless where, as here, the record is clear that the court did consider the relative weight of probative value and prejudice and made a conscious decision to admit the evidence after doing so.

In arguing on appeal that the trial court erred in admitting the prior conviction under RCW 10.58.090,¹⁵ Williams asserts the detail referenced by the State's argument was not present in its proffer at the hearing. The State's proffer included the four exhibits submitted at the hearing, all of which were court-filed documents, including the affidavit of probable cause that detailed the prior event. The fact that the evidence admitted at trial was less than the State's proffer does not affect the admissibility of the prior conviction in this case¹⁶. Defense counsel sought to keep the details of the conviction out, noting that there was a big difference between the fact of conviction and the details. RP 140, 155. Defense

¹⁵ The State addresses this argument assuming Williams will assert it applies equally to admission of the prior conviction under ER 404(b).

¹⁶ The prosecutor had hoped to be able to elicit more details about the prior conviction through testimony from the DOC officer who wrote the PSI in the prior conviction. However, at the time of trial, the State was unable to locate him.

counsel argued against allowing any evidence in other than the plea statement itself, and the court limited the evidence that could be introduced to the plea statement and statements Williams made to his brother at the time of sentencing in the prior conviction. Moreover, the evidence that was admitted demonstrated the marked similarity between the offenses, albeit with less detail than if the court documents had been admitted into evidence or if the prior victim had testified herself. The evidence admitted at trial included the fact that Williams had previously been convicted of rape of a child in the first degree for digitally penetrating the vagina of another of his young nieces and that Williams had admitted to DW that he had been “playing around” with the niece and had inserted his finger inside her vagina.¹⁷ RP 252.

b. harmless error

Williams asserts that the court’s error in admitting the prior conviction under RCW 10.58.090 cannot be harmless where no ER 404(b) limiting instruction was given. A trial court is not required to give a limiting instruction regarding ER 404(b) evidence unless one is requested. Here defense counsel requested the limiting instruction regarding RCW 10.58.090 and did not request an instruction regarding ER 404(b). While

¹⁷ DW’s testimony also revealed that Williams committed the new offenses against EW within a few years after being released from prison and DOC’s supervision. RP 254.

defense counsel's failure to request one under ER 404(b) is understandable given admission of the evidence under RCW 10.58.090, the lack of an instruction limiting the jury's consideration of the evidence is harmless here where the limiting instruction given directed the jury not to convict Williams simply based on propensity and the prosecutor only argued to the jury that Williams' other acts of sexual misconduct should be considered as evidence of a common scheme or plan or to demonstrate his lustful disposition towards his young nieces. As the prior conviction was admissible, and was admitted, under ER 404(b) to show common scheme or plan, the fact that the court alternatively admitted the evidence under RCW 10.58.090 was harmless error.

The appellate court may affirm the trial court on any correct ground. State v. Gresham, *supra*, at ¶ 15. Erroneous admission of ER 404(b) evidence requires reversal "only if the error, within reasonable probability, materially affected the outcome." State v. Everybodytalksabout, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). This nonconstitutional harmless error standard of review also applies to the erroneous admission of prior sexual offense evidence under RCW 10.58.090. Gresham, ¶42.

If evidence of other wrongs is admissible for a proper purpose, the party against whom the evidence is admitted is entitled to a limiting

instruction, *if requested*, instructing the jury that it may consider the evidence only for that proper purpose. Gresham, at ¶16 (emphasis added). The trial court, however, is not required to give a limiting instruction sua sponte. State v. Russell, 171 Wn.2d 118, 123-24, 249 P.3d 604 (2011); ER 105. Failure to request a limiting instruction waives the right to raise that issue on appeal. State v. Williams, 156 Wn. App. 482, 492, 234 P.3d 1174, *rev. den.*, 170 Wn.2d 1011 (2010). Failure to give a limiting instruction regarding ER 404(b) evidence is also subject to the nonconstitutional harmless error standard review. Gresham, ¶26.

Here, the limiting instruction the court gave stated:

In a criminal case in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense may be considered for its bearing on any matter to which it is relevant. *However, evidence of a prior offense on its own is not sufficient to prove the defendant guilty of any crime charged in the Information.* Bear in mind as you consider this evidence that at all times the State has the burden of proving the defendant committed each of the elements of each offense charged in the information. The defendant is not on trial for any act, conduct or offense not charged in the Information.

CP 53 (Inst. No. 6)¹⁸ (emphasis added). In closing the prosecutor only argued that “other information,” Williams’ other acts of sexual abuse

¹⁸ The defense proposed a nearly identical instruction, the only differences being that the phrase “an offense of sexual assault or child molestation” was used in the defense version instead of “sex offense” and the last sentence started with “I remind you that...” CP 80. The court used the State’s proposed version which the State submitted a couple days after the defense. Supp CP __, Sub Nom. 125 (Plaintiff’s Supplemental Proposed Instructions); RP 327.

and/or misconduct, was relevant in order to show Williams' common scheme or plan to sexually abuse his young nieces:

Other information is certainly important because it establishes that Fred Williams had a plan, a design, to molest and rape his young female relatives. It also establishes that he had a lustful disposition towards his young female relatives, in general, and the individual victims in particular. But not each activity, not all activities or each of the activities are actually charged offenses.

RP 889-90. Here the prosecutor did not delineate between Williams' prior conviction and Williams' other sexual misconduct and argued only that the relevance of Williams' other sexual misconduct was to show a common scheme or plan to molest his young nieces and to show his lustful disposition towards them. This argument mitigated against the jury using the information for any improper propensity purpose. *See, State v. Williams*, 156 Wn. App. at 492 (prosecutor's argument in closing that evidence of prior convictions should not be used to decide that defendant was a "bad seed" but to determine if defendant had a common scheme or plan effectively gave proper limiting instruction to jury). Defense counsel didn't reference the prior conviction in his argument or how the jury was to consider this evidence in its deliberations.

Given that the evidence was admissible under ER 404(b), any error in admitting the evidence was harmless. The lack of a limiting instruction regarding the consideration of the prior conviction evidence was harmless

too where the prosecutor only argued that the evidence was relevant to show a common scheme or plan and the limiting instruction given cautioned the jury not to convict Williams on the basis of that evidence alone.

Moreover, there is not a reasonable probability that the error in admitting the prior conviction under RCW 10.58.090, or even if this Court were to determine that it was error to admit it under ER 404(b), materially affected the verdict where evidence of the prior conviction was admitted and used in support of Williams' defense. In addition to arguing that there had been a flawed investigation and that the girls' statements and testimony were unreliable, the defense specifically argued that Williams did not have an opportunity to commit the sexual abuse because the family was aware of the prior child sex conviction and had not allowed their children to be alone with Williams because of it. RP 914-39. In cross-examination of DW, defense counsel elicited testimony that DOC had trained DW to keep Williams in his line-of-sight whenever Williams was around minors and to ensure that Williams was in his line-of-sight when Williams visited his family while Williams was on DOC supervision. RP 300-02, 306-12, 321. Defense counsel specifically elicited testimony from

DW about the lack of opportunities for Williams to be alone with the girls given DW's house rules, and called the girls' mother to testify¹⁹ that the girls were not allowed to be alone with Williams. RP 300-02, 306-12, 321, 557-64, 571. The prior conviction also came up in the testimony of one of the defense witnesses, a CPS worker at the time, that EW knew why her uncle had been in prison and denied that she was having any difficulties with him while her family was living in her uncle's trailer. Defense counsel also argued that given Williams' prior conviction, he's the last guy who would want to be accused of something like that. RP 938. While the defense sought to keep specific details about the prior conviction out, defense certainly used the prior conviction evidence extensively in support of its defense theory. It is unlikely that the error in admission of the prior conviction under RCW 10.58.090 materially affected the jury's verdict, even if the prior conviction wasn't admissible under ER 404(b), where testimony regarding the conviction was elicited and used by defense to make their case.

¹⁹ The mother was initially called by the State as a witness, but upon cross-examination defense exceeded the scope of direct and she was then converted into a defense witness and taken out of order. RP 560-61.

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 “risk of evidentiary accumulation” and the sexual nature of the multiple allegations. Brief at 46-47. The multiple counts involving the two sisters were properly joined for trial and defense failed to establish manifest prejudice that outweighed the desire for judicial economy. The court did not abuse its discretion in denying the motion.

Trial courts may properly join multiple offenses for trial pursuant to RCW 10.37.060 and CrR 4.3. Under CrR 4.3 two or more offenses may be joined in one charging document where the offenses are of the same or similar character. CrR 4.3(a)(1).²⁰ This rule is construed broadly to promote conservation of judicial and prosecution resources. State v. Bryant, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998), *rev. den.*, 137

²⁰ RCW 10.37.060 provides:

When there are several charges against any person, for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments or informations the whole may be joined in one indictment or information, in separate counts, and, if two or more indictments are found, or two or more informations filed, in such cases, the court may order such indictments or informations to be consolidated.

Wn.2d 1017 (1999). Offenses properly joined under CrR 4.3(a) shall be consolidated for trial unless the court determines that severance will promote a fair determination of the defendant's guilt or innocence for each offense. CrR 4.3.1; CrR 4.4(b); Bryant, 89 Wn. App. at 864.

a. waiver

Williams failed to preserve the denial of his severance motion for appellate review by failing to renew his motion at the close of evidence. If a defendant moves for severance pretrial but fails to renew the motion at the close of all evidence, the defendant waives the issue of severance and may not raise it on appeal. CrR 4.4(a)(2); State v. McDaniel, 155 Wn. App. 829, 859, 230 P.3d 245, *rev. denied*, 169 Wn.2d 1027 (2010); Bryant, 89 Wn. App. at 864-65.

Here, Williams is precluded from raising the issue of severance on appeal because he moved pretrial for severance of the counts, but did not renew his motion before or at the close of all evidence. Despite this, Williams asserts in a footnote that severance motions made during trial do not need to be raised again in order to preserve them. Brief at 44 n. 13. He asserts that he made his motion on the "first day of trial," implying that his motion was not made "before trial" and therefore he does not fall under

the waiver provisions of CrR 4.4(a)(2)²¹. Brief at 43. “Before trial” in the context of CrR 4.4 includes hearings held before voir dire. *See, State v. Wood*, 94 Wn. App. 636, 972 P.2d 552 (1999) (motion for severance heard before voir dire and before judge who did not conduct the trial was made “before trial” and not “during trial” for purposes of CrR 4.4(c)(2)).

Contrary to his assertion, Williams did not make his motion during trial, but in pretrial motions. On Feb. 16th, 2011, defense counsel filed a motion and affidavit for severance, and a memorandum in support thereof. CP 121-28. On Feb. 23rd he filed a note for calendar setting the motion on for the 28th of February. Supp CP __, Sub Nom. 96. On Feb. 28th, he filed a memorandum in support of his first motion in limine and motion to sever. CP 102-116. On March 1st he renoted the motions to be heard on March 14th and the motion to sever was heard on March 14th. Supp CP __, Sub Nom. 106C; 116; RP 161-65. Trial commenced with voir dire the next afternoon, on March 15th, after the court heard the CrR 3.5 motion in

²¹ CrR 4.4 states in part:

(a) Timeliness of Motion--Waiver.

- (1) A defendant's motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require. Severance is waived if the motion is not made at the appropriate time.
- (2) If a defendant's pretrial motion for severance was overruled he may renew the motion on the same ground before or at the close of all the evidence. Severance is waived by failure to renew the motion.

the morning. Supp CP ___, Sub Nom. 117, 118; RP 223. Furthermore, CrR 4.4 requires severance motions to be made before trial or they are deemed waived, unless before or at the close of evidence the interests of justice require otherwise. CrR 4.4(a)(1); State v. Harris, 36 Wn. App. 746, 748, 677 P.2d 202 (1984).

b. trial court did not abuse its discretion in denying the severance motion

Even if this Court were to address the merits of this issue, Williams has failed to meet his burden to show that joinder in this case was so manifestly prejudicial as to outweigh the need for judicial economy. Offenses properly joined under CrR 4.3 (a) 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). The 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); State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990). 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. Bythrow, 114 Wn. 2d at 717-18. "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 determining whether the denial of a motion to sever amounts to manifest abuse of discretion, the reviewing 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.

The charged counts relating to EW and those relating to MW were equally strong and easily compartmentalized. The abuse against MW was separated in time from EW’s. While neither girl disclosed during the abuse, MW’s disclosures were specific and detailed, and she had disclosed to her childhood friend before she was interviewed by Det. Landis, the interview that defense asserted tainted MW’s allegations. While EW’s descriptions of abuse were not as detailed as MW’s, both EW and MW described incidents in which Williams used equipment to photograph or

view the girls' vaginas. EW's testimony was also corroborated by her behavior towards Williams, her withdrawn nature and avoidance of Williams whenever he was in the house, and her later disclosure to her mother that Williams was making her uncomfortable. Second, Williams' defense with respect to the two girls was similar and interconnected. In addition to asserting a general denial and lack of opportunity to commit the offenses, Williams asserted that girls' statements were unreliable and tainted by the flawed investigation. The only difference in defenses was that Williams also asserted that EW's disclosures and testimony were not reliable because they lacked sufficient detail and were contradicted by her alleged denial to CPS in 2006. RP 915-38.

As to the third factor, the jury was instructed to consider each count separately. CP 56 (Inst. 9). 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 the joinder of the counts. Moreover, the prosecutor was very 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, that their decision on one count could not control their decision as to any other count. RP 891, 896-904, 908-13.

Much of the evidence from each count was cross-admissible regarding the other counts under ER 404(b). While EW was not able to give as many specifics about each incident of abuse as MW, given the passage of time since their occurrence and her desire to forget what happened to her, the acts of sexual abuse were cross-admissible. EW specifically testified that Williams took a picture of her vagina with a Polaroid camera, informing her that he was taking the picture so he could draw her vagina. MW also described an incident in which Williams showed MW her vagina by using a video camera that he told her was connected to the television set. Both girls related similar instances of abuse, vaginal rubbing and vaginal digital penetration and touching and kissing of their breasts. Both also testified that Williams had told them to keep the abuse secret.

Finally, the counts relating to EW and MW 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 in each girl's case because part of the defense was predicated on the fact that the parents were aware that Williams was a sex offender and therefore the parents didn't allow Williams to be alone with the girls. The CPS worker would have been called to testify in each case because she testified about interviewing both EW and MW during the time they were

living in Williams' trailer. 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 noted by the prosecutor at the severance motion, 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. RP 165-66.

The court denied the severance motion based on its determination regarding the prior conviction's admissibility under ER 404(b) and RCW 10.58.090, the fact that the victims were sisters and the factors identified by the prosecutor. RP 168. Defense did not identify any specific prejudice from the joinder, but argued that the potential of the jury to aggregate the totality of the evidence, particularly in light of the prior conviction, would be problematic in ensuring Williams a fair trial. RP 161-66. The trial court did not abuse its discretion in finding that the defense had not demonstrated that the 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.) Williams' defense was not prejudiced by joinder of these charges where his defense was premised on a general denial and an argument that the flawed investigation resulted in tainted disclosures and unreliable statements. If the counts had been separated for trial, it would have involved two nearly identical trials, except for the victim's testimony. Even if the counts had not been cross-admissible, Williams failed to meet his burden to establish that joinder was so manifestly prejudicial as to outweigh judicial economy.

3. The State was not required to prove Williams' prior strike to a jury beyond a reasonable doubt and met its obligation to prove the prior strike offense by a preponderance of the evidence.

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 two prior "strikes." These arguments have been rejected repeatedly by Washington courts.

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). Despite this explicit language, defendants 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 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.

Subsequently, in State v. Smith the Washington Supreme Court addressed these same issues under the Washington Constitution, Article I, Sections 21 and 22, in another POAA case. State v. Smith, 150 Wn.2d 135, 139, 75 P.3d 934 (2003), *cert. denied*, 541 U.S. 909 (2004). The

court first reaffirmed its holding in Wheeler under the federal constitution. *Id.* at 143. Then, after a full Gunwall analysis, the court rejected the claim that the Washington Constitution requires a jury trial for determining prior convictions at sentencing. *Id.* at 156. *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.").

In addition to Apprendi, Williams relies on 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). In Blakely, the Court extended the right to a jury trial and proof beyond a reasonable doubt to facts that elevate a sentence above the standard range. Blakely, 542 U.S. at 303-04. But the Washington Supreme Court has rejected the arguments that Williams now makes, even in light of Blakely. 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 a prior conviction. Citing Lavery²², Smith and Wheeler, the court reiterated: "This court has repeatedly rejected similar arguments and held that *Apprendi* and its progeny do not require

²² In re Personal Restraint of Lavery, 154 Wn.2d 249, 111 P.3d 837 (2005).

the State to submit a defendant's prior convictions to a jury and prove them beyond a reasonable doubt.” Thieffault, 160 Wn.2d at 418.

The Washington Supreme Court has rejected Williams’ argument that he was entitled to have his prior strikes determined by a jury beyond a reasonable doubt. This Court also recently rejected this same due process argument in State v. Langstead, 155 Wn. App. 448, 452-53, 228 P.3d 799, *rev. den.*, 170 Wn.2d 1009 (2010). 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 met that burden. *Id.* 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 trial from Williams’ brother that he had been convicted of that offense. RP 964; Supp CP ___, Sub Nom. 124, Ex. 1, 2. Williams’ prior strike offense was proved beyond a reasonable doubt.

E. CONCLUSION

The State requests this Court affirm Williams’ convictions and sentence.

Respectfully submitted this 9th day of March, 2012.

Hilary A Thomas

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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, GREGORY LINK, addressed as follows:

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Sydney A. Ross
NAME

03/09/2012
DATE

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