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STATE OF WASHINGTON

NO. 39883-4-II

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

DAVID JOEL GOWER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Bryan E. Chushcoff

No. 07-1-05074-6

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the defendant's conviction of indecent liberties as charged in count II should be affirmed where, viewing the evidence in the light most favorable to the state, there was sufficient evidence from which a rational trier of fact could have found forcible compulsion.

2. Whether the defendant's conviction of second-degree incest, a lesser-included offense of first-degree incest as charged in count III, should be affirmed where, viewing the evidence in the light most favorable to the state, there was sufficient evidence from which a rational trier of fact could have found that the acts occurred in the State of Washington.

3. Whether the defendant's conviction of indecent liberties as charged in count IV should be affirmed where, viewing the evidence in the light most favorable to the state, there was sufficient evidence from which a rational trier of fact could have found sexual contact.

4. Whether the trial court's admission of evidence concerning the defendant's past sex offenses pursuant to RCW 10.58.090 was consistent with due process.

5. Whether RCW 10.58.090 should be upheld as consistent with the separation of powers doctrine and the trial court's admission of evidence thereunder affirmed where that statute is permissive and can be harmonized with ER 404(b).

6. Whether the trial court properly admitted C.M.'s testimony regarding spankings by the defendant under RCW 10.58.090 where such spankings constituted sex offenses within the meaning of that statute.

7. Whether the defendant's convictions should be affirmed where there was no error committed in the trial of this matter and therefore the cumulative error doctrine is inapplicable.

B. STATEMENT OF THE CASE.

1. Procedure

On September 28, 2007, Appellant David Joel Gower, hereinafter referred to as "defendant," was charged by information with second-degree child rape in count I, third-degree rape in count II, first-degree incest in count III, and second-degree assault in count IV. CP 1-2. The victim listed in each count was S.H. *Id.* An amended information was filed June 12, 2009, CP 3-5, and the defendant was arraigned on that

amended information on June 30, 2009. RP 4-7. That amended information charged second-degree child rape in count I, indecent liberties in count II, first-degree incest in count III, indecent liberties in count IV, and second-degree assault in count V. CP 3-5. S.E.H. was listed as the victim in each count. *Id.*

On June 30, 2009, the court heard pre-trial motions, including motions to dismiss and a motion to suppress. RP 7-38.

On July 13, 2009, the State moved to admit testimony of C.M. and J.K. regarding prior sex offenses perpetrated against them by the defendant. *See* RP 43-140. The state took the testimony of these witnesses, RP 44-80, 80-121, and the deputy prosecutor and defense attorney offered arguments. RP 123-31. The court then ruled that “under RCW 10.58.090, the allegations that C[.M.] has made are admissible, but not as to J[.K.]” RP 131-36, 138-40. With respect to testimony concerning the defendant spanking C.M., the court noted that “[t]here was a sexual aspect to it.” RP 135:

Now, he wanted her to sit on his lap frequently and so did J[.K.] for that matter. He seemed to be particularly interested in the buttocks of the child when he was asking her to expose herself to him. While – I’m going to permit that, the spanking information to come forward as well from C[.M.], because I think it has to do with the whole way in which he is relating to this child in a sexual way.”

RP 136-36. The court then clarified that it was going to admit C.M.’s testimony concerning the defendant spanking her, under RCW 10.58.090,

“not on the issue of the assault itself, but with respect to the sexual offenses” because “it has a sexual component.” RP 136. The Court subsequently filed written findings of fact and conclusions of law regarding the State’s motion to admit evidence of prior sex offenses. CP 25-32.

The parties agreed to try the matter to the bench, RP 6, CP 11, and stipulated that the court could consider the pre-trial testimony of C.M. at trial, rather than having her testify twice. RP 136-38, 145-47, CP 12.

The bench trial began on the morning of July 14, 2009. RP 140, 150. The State gave an opening statement that day and the defense reserved. RP 150. Tacoma Police Detective Jason Brooks then testified, RP 150-268, followed S.H., RP 268-78, and S.E.H. RP 286-360.

The State then filed a second amended information, changing count I to second-degree child rape, but leaving the remaining counts unchanged. CP 7-9; CP 11. The defendant was arraigned on the second amended information, RP 360-68, and the defense conducted additional cross-examination of S.E.H. RP 368-71.

The State rested and the defense moved to dismiss. RP 371. That motion was denied. RP 379-81.

The defense gave an opening statement, RP 382, and took testimony of Boris Hodak, RP 382-408, William D. Herrington, RP 408-

33, Elizabeth Gower, RP 438-47, Kerry Barthelemy, RP 447-61, and the defendant. RP 462-543.

The parties gave their closing arguments. RP 544-52, 552-68, 568-71.

On August 24, 2009, the court found the defendant guilty of indecent liberties as charged in counts II and IV, and guilty of second-degree incest, a lesser-included offense of that charged in count III. RP 580; Supp. CP 38-39. The court found the defendant not guilty of counts I and V. *Id.* The court filed findings of fact and conclusions of law re: bench trial on October 9, 2009. CP 10-18.

On October 9, 2009 the defendant was sentenced, as a persistent offender, to life in total confinement on counts II and IV and to 60 months in total confinement on count III. RP 596; Supp. CP 43-64.

The defendant filed a timely notice of appeal the same day. CP 33.

2. Facts

C.M. is the defendant's biological daughter. RP 45. She was born on November 10, 1984 and the defendant started molesting her when she was in the second grade. RP 45-46. The defendant started by "describing anatomy" and showing his "anatomy" to his daughter. RP 48-49. The defendant then started to make C.M. touch him. RP 49. C.M.

remembered having to show the defendant her breasts. *Id.* One time the defendant played with her nipples. RP 51. On another occasion, he wanted to put his penis in his daughter's mouth, but she refused. *Id.* C.M. stated, "I got as far as touching him with my tongue, but that was it." RP 56.

Although C.M. lived mostly with her mother, she stayed with the defendant during the summer of 1995. RP 52. She said that he would come home at about 2:00 or 3:00 in the morning, wake her up and expose himself to her. *Id.* The defendant would then make his daughter take off her clothes, including her panties, turn around, bend over and "spread [her] but cheeks" while he looked. RP 52. He would then make her go back to bed without all of her clothes. *Id.*

C.M. stated that there were times when the defendant would make her watch him masturbate. RP 52.

C.M. described a time when the defendant made her watch pornography with him and made her touch herself. RP 52-53. The defendant made his daughter walk around the house without any clothing on and made her sit in front of the sliding glass door, with the curtains open, facing a cul de sac. RP 53. The defendant then had her dress in a bathing suit, put her on the back of his motorcycle, and took her to Alki Beach. RP 56.

The defendant also made C.M. sit on his lap and expose her breast to him. RP 57. While she did so, the defendant “sucked and played” with his daughter’s nipple. *Id.*

C.M. testified that she was always afraid of physical pain from the defendant, stating, “He hit me a lot.” RP 54. *See* RP 61-63.

The defendant ultimately pleaded guilty to two counts of child molestation for molesting C.M. *See* RP 463, 499-500

S.E.H. was born on November 10, 1989 and has never been married. RP 286-87. The defendant married S.E.H’s mother, Sivilina Ancheta, when S.E.H. was 15 years of age. RP 286-90.

S.E.H. testified that the defendant and her mother “had this interest in sadomasochism” and that “[t]hey had leather whips, paddles, and other stuff that I don’t know the terms for exactly.” RP 294-95.

She said that the first time the defendant did anything inappropriate to her was when she was 11 and he came into her room while she was sleeping. S.E.H. testified that the defendant told her to take off her pants and underwear and open her legs before he put his finger in her vagina and scooped something out. RP 295-96. She didn’t tell anyone because the defendant had made up a rule that whatever happens in the condo stayed in the condo. RP 296-97, 348-49.

S.E.H. testified that when the family moved to their house on South Cedar Street in Tacoma, Washington, the defendant told her to go down to the basement, take off her clothes, and wait. RP 298. The defendant then used a paddle, belts, a coat hanger, a “flogger,” or his hand and hit her while she counted his strikes. RP 298-99, 335. S.E.H. said that she would be completely naked during these beatings. RP 299-300. She testified that this happened every month. RP 300.

S.E.H. testified that her “grades weren’t that great” and that in late August or early September, 2007, the defendant, who was a truck driver, told her to either accompany him on a trip or when he got back he would hit her with whatever he chose. RP 304, 348. S.E.H. testified that she accompanied him on the trip, but that once she got in the truck, “there were choices of punishment within the truck.” RP 306, 348. She said that, “I would have to put one of my breasts in his hand, and he would twist the nipple” and that she would have to sit with her pants off and that he would stick his finger in her vagina or make her do so. *Id.*

S.E.H. testified that she was scared while this was occurring, RP 309, and that she was intimidated by the defendant. RP 300-01. She stated that the defendant was “a scary figure.” RP 300-01. The defendant weighed about 380 pounds at the time. RP 499. S.E.H. testified that there was no way to get out of the truck without injuring herself once the trip

started because it was moving down the road and there was no where to go. RP 354-55.

S.E.H. stated that later in September, 2007, she had put potato skins down the drain and that it got clogged. She testified that the defendant told her to go downstairs, take off her clothes, and wait. RP 309-10. She did so and the defendant came down and hit her with a coat hanger. RP 310. While the defendant was hitting S.E.H. on her buttocks, the defendant asked her, "Are we having fun yet?" RP 311-12. S.E.H. was 17 years of age and completely naked while this was occurring. *Id.*

S.E.H. said that the defendant had also hit her with "a flogger" used in sadomasochism." RP 232, 251. She indicated that the flogger had a handle with leather fringe, and that it was kept in a separate room in the basement. RP 251. S.E.H. said that she had been beaten with several other items as well, including belts, paddles, and wire hangers. RP 250.

Later that month, S.E.H. met with a friend, and then went with her to a teacher to disclose the defendant's sexual and physical abuse. RP 313.

On September 24, 2007, Tacoma Police Detective Jason Brooks was assigned the case. RP 151-56. He began his investigation that same day by reading the report prepared by the patrol officer and then interviewing S.E.H. RP 155-57. During that interview, S.E.H. appeared

to be upset and scared and was visibly shaking, emotional, crying, and sad.
RP 157.

S.E.H provided some details regarding the crime scene and Detective Brooks thereafter obtained a search warrant for the house where she lived with her mother, sister, and the defendant. RP 158-59. The detective served that search warrant the next day, on September 25, 2007.
RP 159.

Photographs of the residence were taken, as well as photographs of an "S & M room" in the basement of the residence. RP 159-60. Police found "a part of a tripod," "some wires and some rope of some kind," "eyebolts mounted to the wall," makeup smeared against the wall, a box containing "sex toys and sex items including DVDs, condoms, and other devices," and "a large piece of wood" that appeared to be "a device for spanking or hitting" RP 164-71, RP 227. Detective Brooks indicated that S.E.H. disclosed that she had been "spanked and hit with several different types of items." RP 171. The box and items inside were admitted into evidence. RP 175-79.

Detective Brooks also found a game entitled "Spanky, Spanky," inside the "S&M room." RP 179. That game included a wood dowel, a plastic and wire racquet, a sex toy, wood spatula items, and a metal disk. RP 179-82. The game box of "Spanky, Spanky" read, "Don't spare the

rod, play 'Spanky, Spanky,' the hanky panky game for consenting adults." RP 256, 258-61. Detective Brooks indicated that he believed that this game was relevant to his investigation because S.E.H. "received spanking across her bare bottom." RP 261.

He also found what he described as a sword and a "torture device" that had "a wood handle with long blades coming out of it." RP 182. He found a black wire whip and a metal paddle in the defendant's bedroom. RP 185. There were also various other weapons left in the residence such as "a big sword" and "an axe-type device." RP 212.

The defendant's wife indicated that she and the defendant used the S&M room for sex and that she liked it to be "kinky and rough sex." RP 230. The S&M room was used for "sadoomasochism, S&M, torture sex." *Id.*

Boris Hodak, who was involved in a sadoomasochism group with the defendant and his wife, testified that one of the reasons for involvement in the group is that normal things in life do not satisfy desires. RP 397. He also testified that people involved in the sadoomasochistic lifestyle spank each other as a form of pleasure, RP 404, and that some people have trouble differentiating between the sadoomasochistic lifestyle and their day-to-day life. RP 391. In fact, there

are quite a few support groups to help people differentiate appropriately.

Id.

Kerry Barthelemy also knew the defendant through the defendant's involvement in a sadomasochism group and noted that the defendant "was part of the main core of that group." RP 448, 456.

Brooks indicated that he examined and photographed the defendant's truck, RP 187-208, 244-, and the defendant's residence. RP 209-12, 226. The defendant was placed under arrest during service of the warrant on the house. RP 226.

S.H., S.E.H.'s sister, stated that she shared "an attic loft" with S.E.H. and that she didn't go downstairs often because the defendant was usually down there. RP 271-72. S.H. testified that sometimes S.E.H. would come back from the basement not wearing any pants or underwear and noted that "[i]t was probably a punishment, not wearing any pants." RP 272. S.E.H. was "[u]sually slightly pissed off and crying" when she came up from the basement naked from the waist down. RP 273.

The defendant testified that he is 46 years of age, RP 463, and that he was born April 17, 1963. RP 499. He stated that he had previously pleaded guilty to two counts of child molestation for molesting his biological daughter. RP 463, 499-500. He testified that he would have his daughter get up in the middle of the night, take her clothes off, and bend

over in front of him. RP 500. Despite these convictions, he married S.E.H.'s mother, Sivilina, RP 463, and moved in with Sivilina and her two young daughters. RP 479. The defendant, however, denied sexually or physically abusing S.E.H., RP 472-94, or ever seeing her naked. RP 476. Despite testifying that he set up a system by which he would not be alone with the girls, the defendant said that he took S.E.H. with him alone three times on trips to Astoria. RP 505. He also admitted to being involved in sadomasochism and that, at least at one point in his life, "normal" things did not satisfy him sexually. RP 516-18.

C. ARGUMENT.

1. THE DEFENDANT'S CONVICTION OF INDECENT LIBERTIES AS CHARGED IN COUNT II SHOULD BE AFFIRMED BECAUSE, VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE FROM WHICH A RATIONAL TRIER OF FACT COULD HAVE FOUND FORCIBLE COMPULSION.

In a criminal case, a defendant may challenge the sufficiency of the evidence before trial, at the end of the State's case in chief, at the end of all of the evidence, after the verdict, and on appeal. *State v. Lopez*, 107 Wn. App. 270, 276, 27 P.3d 237 (2001). "In a claim of insufficient evidence, a reviewing court examines whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,' 'viewing the evidence in the light most favorable to the State.'"

State v. Brockob, 159 Wn.2d 311, 336, P.3d 59 (2006)(quoting *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). Thus, “[s]ufficient evidence supports a conviction when, viewing it in the light most favorable to the State, a rational fact finder could find the essential elements of the crime beyond a reasonable doubt.” *State v. Cannon*, 120 Wn. App. 86, 90, 84 P.3d 283 (2004). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.* (quoting *State v. Myers*, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn. 2d 192, 201, 829 P.2d 1068 (1992). “Determinations of credibility are for the fact finder and are not reviewable on appeal.” *Brockob*, 159 Wn.2d at 336.

“After a bench trial,” an appellate court “determine[s] whether substantial evidence supports the trial court’s findings of fact, and in turn, whether the findings support the conclusions of law.” *State v. Stevenson*, 128 Wn.2d 179, 114 P.3d 699 (2005). “When findings of fact are unchallenged, they are verities on appeal.” *State v. Rogers*, 146 Wn.2d 55, 61, 43 P.3d 1 (2002)(citing *City of Seattle v. Muldrew*, 69 Wn.2d 877, 878, 420 P.2d 702(1966)). “Notwithstanding the absence of a challenge to findings of fact,” however, “when the sufficiency of the evidence is challenged the appellate court must still determine whether the unchallenged findings of fact support the trial court’s conclusions of law.”

Id. (citing *State v. Aitken*, 79 Wn. App. 890, 905 P.2d 1235 (1995)). In fact, in a challenge to the sufficiency of the evidence following a bench trial, when findings of fact are not challenged, “review is limited to whether the findings of fact support the trial judge’s conclusions of law.” *State v. Munson*, 120 Wn. App. 103, 83 P.3d 1057 (2004).

The defendant here was charged in count II of the second amended information, with committing the crime of indecent liberties. CP 7-9.

That count charged that the defendant

During the period between the 1st day of August, 2007 and the 10th day of September, 2007, did unlawfully and feloniously by forcible compulsion, knowingly cause S.E.H., not the spouse of the defendant to have sexual contact with him or another

CP 3-4. See RCW 9A.44.100(1)(a).

RCW 9A.44.010(6) defines “forcible compulsion” as:

Physical force which overcomes resistance, or *a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.*

(emphasis added).

In the present case, in finding of fact VI, the court found that:

[b]etween August 1st, 2007, and September 10th, 2007, S.E.H. was told by the defendant that she had to accompany him on a trip to Astoria, OR, or be spanked. S.E.H. had previously been struck by the defendant.... S.E.H. opted to accompany the defendant on the trip to Oregon rather than receive a spanking. S.E.H. was sitting in the passenger seat and the defendant was driving.

While driving to Oregon, the defendant ordered S.E.H. to remove her pants and underwear. The defendant rubbed S.E.H.'s clitoris. The defendant also grabbed the inside of S.E.H.'s labia and twisted it, penetrating her vagina with his finger. The defendant had S.E.H. place her breast in his hand, and touched her breasts.

CP 14. *See* RP 304-05.

This finding is unchallenged, *see* Appellant's Brief, p. 1- 32, and, therefore a verity.

Based on this finding of fact, the court issued the following conclusion of law:

That S.E.H.'s account of the road trip to Astoria did in fact describe sexual contact by forcible compulsion. While the defendant had a reasonable basis to discipline S.E.H. for dangerous driving, her account that she was given the option of a spanking instead of going on the trip is credible evidence of forcible compulsion. S.E.H. had a reasonable fear of physical injury given the history of being struck by objects if she had not submitted to the sexual contact inside the truck during the trip to Astoria.

CP 16.

Viewing this finding in the light most favorable to the State, a rational fact finder could find, as the trial court here did find, that when the defendant told S.E.H that she had to accompany him on the trip or be spanked, he was making an express and/or implied threat that if S.E.H. did not submit to sexual contact during that trip, the defendant would physically injure her. S.E.H. knew from experience that if she disobeyed

the defendant, she would be physically attacked by him. CP 14. She knew this because she “had previously been struck by the defendant.” *Id.* Because “[t]he defendant’s sexual touching of S.E.H.... occurred throughout the trip,” if S.E.H. had resisted by refusing to accompany the defendant further, she would have failed to complete the trip and therefore, according to the defendant’s explicit threat, been spanked by him. CP 14. *See* RP 304-05.

If she had simply resisted and thereby disobeyed the defendant, her experience was that he would strike her and thereby subject her to physical injury. *Id.* Therefore, there was an implied threat as well, that had she not submitted to the sexual contact, the defendant would have subjected her to physical injury. Consequently, viewing the evidence in the light most favorable to the State, a rational fact finder could find that the defendant made a threat that placed S.E.H. in fear of physical injury had she not submitted to the defendant’s sexual contact of her. In other words, there was sufficient evidence from which a rational trier of fact could find the element of forcible compulsion in count II beyond a reasonable doubt. *See* RCW 9A.44.100(6). Therefore, there was sufficient evidence of indecent liberties as charged in count II, and the defendant’s conviction thereof should be affirmed.

2. THE DEFENDANT'S CONVICTION OF SECOND-DEGREE INCEST, A LESSER-INCLUDED OFFENSE OF FIRST-DEGREE INCEST AS CHARGED IN COUNT III, SHOULD BE AFFIRMED BECAUSE, VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE FROM WHICH A RATIONAL TRIER OF FACT COULD HAVE FOUND THAT THE ACTS OCCURRED IN THE STATE OF WASHINGTON.

The defendant here was convicted of second-degree incest, a lesser-included offense of first-degree incest as charged in count III of the second amended information. CP 7-9; CP 17; CP 43-64. Count III charged that the defendant

during the period between the 1st day of August, 2007 and the 10th day of September 2007, did unlawfully and feloniously engage in sexual intercourse with S.E.H., who was known by him to be related to him, either legitimately or illegitimately, as an ancestor, descendent, brother, or sister of the whole or half blood

CP 7-9. *See* RCW 9A.64.020(1).

RCW 9A.64.020(2) indicates that a person is guilty of second-degree incest:

if he or she engages in sexual contact with a person whom he or she knows to be related to him or her either legitimately or illegitimately, as an ancestor, descendent, brother, or sister of the whole or half blood.

The trial court concluded that:

It was unclear as to whether sexual contact or sexual intercourse occurred within the State of Washington or

Oregon. It was clear beyond a reasonable doubt that sexual contact occurred within the State of Washington, and that sexual intercourse occurred somewhere during the course of the trip to Astoria, but it was not clear beyond a reasonable doubt that sexual intercourse occurred in the State of Washington.

CP 17. Therefore, the court concluded that “the defendant is not guilty of incest in the first degree, and guilty beyond a reasonable doubt of the lesser included crime of incest in the second degree.” *Id.*

This conclusion is based on finding of fact VI, quoted above, in which the court found that “[t]he defendant’s sexual touching of S.E.H. started soon after they began driving the truck in Tacoma, and occurred throughout the trip to Astoria.” CP 15. The court further found that “[t]he sexual contact occurred while the truck was in motion on the road in both Washington and Oregon. *Id.*

The defendant does not explicitly challenge this finding of fact and it should, therefore, be considered a verity. *See, e.g., Rogers*, 146 Wn.2d at 61, *Muldrew*, 69 Wn.2d 877. When it is, it is obvious that the court’s conclusion that the defendant’s sexual contact occurred in Washington is overwhelmingly supported by its findings that his “sexual touching of S.E.H. started soon after they began driving the truck in Tacoma” and that “sexual contact occurred while the truck was in motion on the road in both Washington and Oregon.” *Id.* Therefore, there is more than sufficient

evidence from which a rational fact finder could find that the acts occurred in the State of Washington beyond a reasonable doubt. As a result, the defendant's conviction of incest in the second degree, a lesser-included offense of incest in the first degree as charged in count III, should be affirmed.

While the defendant does not explicitly challenge any of the findings of fact in his argument, *see* Appellant's Brief, p. 1-32, the defendant, at one point, does contend that S.E.H.'s "testimony is too vague to support a finding that the illegal conduct actually occurred in Washington." *Id.* at p. 13. Assuming *arguendo* that this constitutes a challenge to the court's finding that "sexual contact occurred while the truck was in motion on the road in both Washington and Oregon," CP 15, this challenge should be rejected.

When a finding of fact is challenged, an appellate court will determine whether substantial evidence supports it. *Stevenson*, 128 Wn.App. at 193. "Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding's truth." *Id.*

In this case, the court's findings of fact that "[t]he defendant's sexual touching of S.E.H. started soon after they began driving the truck in Tacoma" and that "[t]he sexual contact occurred while the truck was in motion on the road in both Washington and Oregon," CP 15, were

supported by substantial evidence. Specifically, S.E.H. testified that the sexual contact occurred once she left on the trip from Tacoma to Astoria, RP 305-06. When asked “what exactly did [the defendant] say to you when you first got in the truck,” S.E.H. responded by saying

Because it was early in the morning, we would drive down until the heater had started to kick on. When the warm air came in, I had to take my pants off and my underwear.

RP 309. S.E.H. testified that, after her pants and underwear were off, the defendant “would go and stick his finger in my vagina or make me do it.”

RP 306. In other words, S.E.H. testified that the defendant told her to remove her pants and then had sexual contact with her early in the morning. Because this was “a 24-hour trip” that ended early the next morning, RP 339, the defendant must have told S.E.H. to remove her pants and underwear just after they left Tacoma, in the State of Washington. This is certainly evidence sufficient to persuade a fair-minded, rational person of that “[t]he defendant’s sexual touching of S.E.H. started soon after they began driving the truck in Tacoma.” CP 15. Therefore, the court’s finding of fact VI is supported by substantial evidence and the trial court’s finding should be affirmed.

S.E.H. also testified that the sexual contact continued sporadically throughout the trip. RP 308-09. She clarified what sporadically meant by

testifying that the defendant told her to put her pants back on before they “got into an actual city.” RP 308. This implies that her pants were off and sexual contact was occurring between cities, which would indicate that sexual contact occurred within the State of Washington. Moreover, because the touching occurred after the defendant and S.E.H. left Tacoma, Washington but before they were stopped by the Washington State Patrol, see RP 359, it must have occurred before they reached the State of Oregon and while they were still in the State of Washington, the only state in which the Washington State Patrol could under the circumstances described have lawfully stopped the vehicle. This is certainly evidence sufficient to persuade a fair-minded, rational person of that “[t]he sexual contact occurred while the truck was in motion on the road in both Washington and Oregon.” CP 15. Therefore, this finding is supported by substantial evidence and should be affirmed.

Because substantial evidence supports the trial court’s finding of fact VI, and this finding, in turn, supports the court’s conclusion that the defendant committed second-degree incest, a lesser-included offense of that charged in count III, see *State v. Stevenson*, 128 Wn. App. 179, 114 P.3d 699 (2005), the court’s finding and the defendant’s conviction should be affirmed.

3. THE DEFENDANT’S CONVICTION OF INDECENT LIBERTIES AS CHARGED IN COUNT IV SHOULD BE AFFIRMED BECAUSE, VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE FROM WHICH A RATIONAL TRIER OF FACT COULD HAVE FOUND SEXUAL CONTACT.

The defendant here was charged in count IV of the second amended information, with committing the crime of indecent liberties. CP 7-9. That count charged that the defendant

[o]n or about the 19th day of September, 2007, did unlawfully and feloniously by forcible compulsion, knowingly cause S.E.H., not the spouse of the defendant to have sexual contact with him or another.

Id. See RCW 9A.44.100(1)(a).

RCW 9A.44.010(2) defines “sexual contact” as

Any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

The hips, abdomen, and buttocks are considered to be “intimate parts” for purposes of this statute. *In Re Adams*, 24 Wn. App. 517, 519-20, 601 P.2d 995 (1979).

In finding of fact VII, the trial court found that, on September 19, 2007, after S.E.H. had caused the kitchen drain to clog, the defendant ordered her to the basement for her “punishment.” CP 15. The defendant then told

S.E.H. to take her pants and underwear off so she could receive a spanking. The defendant then spanked S.E.H.'s nude buttocks with a coat hanger, while telling her "are we having fun yet?"

Id.

In finding of fact V, the trial court also found that

[t]he defendant and Silvilina Gower practiced sadomasochism, also known as S&M. The defendant was involved in local S&M groups, and regularly partook in S&M activities in the greater Seattle area.

CP 14.

The court further found that

[w]ithin the S&M community, the objective of spanking is to satisfy desire. There is a sexual component to this spanking activity, as the reason for involvement in S&M is because normal things in life do not satisfy the sexual desire of an S&M practitioner.

Id.

None of these findings of fact are explicitly challenged and therefore, all should be considered verities for purposes of this analysis.

State v. Rogers, 146 Wn.2d at 61.

Based on these findings, the court made the following conclusion:

The defendant was sexually motivated in spanking S.E.H. under the circumstances she described. The defendant obtained sexual contact by compelling S.E.H. to remove her clothing and expose her lower body by the use of force or threat of the use of force.

CP 17-18. The court therefore found the defendant guilty of the crime of indecent liberties as charged in count IV. *Id.* at 18.

The court's conclusion was clearly supported by the unchallenged findings of fact and the defendant's conviction, therefore, clearly based on sufficient evidence of sexual contact.

Specifically, the court's unchallenged findings of fact indicate that the defendant practiced sadomasochism and that practitioners of sadomasochism engage in spanking to satisfy their sexual desire. CP 14. It would be reasonable to infer from this evidence that when the defendant, a practitioner of sadomasochism, instructed S.E.H. to remove all of her clothing and then spanked her on her naked buttocks, that he did so to gratify his sexual desire. Because, in analyzing a challenge to the sufficiency of evidence, all reasonable inferences from the evidence must be drawn in favor of the State, *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), this inference must be made. When it is, it is clear that the defendant spanked S.E.H. on her bare buttocks, an "intimate part" of her, to gratify his sexual desire. Because "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire," is "sexual contact," RCW 9A.44.100(2), there is more than sufficient evidence from which a rational trier of fact could have found

such contact beyond a reasonable doubt. Therefore, the defendant's conviction of indecent liberties as charged in count IV should be affirmed.

Assuming *arguendo*, that the defendant is challenging the court's finding of fact V that "[t]here is a sexual component to this spanking activity, as the reason for involvement in S&M is because normal things in life do not satisfy the sexual desire of an S&M practitioner," CP 14, such a challenge should be rejected.

The court's finding is clearly supported by substantial evidence. Boris Hodak, who was involved in a sadomasochism group with the defendant and his wife, testified that people involved in the sadomasochistic lifestyle spank each other as a form of pleasure. RP 397-404. He also testified that one of the reasons for involvement in the group is that normal things in life do not satisfy desires. RP 397. In fact, the defendant himself admitted to being involved in sadomasochism and that, at least at one point in his life, "normal" things did not satisfy him sexually. RP 516-18. This testimony is certainly sufficient to persuade a fair-minded, rational person that "[t]here is a sexual component to this spanking activity, as the reason for involvement in S&M is because normal things in life do not satisfy the sexual desire of an S&M practitioner." CP 14. See *Stevenson*, 128 Wn. App. at 193. Therefore,

finding of fact V is supported by substantial evidence and should be affirmed.

Because substantial evidence supports the trial court's finding of fact V, and this finding, in turn, supports the court's conclusion that the defendant committed indecent liberties as charged in count IV, the court's finding and the defendant's conviction should be affirmed.

4. THE TRIAL COURT'S ADMISSION OF EVIDENCE CONCERNING THE DEFENDANT'S PRIOR SEX-OFFENSES PURSUANT TO RCW 10.58.090 WAS CONSISTENT WITH DUE PROCESS.

"A statute is presumed constitutional and the party challenging it has the burden to prove beyond a reasonable doubt that it is unconstitutional." *State v. Scherner*, 153 Wn. App. 621, 632, 225 P.3d 248, 252 (2009)(citing *State v. Ward*, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994)).

The 14th Amendment to the United States Constitution and Article I, section 3 of the Washington State Constitution "declare that no person shall be deprived of life, liberty, or property without due process of law." *State v. Scherner*, 153 Wn. App. 621, 651, 225 P.3d 248, 262 (2009).

"Due process includes the guarantee of a fair trial, including conviction on nothing less than proof beyond a reasonable doubt in a criminal case." *Id.*

“The United States Supreme Court has held that the test for whether an evidentiary rule violates due process is if ‘the introduction of this type of evidence is so extremely unfair that its admission violates ‘fundamental conceptions of justice.’” *Id.* (quoting *Dowling v. U.S.*, 493 U.S. 342, 352, 110 S.Ct. 668, 107 L. Ed. 2d 708 (1990)). However, the Court also stated that “the category of rules that violate fundamental conceptions of justice should be construed ‘very narrowly.’” *Id.*

RCW 10.58.090(1) states:

In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant’s commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403.

In the present case, the court found that evidence concerning the defendant’s prior sex offenses was admissible under RCW 10.58.090. CP 25-32. Although the defendant argues that such evidence was “propensity evidence” and that its admission “violated Mr. Gower’s Fourteenth Amendment right to due process,” Appellant’s Brief, 16-19, Division 1 of this Court recently rejected an almost identical argument. *Scherner*, 153 Wn. App. at 651-57.

Scherner relied on the Ninth Circuit’s decision in *United States v. LeMay*, 260 F.3d 1018 (9th Cir. 2001). The Court in *LeMay* rejected a due process challenge to FER 414(a), which is similar to RCW 10.58.090. FER 414(a) reads:

In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

In reaching its decision, the Ninth Circuit noted that "courts have routinely allowed propensity evidence in sex-offense cases, even when disallowing it in other criminal prosecutions." *Lemay*, 260 F.3d at 1025. The Court concluded that

there is nothing fundamentally unfair about the allowance of propensity evidence under Rule 414. As long as the protections of Rule 403 remain in place to ensure that potentially devastating evidence of little probative value will not reach the jury, the right to a fair trial remains adequately safeguarded.

Id. at 1026. Therefore, the Court held that "as long as the protections of Rule 403 remain in place so that distinct judges retain the authority to exclude potentially devastating evidence, Rule 414 is constitutional." *Id.* at 1027. The Court concluded

the claim that Rule 414 is unconstitutional can be reduced to a very narrow question: "whether admission of... evidence that is both relevant under Rule 402 and not overly prejudicial under 403 may still be said to violate the defendant's due process right to a fundamentally fair trial." *Castillo*, 140 F.3d at 882. As the *Castillo* court noted, "to ask that question is to answer it." Rule 414 is constitutional on its face.

Lemay, 260 F.3d at 1027. The Court in *LeMay* noted that "[s]everal courts have reached the same conclusion." *Id.* (citing *United*

States v. Castillo, 140 F.3d 874 (10th Cir 1998); *United States v. Enjady*, 134 F.3d 1427, 1430-35 (10th Cir. 1998)(applying “nearly identical reasoning” to affirm the constitutionality of FER 413, “which allows for propensity inferences in rape and sexual assault cases”); *United States v. Mound*, 149 F.3d 799, 800-802 (8th Cir. 1998); *United States v. Wright*, 53 M.J. 476 (C.A.A.F. 2000); *Kerr v. Caspari*, 956 F.2d 788, 790 (8th Cir. 1992), and went on to hold that “[i]f the prior acts of molestation were properly admitted under Rule 403, there can have been no as-applied constitutional violation.” *Id.*

The Court in *Scherner* noted that RCW 10.58.090, like FER 414 analyzed in *LeMay*, “explicitly requires the trial court to conduct a modified ER 403 balancing test and prohibits admission of evidence of prior sex offenses where risk of unfair prejudice is greater than the probative value of the evidence.” *Scherner*, 153 Wn. App. at 655. The Court therefore concluded that RCW 10.58.090 “does not violate due process.” *Id.* at 656.

In the present case, evidence of the defendant’s prior sex offenses was admitted under RCW 10.58.090 only after the court conducted the required balancing test under ER 403 and found that the probative value of such evidence “substantially outweighs any prejudice that may exist after the trier of fact hears the evidence.” CP 25-32. Because RCW 10.58.090

is not facially violative of the due process clauses and there can be no as-applied constitutional violation where the prior acts were so admitted under Rule 403, admission of evidence concerning the defendant's prior sex offenses in this case did not violate due process. Therefore, the trial court's admission of such evidence should be affirmed.

5. RCW 10.58.090 SHOULD BE UPHeld AS CONSISTENT WITH THE SEPARATION OF POWERS DOCTRINE AND THE TRIAL COURT'S ADMISSION OF EVIDENCE THEREUNDER AFFIRMED BECAUSE THAT STATUTE IS PERMISSIVE AND CAN BE HARMONIZED WITH ER 404(b).

"A statute is presumed constitutional and the party challenging it has the burden to prove beyond a reasonable doubt that it is unconstitutional." *State v. Scherner*, 153 Wn. App. 621, 632, 225 P.3d 248, 252 (2009)(citing *State v. Ward*, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994)).

"The doctrine of separation of powers, implicit in our state constitution, divides the political power of the people into three co-equal branches of government." *City of Fircrest v. Jensen*, 158 Wn.2d 384, 393, 143 P.3d 776 (2006). See *Loving v. U.S.*, 517 U.S. 748, 116 S. Ct. 1737, 135 L. Ed. 2d 36 (1996). "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.” *Id.* at 393-94; *Loving*, 517 U.S. at 756 (quoting *Buckley v. Valeo*, 424 U.S. 1, 121, 96 S. Ct. 612, 683, 46 L. Ed. 2d 659 (1976), for the proposition that, in the federal system, “hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively”). Therefore, in examining the constitutionality of a governmental act, the court’s inquiry 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.” *Id.* at 394 (quoting *State v. Moreno*, 147 Wn.2d 500, 505-06, 59 P.3d 265 (2002) (quoting *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994))).

Article II, Section 1 of the Washington State Constitution vests the legislative authority of the State in the legislature, *Bower v. State*, 137 Wn.2d 44, 54, 969 P.2d 42 (1998), and “[t]he authority of the legislature to enact evidence rules has been recognized since statehood.” *State v. Gresham*, 153 Wn. App. 659, 666, 223 P.3d 1194 (2009) (citing *State ex rel. Foster-Wyman Lumber Co. v. Superior Court for King County*, 148 Wn. 1, 4, 267 P. 770 (1928)). Indeed, the legislature has enacted many statutes regarding “the admissibility of specific classes of evidence based on overarching policy concerns,” which because they have been “merely

permissive” have been “consistently upheld.” *Scherner*, 153 Wn. App. at 645.¹

Article IV, Section 1 of the Washington State Constitution vests the Washington State Supreme Court with the judicial power, which “includes the power to govern court procedures.” *Jensen*, 158 Wn.2d at 394. Through RCW 2.04.190, the legislature also delegated to the Court “the power to adopt rules of procedure,” *Id.*:

The supreme court shall have the power... to regulate and prescribe by rule the forms for and the kind and character of the entire pleading, practice and procedure to be used in all suits, actions, appeals and proceedings of whatever nature by the supreme court, superior courts, and district courts of the state.

RCW 2.04.190.

“Therefore, rules of evidence may be promulgated by both the legislative and judicial branches.” *Jensen*, 158 Wn.2d at 394. Given this overlap, “[w]hen a court rule and a statute conflict, the court will attempt to harmonize them, giving effect to both.” *Id.* It is only when there is an irreconcilable conflict between a court rule and a statute concerning a matter related to the court’s inherent power that the court rule will prevail. *Id.*

In the present case, the defendant argues that RCW 10.58.090 violates the separation of powers doctrine because it is “in direct conflict

¹ See, e.g., RCW 5.64.010, RCW 5.66.010; RCW 5.60.050; RCW 5.60.060.

with ER 404(b).” Appellant’s Brief, p. 26. He contends that “[b]y its terms, the statute conflicts with ER 404(b)” and “usurps the court’s authority to ban propensity evidence outright.” *Id.* at 25. However, the same argument has already been twice considered and rejected by Division 1 of the Court of Appeals. See *State v. Scherner*, 153 Wn. App. 621, 643-48, 255 P.3d 248, 258-60 (2009); *State v. Gresham*, 153 Wn. App. 659, 223 P.3d 1194 (2009).

RCW 10.58.090(1) states:

In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant’s commission of another sex offense or sex offenses **is admissible**, notwithstanding Evidence Rule 404(b), if the evidence **is not inadmissible** pursuant to Evidence Rule 403.

(emphasis added).

Evidence Rule 404(b), hereinafter “ER 404(b),” states that:

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 motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(emphasis added).

The Court in *Gresham* and *Scherner* was confronted with the same argument made by the defendant here. While the Court acknowledged that “the language, ‘notwithstanding Evidence Rule 404(b),’ may present an apparent conflict” with that rule, it ultimately

found that RCW 10.58.090 could be harmonized with the court rule and that it did not invade the prerogative of the Court, and therefore, rejected the defendant's argument. *Gresham*, 153 Wn. App. at 665-70; *Scherner*, 153 Wn. App. at 643-48.

In doing so, both *Gresham* and *Scherner* relied on the Supreme Court's decision in *Jensen*, 158 Wn.2d 384, 143 P.3d 776 (2006). In *Jensen*, the Court considered whether SHB 3055, later codified as RCW 46.61.506(4)(a), violated the separation of powers doctrine. That statute provided, "[a] breath test performed by any instrument approved by the state toxicologist shall be admissible at trial or an administrative proceeding if the prosecution or department produces prima facie evidence of [a list of specific elements]." *Id.* at 396-7. Although Jensen argued that, through SHB 3055, the legislature impermissibly "attempt[ed] to regulate court procedure by mandating admission of BAC test results," the Court rejected this argument. *Id.* at 395-99. It found that "[t]he act does not state such tests must be admitted if a *prima facie* burden it met; it states that such tests are *admissible*." *Id.* at 399(emphasis in original). As a result, the Court found that the statute was "permissive, not mandatory, and can be harmonized with the rules of evidence." *Id.* The Court noted that "[t]here 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.” *Id.* Consequently, the Court found that “[t]he legislature is not invading the prerogative of the courts nor is it threatening judicial independence,” and therefore held that the statute did “not violate the separation of powers doctrine.” *Id.*

Division 1 of this Court, in *Gresham* and *Scherner*, found that the same analysis applies to RCW 10.58.090. *Gresham*, 153 Wn. App. at 669; *Scherner*, 153 Wn. App. at 645-48. Because RCW 10.58.090 does not state that evidence of other sex offenses must be admitted, but only that it is “admissible,” Division 1 found that the statute is permissive, not mandatory. *Gresham*, 153 Wn. App. at 669-70; *Scherner*, 153 Wn. App. at 648. Consequently, it “preserves to the court authority to exclude evidence of past sex offenses under ER 403,” and can therefore, be harmonized with the rules of evidence. *Gresham*, 153 Wn. App. at 669-70. Indeed, “admission [of such evidence] is subject to the court establishing that the evidence is relevant and that the probative value outweighs the risk of unfair prejudice under the modified ER 403 balancing test.” *Scherner*, 153 Wn. App. at 648.

Because RCW 10.58.090 thereby “recognize[s] the court’s ultimate authority to determine what evidence will be considered by the fact finder in any individual case,” through use of the Court’s rules of evidence, the Courts in *Gresham* and *Scherner* found that it does not

threaten the independence or integrity or invade the prerogatives of the judiciary. *Id.*; **Gresham**, 153 Wn. App. at 669-70. Therefore, **Gresham** and **Scherner** held that RCW 10.58.090 did not violate “the separation of powers between the legislature and the judicial branches of government.” **Scherner**, 153 Wn. App. at 648. *See Gresham*, 153 Wn. App. at 670.

Because there is nothing to distinguish the present case from that of **Scherner** or **Gresham**, RCW 10.58.090 should be upheld, and the trial court’s admission of evidence thereunder affirmed.

Although, the defendant argues that “RCW 10.58.090 is in direct conflict with ER 404(b) in that the statute removes the prohibition on propensity evidence and makes otherwise inadmissible evidence admissible,” Appellant’s Brief, p. 26, **Scherner** considered and rejected the same argument. **Scherner**, 153 Wn. App. at 645-8. The Court agreed that RCW 10.58.090 “expand[s] the nonexclusive list of permissible purposes for which evidence of prior ‘crimes, wrongs, or acts’ may be relevant to include prior sex offenses by the defendant in sex offense cases.” *Id.* at 646. However, it found that “[t]he exception that the legislature carved out closely tracks developments in Washington case law that have allowed admission of prior sexual misconduct evidence in sex offense cases for a number of limited purposes.” *Id.* Specifically, the courts “have long admitted evidence of a defendant’s ‘lustful disposition’

toward the victim under the common law,” *Id.* at 646-47 (citing *State v. Ferguson*, 100 Wn.2d 131, 133-34, 667 P.2d 68 (1983), and have also allowed such evidence involving other victims under “a less stringent version of the ‘common scheme or plan’ exception to ER 404(b)”, *Id.* at 647 (citing *State v. DeVincentis*, 150 Wn.2d 11, 21, 74 P.3d 119 (2003)). “Evidence of prior sexual misconduct involving other victims has also been allowed as evidence of identity, a unique *modus operandi*, and to rebut the defendant’s claim that the charged sexual offense was accidental.” *Id.* (citing *State v. Herzog*, 73 Wn.App. 34, 43-44, 867 P.2d 648 (1994); *State v. Bowen*, 48 Wn. App. 187, 193, 738 P.2d 316 (1987); *State v. Baker*, 89 Wn. App. 726, 734-35, 950 P.2d 486 (1997)). Therefore, “RCW 10.58.090 is consistent with the case law allowing prior sexual misconduct evidence in sex offense cases.” *Id.* at 648.

Regardless of this, however, the statute cannot, as the defendant claims, remove any prohibition on propensity evidence or make otherwise inadmissible evidence admissible because the statute itself is merely permissive. It does not require a court to admit propensity evidence or evidence of any sort. Rather, admission is, as it was before the statute, subject to the court establishing that the evidence is relevant and that its probative value outweighs the risk of unfair prejudice. *Scherner*, 153 Wn. App. at 648.

Because RCW 10.58.090 is permissive, it can be harmonized with ER 404(b) and does not threaten the independence or integrity or invade the prerogative of the judiciary. Consequently, it does not violate the separation of powers between the legislative and judicial branches of government. Therefore, RCW 10.58.090 should be upheld and the trial court's admission of evidence thereunder affirmed.

6. THE TRIAL COURT PROPERLY ADMITTED C.M.'S TESTIMONY REGARDING SPANKINGS BY THE DEFENDANT UNDER RCW 10.58.090 BECAUSE SUCH SPANKINGS CONSTITUTED SEX OFFENSES WITHIN THE MEANING OF THAT STATUTE.

RCW 10.58.090(1) states:

In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403.

RCW 10.58.090(4) defines a "sex offense" as, *inter alia*, "[a]ny offense defined as a sex offense by RCW 9.94A.030." RCW 10.58.090(4)(a). "[U]ncharged conduct is included in the definition of 'sex offense,'" RCW 10.58.090(5). RCW 9.94A.030(42) defines "sex offense" as, *inter alia*, "[a] felony with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135." RCW 9.94A.030(42)(c). "'Sexual motivation' means that one of the purposes for which the defendant

committed the crime was for the purpose of his or her sexual gratification.” RCW 9.94A.030(43).

In the present case, the trial court admitted the testimony of C.M. concerning the defendant spanking her as trial testimony under RCW 10.58.090. CP 25-32. During the pre-trial hearing concerning the admission of such testimony, C.M. had testified that, among other things, the defendant

would make me take my clothes off, take off my panties. He would make me turn around and bend over and spread my butt cheeks and he would look.

RP 52. C.M. also testified that, on other occasions, the defendant spanked her so hard that it left bruises. RP 62-63.

Although the defendant argues that the trial court erred in admitting testimony concerning the defendant’s spanking of C.M., Appellant’s Brief, p. 29-30, such evidence was properly admissible under RCW 10.58.090.

Given that the defendant spanked C.M. to the point that bruising developed, his actions constituted uncharged second-degree assaults or second-degree assaults of a child. See RCW 9A.36.021; RCW 9A.36.130; *State v. Atkinson*, 113 Wn. App. 661, 667, 54 P.3d 702 (2002). Both of these crimes are felonies. See RCW 9A.36.021(2), RCW 9A.36.130(2). Because the defendant had a demonstrated sexual interest in his daughter’s

buttocks, *see* RP 52, one of the purposes for which the defendant committed these uncharged assaults could very well have been for sexual gratification. As a result, the acts that C.M. described were uncharged felony assaults with sexual motivation. *See* RCW 9.94A.030(43). Because a felony with a finding of sexual motivation, is for purposes of RCW 10.58.090, a “sex offense,” RCW 10.58.090(4), RCW 9.94A.030(42)(c), the spankings at issue were sex offenses within the meaning of that statute.

Therefore, evidence of these spankings, in the form of C.M.’s testimony, was properly admissible under RCW 10.58.090(1) and the trial court’s admission of such evidence should be affirmed.

7. THE DEFENDANT’S CONVICTIONS SHOULD BE AFFIRMED BECAUSE THERE WAS NO ERROR COMMITTED IN THE TRIAL OF THIS MATTER AND THEREFORE THE CUMMULATIVE ERROR DOCTINRE IS INAPPLICABLE.

The “cumulative error doctrine” is “limited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.” *State v. Greiff*, 141 Wn. 2d 910, 929, 10 P.3d 390 (2000).

Given the argument above, there was no error committed by the trial court in the present case. Because there was no error, there can be no

cumulative error. Therefore, the defendant's argument fails and the defendant's convictions should be affirmed.

D. CONCLUSION.

The defendant's conviction of indecent liberties as charged in count II should be affirmed because, viewing the evidence in the light most favorable to the state, there was sufficient evidence from which a rational trier of fact could have found forcible compulsion beyond a reasonable doubt.

The defendant's conviction of second-degree incest, a lesser-included offense of first-degree incest as charged in count III, should be affirmed because, viewing the evidence in the light most favorable to the state, there was sufficient evidence from which a rational trier of fact could have found that the acts occurred in the State of Washington.

The defendant's conviction of indecent liberties as charged in count IV should be affirmed because, viewing the evidence in the light most favorable to the state, there was sufficient evidence from which a rational trier of fact could have found sexual contact.

RCW 10.58.090 should be upheld as consistent with the separation of powers doctrine and the trial court's admission of evidence thereunder affirmed because that statute is permissive and can be harmonized with ER 404(b).

The trial court properly admitted C.M.'s testimony regarding spankings by the defendant under RCW 10.58.090 because such spankings constituted sex offenses within the meaning of that statute.

Finally, the defendant's convictions should be affirmed because there was no error committed in the trial of this matter and therefore the cumulative error doctrine is inapplicable.

DATED: June 25, 2010

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6/28/10 *[Signature]*
Date Signature

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