

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

NO. 41634-4-II

STATE OF WASHINGTON,

Respondent,

vs.

STEVEN WELTY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
 STATE OF WASHINGTON FOR CLALLAM COUNTY
 CAUSE NO. 10-1-00332-0

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES:

1. Does the absence of written findings of fact and conclusion of law after a bench trial require remand when the defendant does not challenge the sufficiency of the evidence?
2. Does RCW 10.58.090 violate (1) ex post facto protections, (2) the separation of powers doctrine, and (3) due process guarantees?
3. Did the trial court err when it admitted into evidence acts of prior uncharged sexual misconduct under RCW 10.58.090 and ER 404(b)?
4. If the trial court erred when it admitted into evidence acts of prior sexual misconduct, was the resulting error harmless when the case was tried without a jury, the judge only considered the evidence for purposes of corroboration, and the defendant essentially confessed to the crimes charged?
5. Did the trial court err when it ordered the defendant to abstain from the possession or use of drugs and alcohol when there was no evidence that these substances played a part in the crimes committed?

II. STATEMENT OF THE CASE:

FACTS

E.G. and her older brother often visited their grandfather, Steven Welty, during their winter and spring vacations.¹ RP (10/4/2010) at 33-34; RP (10/5/2010) at 4-6, 9-10, 30, 32-33, 36. During these visits, Welty

¹ The children would travel from their home in McCleary, Washington to Welty's residence in Sequim, Washington.

would sexually abuse his granddaughter. *See* RP (10/5/2010) at 4-30; Ex. 11 at 2-6; Ex. 12 at 2-4; Ex. 13 at 3.

The abuse began when E.G. was four years old. RP (10/5/2010) at 5, 27. Welty would quietly enter his grandchildren's bedroom while the two siblings were asleep. RP (10/5/2010) at 5-6, 16-17. *See also* RP (10/5/2010) at 33-34. Welty would then wake E.G. and carry or escort her to the master bedroom after his wife left for work. RP (10/5/2010) 5-7, 9, 16-18. Alone in the master bedroom, Welty inappropriately touched and performed oral sex on E.G.² RP (10/5/2010) at 4-5, 7-8, 11-12, 18-22, 25-29; RP (10/6/2010) at 7. While performing oral sex, Welty actually penetrate E.G.'s vagina with his tongue, causing his granddaughter considerable pain. RP (10/5/2010) at 8, 18, 21, 25-28; RP (10/6/2010) at 7.

During and after the abuse, Welty told E.G. that he loved her and not to tell anyone about what transpired in the bedroom. RP (10/5/2010) at 8, 24. The abuse repeated itself every visit, every year, for seven years. RP (10/5/2010) at 10-11, 17, 20, 23, 28. The abuse finally ended when, at age eleven, E.G. told her grandfather "no" and that she needed to keep sleeping. RP (10/5/2010) at 11.

² On one occasion, Welty forced E.G. to touch his penis when she was seven years old. RP (10/5/2010) at 12.

A few years later, E.G. disclosed the abuse to her mother, A.G. RP (10/4/2010) at 43; RP (10/5/2010) at 13. Prior to this disclosure, A.G. had never told E.G. that she too was sexually abused by Welty. RP (10/4/2010) at 52-53. *See also* Ex 10 at 2. When A.G. learned what happened to E.G., she notified the police. RP (10/4/2010) at 34.

Law enforcement obtained a wire order to record several phone conversations between A.G. and Welty. RP (9/22/2010) at 5, 55. *See also* Ex. 5-8, 10-13. During these calls, A.G. confronted her father with E.G.'s disclosure. While Welty initially denied the allegations, he ultimately confessed that he sexually abused his granddaughter. *See e.g.* Ex. 11 at 2-6; Ex. 12 at 2-4; Ex. 13 at 3.

PROCEDURAL HISTORY

The State charged Welty with 18 separate criminal counts: first-degree child rape (6 counts), first-degree child molestation (6 counts), and first-degree incest (6 counts). CP 22-30.

On October 4, 2010, Welty waived his right to a jury. RP (10/4/2010) at 3-7. CP 31. Despite the State's efforts to accommodate a separate pre-trial hearing to determine whether evidence of Welty's prior uncharged sexual misconduct would be admissible under ER 404(b) and/or RCW 10.58.090, *see* RP (10/1/2010) at 3, the defense argued there

was no reason to hold a separate hearing apart from the actual trial.³ RP (10/4/2010) at 9-10.

The defense argued the trial court could separate the “wheat from the chaff” when hearing testimony supporting (1) the uncharged prior sexual abuse, and (2) the charged crimes against E.G. RP (10/4/2010) at 9-10, 12, 14. The trial court agreed, stating that if it ruled the evidence of prior sexual acts was inadmissible then it would not consider the testimony when evaluating whether the defendant committed the charged offenses. RP (10/4/2010) at 17.

Welty’s sister, R.P., testified the defendant sexually abused her when she was a young girl between the ages of six and ten. RP (10/4/2010) at 22-25, 27. According to R.P., the abuse often occurred when she shared a bed with the defendant.⁴ RP (10/4/2010) at 23-25, 27. On these nights, Welty would perform oral sex on his baby sister while she was sleeping. RP (10/4/2010) at 24-25, 28.

Welty’s daughter, A.G., also testified the defendant began performing oral sex on her when she was four or five.⁵ RP (10/4/2010) at

³ The defense reserved the right to challenge the admissibility of his sister’s testimony. RP (10/4/2010) at 21-22.

⁴ Welty’s family came from humble origins. R.P. testified that she did not have her own bed and had to share the beds of her five older brothers. RP (10/4/2010) at 23.

⁵ On one occasion, Welty encouraged A.G. to touch his penis when she was three years old. RP (10/4/2010) at 44.

44-48. According to A.G., Welty explained these acts were an expression of his love for her. RP (10/4/2010) at 45. He also told her that she should never tell anyone about said acts. RP (10/4/2010) at 45.

A.G. said the abuse began one of two ways: Welty would (1) enter her room, disrobe, climb into her bed, and lay against her, or (2) escort her to his bedroom and encourage her to take a nap with him. RP (10/4/2010) at 46. A.G. stated the abuse continued until she was thirteen. RP (10/4/2010) at 47.

As part of the State's case in chief, E.G. testified to the events previously described above. RP (10/5/2010) at 3-31. The State also played several recorded phone conversations. Ex. 5-9.

After all the evidence was presented, the parties argued whether the court could consider R.P.'s and A.G.'s allegations of sexual abuse.⁶ RP (10/5/2010) at 47-58. The trial court found that the State proved Welty had sexually abused his sister and daughter by a preponderance of the evidence. RP (10/5/2010) at 60. Additionally, the trial court ruled that R.P.'s and A.G.'s testimony was admissible under both ER 404(b) and RCW 10.58.090. RP (10/5/2010) at 58-60.

⁶ In its argument, the defense argued RCW 10.58.090's nonexclusive factors weighed against admission of the testimony. RP (10/5/2010) at 53-55.

With respect to its RCW 10.58.090 ruling, the trial court sought to apply the nonexclusive factors prescribed by the statute. *See* RP (10/5/2010) at 58-64. The trial court found the past sexual acts were “very similar” to those that the State alleged Welty committed against E.G.:

[T]he similarity in the testimony at least on the modus operandi, and the nature, sex, relationship, age, appearance of the alleged victims is beyond remarkable. It – the testimony speaks of acts which are so very similar in all of those respects as to give it some corroborative effect with regard to the testimony of the alleged victim in this case.

RP (10/5/2010) at 59-60. *See also* RP (10/5/2010) at 61. While the trial court glossed over the next two factors in the analysis, it concluded they did not favor the testimony’s admission or exclusion. *See* RP (10/5/2010) at 61. The trial court found the testimony was necessary because the charges rested primarily on the victim’s testimony. RP (10/5/2010) at 61. *See also* RP (10/5/2010) at 59. The trial court reasoned the absence of criminal convictions for the prior sexual misconduct did not weigh in favor of exclusion given the many years it often takes child sex abuse to surface. RP (10/5/2010) at 61. The trial court noted there were no intervening circumstances that affected its ruling, *i.e.* that the defendant had not enrolled or succeed in counseling in between the prior sexual misconduct and the abuse he inflicted upon his granddaughter. RP (10/5/2010) at 63. Finally, the trial court found the testimony was more

probative than prejudicial, especially because Welty elected to proceed without a jury. RP (10/5/2010) at 58-61, 63-64.

After closing arguments, the trial court found Welty guilty of the 18 crimes charged. RP (10/6/2010) at 6-7, 12. The trial court explained the State had presented evidence beyond a reasonable as to each element of the several charged crimes. RP (10/6/2010) at 3-7, 12-13. The trial court also emphasized what evidence it found most compelling: (1) the credibility of the victim, E.G.; (2) the defendant “essentially admitted his transgressions” during the recorded conversations; and (3) the lack of any evidence showing the witnesses had a motive to lie. RP (10/6/2010) at 7-11, 13.

The trial court said it only considered R.P.’s and A.G.’s testimony for a very limited purpose – to corroborate E.G.’s testimony:

So, once again, while this corroboration is just that, it is corroboration, it is not essential the Court’s decision but it provides this Court with overwhelming corroboration of the accuracy of the victim’s testimony in this case.

RP (10/6/2010) at 11-12. After it delivered the verdict, the trial court scheduled a sentencing hearing and ordered a presentence investigation (PSI) report. RP (10/6/2010) at 12.

At sentencing, the State asked the trial court to adopt the sentencing recommendation that the PSI proposed.⁷ RP (11/16/2010) at 5. The trial court sentenced Welty to 318 months confinement. RP (11/16/2010) at 16; CP 10. Among other conditions of community custody, the trial court ordered Welty to “abstain from the possession or use of drugs unless prescribed by a medical professional,” and “abstain from the possession or use of alcohol[.]” CP 11, 20. Welty appeals.

III. ARGUMENT:

A. THE ABSENCE OF WRITTEN FINDINGS AND CONCLUSIONS DOES NOT REQUIRE REMAND.

Welty argues the trial court erred when it failed to enter mandatory findings of fact and conclusions of law to support its guilty verdicts under CrR 6.1(d). *See* Brief of Appellant at 35-36. The State concedes error. However, remand is not necessary because the error was harmless. On appeal, Welty does not challenge the sufficiency of the evidence. Instead, his appeal focuses on (1) the constitutionality of RCW 10.58.090, (2) the trial court’s evidentiary rulings, and (3) certain conditions of community custody imposed at sentencing. Because the record is sufficient to

⁷ The State noted the PSI revealed Welty had attempted to shift the blame for his criminal acts to his victim, characterizing his crimes as simple “muff diving.” RP (11/16/2010) at 4. Additionally, Welty admitted he was attracted to very young girls. RP (11/16/2010) at 4.

facilitate review, this Court may resolve the present appeal in the absence of written findings and conclusions.⁸

CrR 6.1(d) provides:

In a case tried without a jury, the court shall enter findings of fact and conclusions of law. In giving the decision, the facts found and the conclusions of law shall be separately stated. The court shall enter such findings of fact and conclusions of law only upon 5 days' notice of presentation to the parties.

Because written findings and conclusions facilitate appellate review, reviewing courts will generally refuse to address issues raised on appeal in the absence of such findings and conclusions. *See State v. Head*, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998). However, where the record is sufficient to facilitate review, this Court may decide issues raised on appeal in the absence of written findings and conclusions. *See State v. Denison*, 78 Wn. App. 566, 897 P.2d 437 (vacating judgment and remanding for entry of findings and conclusions but deciding issues that did not require findings of fact for their resolution), *review denied*, 128 Wn.2d 1006, 907 P.2d 297 (1995).

Nonetheless, Washington recognizes a harmless error analysis when determining whether the failure to enter written findings and

⁸ The State has filed proposed CrR 6.1(d) findings of fact and conclusions law. These findings adhere to the trial court's oral opinion when it found the defendant guilty of the charged crimes. *See* RP (10/6/2010) at 3-13. The State has provided a copy of its proposed findings/conclusions to Welty's trial and appellate counsel.

conclusions will necessitate remand. *State v. Banks*, 149 Wn.2d 38, 43-44, 65 P.3d 1198 (2003). Under the harmless error analysis, the test is “ ‘whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’ ” *Banks*, 149 Wn.2d at 44 (quoting *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)).

Here, the trial court’s failure to enter findings of fact and conclusions of law following a bench trial is harmless error. Welty only challenges (1) the constitutionality of RCW 10.58.090, (2) evidentiary rulings pursuant to said statute, and (3) conditions of community custody. Because the evidence admitted pursuant to RCW 10.58.090 did not contribute to the verdict obtained, and Welty does not challenge the sufficiency of the evidence supporting the verdict, remand for further findings and conclusions is unnecessary.

B. RCW 10.58.090 IS CONSTITUTIONAL.

Welty argues RCW 10.58.090 is unconstitutional because (1) it violates the prohibition against ex post facto laws, (2) it violates the separation of powers doctrine, and (3) it violates due process. *See* Brief of Appellant at 17-27. These arguments are without merit.

Washington’s appellate courts presume statutes are constitutional. *State v. Ward*, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994); *State v.*

Scherner, 153 Wn. App. 621, 632, 225 P.3d 248 (2009); *State v. Gresham*, 153 Wn. App. 659, 663-64, 223 P.3d 1194 (2009). The party challenging the constitutionality of a statute has the burden to prove beyond a reasonable doubt that it is unconstitutional. *Ward*, 123 Wn.2d at 496; *Scherner*, 153 Wn. App. at 632; *Gresham*, 153 Wn. App. at 663-64. This Court reviews constitutional challenges to a statute de novo. *City of Fircrest v. Jensen*, 158 Wn.2d 384, 389, 143 P.3d 776 (2006); *Scherner*, 153 Wn. App. at 632; *Gresham*, 153 Wn. App. at 663.

The primary goal of statutory interpretation is to ascertain and give effect to the intent and purpose behind the statute.⁹ *Scherner*, 153 Wn. App. at 632 (citing *In re Parentage of J.M.K.*, 155 Wn.2d 374, 387, 119 P.3d 840 (2005)). RCW 10.58.090 provides:¹⁰

- (1) 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.
- (2) In a case in which the state intends to offer evidence under this rule, the attorney for the state shall disclose the evidence to the defendant, including statements of

⁹ "If, among alternative constructions, one or more would involve serious constitutional difficulties, the court will reject those interpretations in favor of a construction that will sustain the constitutionality of the statute." *Scherner*, 153 Wn. App. at 632 (quoting *J.M.K.*, 155 Wn.2d at 387).

¹⁰ RCW 10.58.090 became effective June 12, 2008. *See* Laws of Washington 2008 c. 90 § 2. The legislature has not amended the statute.

witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(3) This section shall not be construed to limit the admission or consideration of evidence under any other evidence rule.

(4) For purposes of this section, “sex offense” means:

(a) Any offense defined as a sex offense by RCW 9.94A.030;

(b) Any violation under RCW 9A.44.096 (sexual misconduct with a minor in the second degree); and

(c) Any violation under RCW 9.68A.090 (communication with a minor for immoral purposes).

(5) For purposes of this section, uncharged conduct is included in the definition of “sex offense.”

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

(a) The similarity of the prior acts to the acts charged;

(b) The closeness in time of the prior acts to the acts charged;

(c) The frequency of the prior acts;

(d) The presence or lack of intervening circumstances;

- (e) The necessity of the evidence beyond the testimonies already offered at trial;
- (f) Whether the prior act was a criminal conviction;
- (g) Whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence; and
- (h) Other facts and circumstances.

The legislature enacted the statute as an “exception to Evidence Rule 404(b)” to “ensure that juries receive the necessary evidence to reach a just and fair verdict.” *Gresham*, 153 Wn. App. at 665 (citing SUBSTITUTE S.B. 6933, at 412-14, 60th Leg., Reg. Sess. (Wash. 2008)).

1. The statute does not violate ex post facto protections.

Welty argues RCW 10.58.090 violates ex post facto protections because it reduces the quantum of evidence necessary to obtain a conviction. *See* Brief of Appellant at 21-26. This argument fails because RCW 10.58.090 only permits the State to introduce evidence that might otherwise be inadmissible. The statute does not reduce the necessary facts to establish guilt. This Court should reject the ex post facto challenge.

The U.S. Constitution declares “no state shall ... pass any ... ex post facto law.” U.S. Const. art. I § 10. The Washington Constitution

includes a virtually identical prohibition: “No ... ex post facto law ... shall ever be passed.” Wash. Const. art. I § 23. The two constitutional provisions are coextensive. *Gresham*, 153 Wn. App. at 670. Thus, Washington’s appellate courts apply the federal ex post facto analysis to the state analogue.¹¹ *Gresham*, 153 Wn. App. at 670; *Scherner*, 153 Wn. app. at 635.

When reviewing an ex post facto challenge, Washington’s appellate courts consider four categories of prohibited laws:

- (1) Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action.
- (2) Every law that aggravates a crime, or makes it greater than it was, when committed.
- (3) Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.
- (4) *Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.*

¹¹ Welty argues Washington’s ex post facto clause offers criminal defendant’s greater protections than its federal counterpart. See Brief of Appellant at 23-26. The State does not address this claim. The Washington’s Supreme Court continues to adopt and apply the U.S. Supreme Court’s framework for an ex post facto challenge. See e.g. *Ludvigsen v. City of Seattle*, 162 Wn.2d 660, 668-69, 174 P.3d 43 (2007) (citing *Carmell v. Texas*, 529 U.S. 513, 525, 120 S.Ct. 1620, 146 L.Ed.2d 557 (2000); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 1 L.Ed. 648 (1798)); *State v. Edwards*, 104 Wn.2d 63, 70-71, 701 P.2d 508 (1985) (citing *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 1 L.Ed. 648 (1798)).

Scherner, 153 Wn. App. at 636 (citing *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648 (1798)) (emphasis added). Here, the fourth category is at issue.

In *State v. Gresham*, 153 Wn. App. 659, 673, 223 P.3d 1194 (2009), *review granted*, 168 Wn.2d 1036 (2010), the Court of Appeals – Division 1 recognized where an appellant challenges an evidentiary rule on ex post facto grounds, the test is whether the new rule alters the quantum of evidence required to prove an element of the charged crime. Applying this test, Division 1 reasoned:

RCW 10.58.090 does not alter the facts necessary to establish guilt, and it leaves unaltered the degree of proof required for a sex offense conviction. It only makes admissible evidence that might otherwise be inadmissible.

Gresham, 153 Wn. App. at 673. *See also State v. Clevenger*, 69 Wn.2d 136, 141-42, 417 P.2d 626 (1966) (rejecting ex post facto challenge to amendment of the spousal privilege statute because it did not change the “ingredients” of the charged offense or the ultimate facts necessary to establish guilt in child sex case). Accordingly, the appellate court held RCW 10.58.090 did not violate the constitutional prohibition against ex post facto laws because it did not alter the quantum of evidence necessary to convict the defendant for the charged crimes he/she faced. *Gresham*, 153 Wn. App. at 673.

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In *State v. Scherner*, 153 Wn. App. 621, 635-43, 225 P.3d 248 (2009), *review granted*, 168 Wn.2d 1036 (2010), Division 1 reached the same conclusion:

RCW 10.58.090 does not subvert the presumption of innocence because it does not concern whether the admitted evidence is sufficient to overcome the presumption of innocence.

Scherner, 153 Wn. App. at 642. *See also Schroeder v. Tilton*, 493 F.3d 1083, 1088 (9th Cir. 2007) (upholding a similar statute because it did not “eliminate or lower the quantum of proof required or in any way reduce the prosecutor’s burden of proof”). The language of RCW 10.58.090 does not permit the trier of fact to convict a defendant of the charges for which he/she stands accused based solely upon the evidence of any uncharged¹² past sexual acts. *Scherner*, 153 Wn. App. at 641. As such, there was no constitutional violation. *Scherner*, 153 Wn. App. at 642.

Here, the State still had to prove beyond a reasonable doubt all the unaltered elements of the crimes charged – here, first-degree child rape (6 counts), first-degree child molestation (6 counts), and first-degree incest (6 counts) – regardless of whether evidence was admitted under RCW

¹² In this context, the term “uncharged” should not be misconstrued as “unproven.” *See e.g.* Brief of Appellant at 20. In *Scherner*, Division I held RCW 10.58.090 still requires the State to prove the prior sexual misconduct actually occurred by a preponderance of the evidence. 153 Wn. App. at 639.

10.58.090. Because RCW 10.58.090 does not alter the quantum of evidence necessary to convict, it is not an ex post fact law.

2. The statute does not violate the separation of powers doctrine.

Welty argues RCW 10.58.090 violates the separation of powers doctrine. *See* Brief of Appellant at 17-19. According to him, an irreconcilable conflict exists between the legislative enactment and the court rule, ER 404(b), because nothing in the statute limits the admission of uncharged bad acts. *See* Brief of Appellant at 19. However, RCW 10.58.090 is a permissive statute. It does not obligate the trial court to accept the proffered evidence. Furthermore, the proffered evidence is only admissible after the trial court conducts the requisite balancing test under ER 403 and several nonexclusive factors prescribed by the statute. The argument fails.

The state and federal constitutions divide government's political power among three co-equal branches. Implicit in this distribution of power is the separation of powers doctrine, the purpose of which is to secure the core functions of each branch against encroachment by the other two branches. *Gresham*, 153 Wn. App. at 665 (citing *State v. Moreno*, 147 Wn.2d 500, 505-06, 58 P.3d 265 (2002)). However, the doctrine does not require that the three branches remain hermetically

sealed from one another. *Gresham*, 153 Wn. App. at 665 (citing *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)). Some overlap is required to “maintain an effective system of checks and balances.” *Gresham*, 153 Wn. App. at 665 ((*Carrick*, 125 Wn.2d at 135)). Accordingly, the test for deciding whether “one branch of government [is] aggrandizing itself or encroaching upon the ‘fundamental functions’ of another” is “not whether the 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.” *Gresham*, 153 Wn. App. at 656-66 (quoting *Moreno*, 147 Wn.2d at 505-06)).

Both the Supreme Court¹³ and the Legislature¹⁴ have authority to promulgate rules of evidence. *Jensen*, 158 Wn.2d at 394; *Scherner*, 153 Wn. App. at 643-44; *Gresham*, 153 Wn. App. at 666. If an apparent

¹³ In Washington, the Supreme Court’s authority derives from article IV of the state constitution and RCW 2.04.190. *Jensen*, 158 Wn.2d at 394; *Scherner*, 153 Wn. App. at 643; *Gresham*, 153 Wn. App. at 666. Article IV provides the judiciary with the power to promote the effective administration of justice by governing court practice and procedure. *Jensen*, 158 Wn.2d at 394; *Gresham*, 153 Wn. App. at 666. “[P]ractice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated.” *Jensen*, 158 Wn.2d at 394; *Gresham*, 153 Wn. App. at 666. This includes the power to determine the admissibility of evidence. *Ludvigsen*, 162 Wn.2d at 671; *Gresham*, 153 Wn. App. at 666.

¹⁴ The Supreme Court has long recognized the Legislature’s authority to enact rules of evidence. *Scherner*, 153 Wn. App. at 644 (citing *Jensen*, 158 Wn.2d at 394; *State v. Fields*, 85 Wn.2d 126, 128-29, 530 P.2d 284 (1975); *State v. Sears*, 4 Wn.2d 200, 103 P.2d 337 (1940); *State v. Pavelich*, 153 Wash. 379, 279 P. 1102 (1929)).

conflict between a court rule and a statutory provision can be harmonized, both are given effect. *Scherner*, 153 Wn. App. at 644; *Gresham*, 153 Wn. App. at 667 (citing *Jensen*, 158 Wn.2d at 394). If, on the other hand, there is “an irreconcilable conflict between a court rule and a statute concerning a matter related to the court’s inherent power, the court rule will prevail.” *Scherner*, 153 Wn. App. at 644 (*Jensen*, 158 Wn.2d at 394). The “inability to harmonize a court rule with a statute occurs only when the statute directly and unavoidably conflicts with the court rule.” *Scherner*, 153 Wn. App. at 644 (*Washington State Council of County and City Employees v. Hahn*, 151 Wn.2d 163, 169, 86 P.3d 774 (2004)).

Division I already rejected a separation of powers challenge to RCW 10.58.090. *See Scherner*, 153 Wn. App. at 643-48; *Gresham*, 153 Wn. App. at 665-70. Applying the above analysis, the *Gresham* court upheld RCW 10.58.090 because the statute could be harmonized with ER 404(b):

[S]ince RCW 10.58.090 is permissive, preserving to the court authority to exclude evidence of past offenses under ER 403, [the defendant’s] challenge to the statute fails. 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). With this language the legislature recognized the court’s ultimate

authority to determine what evidence will be considered by the fact finder in any individual case.

153 Wn. App. at 669-70 (emphasis in original). *Accord Scherner*, 153 Wn. App. at 645, 648 (admission of prior sexual misconduct is subject to the trial court establishing that the evidence is relevant and that its probative value outweighs the risk of unfair prejudice under an expanded ER 403 balancing test). Because the statute is permissive, and does not mandate the admission of evidence of past sex offenses, it does not circumscribe the core function of the courts. *Gresham*, 153 Wn. App. at 70; *Scherner*, 153 Wn. App. at 648.

Welty reads the scope of ER's 404(b)'s exclusion of propensity evidence too broadly. *See* Brief of Appellant at 19. ER 404(b) does not ban all evidence of prior bad acts:

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.

ER 404(b) (emphasis added). In fact, the Washington Supreme Court recently upheld the admission of sexual misconduct evidence involving other victims under a less stringent version of the "common scheme or plan" exception to ER 404(b). *See State v. DeVincentis*, 150 Wn.2d 11, 21, 74 P.3d 119 (2003) (holding high level of similarity between the charged

crime and prior bad acts necessary to prove common scheme or plan does not require evidence of common features to show a unique method of committing the crime).

RCW 10.58.090 is consistent with the direction of state and federal law allowing prior sexual misconduct cases in sex offense cases.¹⁵ Most significantly, evidence admitted under the statute remains subject to the rules of evidence; thereby, preserving the courts' authority to determine what evidence is admissible in the cases over which they preside. There is no violation of the separation of powers doctrine.

3. The statute does not violate due process guarantees.

Welty argues RCW 10.58.090 violates his due process right to a fair trial. *See* Brief of Appellant at 26-27. According to him, the statute “opens the floodgates to evidence of other uncharged wrongs in sex offense cases, and permits courts and juries to rely on the traditionally forbidden inference of bad character or criminal propensity.” *See* Brief of

¹⁵ *See e.g. State v. Sexsmith*, 138 Wn. App. 497, 506, 157 P.3d 901 (2007) (probative value of evidence of prior sex offenses is substantial in cases where there is little proof that sexual abuse has occurred, especially where the only other evidence is the testimony of the child victim); *State v. Krause*, 82 Wn. App. 688, 696, 919 P.2d 123 (1996) (observing that the need for the evidence of prior similar offenses is especially high in child sex abuse cases because of numerous factors, including the secrecy in which such acts take place, the absence of physical proof of the crime, and a general lack of confidence in the ability of the jury to assess the credibility of child witnesses); Federal Evidence Rules (FER) 413 and 414 (permitting trial judges to admit evidence of prior sex offenses committed by the defendant in sex offense cases and evidence of prior child molestation committed by the defendant in child molestation cases).

Appellant at 27. However, this concern is unfounded given the restriction in the statute.

The state and federal constitutions declare no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend 14; Wash. Const. art. I § 3. Due process includes the guarantee of a fair trial, including convictions on nothing less than proof beyond a reasonable doubt in all criminal cases. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Hundley*, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). The U.S. Supreme Court has held 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.’” *Dowling v. United States*, 493 U.S. 342, 352, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990). The high court also stated that the category of rules that violate fundamental conceptions of justice should be construed “very narrowly.” *Dowling*, 493 U.S. at 352.

In *Scherner*, Division 1 rejected the argument that RCW 10.58.090 violated due process by opening the “floodgates” to evidence offered for the sole purpose of proving that the defendant acted in conformity with an unsavory character trait:

RCW 10.58.090 explicitly requires the trial court to conduct a modified ER 403 balancing test and prohibits admission of evidence of prior sex offenses where the risk of unfair prejudice is greater than the probative value of the evidence. Application of ER 403 in determining admissibility ensure that RCW 10.58.090 does not open the door to any and all propensity evidence in sex offense.

153 Wn. App. at 655. *See also United States v. LeMay*, 260 F.3d 1018, 1024-26 (9th Cir. 2001) (rejecting a similar due process challenge to the federal rule counterpart, FER 414). The balancing test the statute requires before a trial court admits prior acts of sexual misconduct ensures criminal defendants receive a fair trial. *See* RCW 10.58.090(1), (6). The statute is in accord with all due process guarantees.

In sum, this Court should hold that RCW 10.58.090 is constitutional. While the Washington Supreme Court has accepted review of both *Scherner* and *Gresham*, and will ultimately rule on the constitutionality of RCW 10.58.090, unless and until the high court overrules the authority cited above, this Court should adhere to the existing precedent.

C. THE TRIAL COURT PROPERLY ADMITTED THE EVIDENCE OF PRIOR SEXUAL MISCONDUCT.

Welty argues the trial court erred when it admitted testimony that he sexually abused his sister and daughter when they were both young

girls. *See* Brief of Appellant at 8-17. According to Welty, the trial court failed to consider certain mandatory factors under RCW 10.58.090. *See* Brief of Appellant at 9-14. He also claims that the sexual abuse was far too old to be considered part of a common scheme or plan. *See* Brief of Appellant at 14-17. The argument is unpersuasive.

1. The trial court properly admitted the testimony under RCW 10.58.090.

Welty claims the trial judge failed to consider every nonexclusive factors outlined in RCW 10.58.090(6). *See* Brief of Appellant at 9-14. He claims the trial court dismissed three mandatory factors, rather than evaluate whether they weighed against admitting the challenged testimony. *See* Brief of Appellant at 10-11. The record does not support this contention. However, if the trial court failed to adequately address each factor, then the error was harmless.

This Court reviews a trial court's decision to admit evidence under RCW 10.58.090 for an abuse of discretion. *Scherner*, 153 Wn. App. at 656. RCW 10.58.090 directs the trial court to conduct a balancing test pursuant to ER 403 when evaluating the admissibility of a defendant's prior acts of sexual misconduct.¹⁶ RCW 10.58.090(1). When conducting

¹⁶ ER 403 provides:

the requisite balancing test, the statute requires the court to evaluate several nonexclusive factors. RCW 10.58.090(6). RCW 10.58.090 does not instruct the court on how to weigh the articulated factors. *Scherner*, 153 Wn. App. at 658. Instead, it only requires the trial court to “consider all of the factors when conducting its ER 403 balancing test.” *Scherner*, 153 Wn. App. at 658.

However, if a reviewing court finds the trial judge failed to consider each nonexclusive factor, reversal is not necessarily warranted. When a trial court fails to properly weigh evidence on the record, its admission may be upheld as harmless error where a sufficient record exists for the reviewing court to determine that if the judge properly weighed the evidence, then he/she would have admitted it at trial. *See State v. Carleton*, 82 Wn. App. 680, 686, 919 P.2d 128 (1996); *State v. Avila*, 78 Wn. App. 731, 735-36, 899 P.2d 11 (1995); *State v. Bond*, 52 Wn. App. 326, 333, 759 P.2d 1220 (1988).

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Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(a) The similarity of the prior acts to the acts charged.

Here, the trial court found the first factor the most compelling given the similarity between the prior sexual misconduct and the charged offenses. *See* RP (10/5/2010) at 59-61. The testimony supports this finding.

Welty began abusing his three victims when they were approximately the same age: E.G. (4 years old); A.G. (4 years old); R.P. (6 years old). RP (10/4/2010) at 24, 44; RP (10/5/2010) at 5, 27. The abuse ended when the children neared their adolescence: E.G. (11 years old); A.G. (13 years old); R.P. (10 years old). RP (10/4/2010) at 24, 47; RP (10/5/2010) at 11. The sexual abuse always involved the defendant performing oral sex on his young victims while they were sleeping, they were preparing for bed, or after he woke them from their sleep. RP (10/4/2010) at 24-25, 28, 46; RP (10/5/2010) 4-9, 11-12, 16-22, 25-29. Welty committed the abuse at night or during the early morning hours in order to conceal his crimes. Welty only targeted family members, with whom he held a position of trust. Ex. 11 at 2. Finally, Welty would tell his victims that the abuse was an expression of his love. RP (10/4/2010) at 45; (10/5/2010) at 8. These similar facts support the trial court's finding that

the first factor weighed in favor of the testimony's admission.¹⁷ *See infra*, *State v. Kennealy*, 214 Wn. App. 861, 214 P.3d 200 (2009).

(b) The closeness in time of the prior acts to the acts charged.

Welty claims the trial court failed to evaluate the second factor prescribed by the statute. *See* Brief of Appellant at 10-11. The trial court did gloss over this factor. *See* RP (10/5/2010) at 61. However, a fair characterization of the record would be that the trial court believed the elapsed time between the prior acts and the charged crimes did not favor the admission or exclusion of the evidence. *See* RP (10/5/2010) at 61.

In the alternative, the failure to address this factor was harmless. The trial court was aware Welty only abused the young females in his family, and that the abuse continued until the victims' adolescence. *See* Ex. 11 at 2; RP (10/4/2010) at 24, 47; RP (10/5/2010) at 11. Obviously, a period of time would lapse before the next familial generation presented a new victim.

Further, the long passage of time in between the prior sexual misconduct and the charged offenses does not require the trial court to exclude the proffered evidence. First, RCW 10.58.090 prescribes no time

¹⁷ While Welty's sexual abuse of his family members did not involve any unique signature, such is not required to prove a common scheme or plan. *See DeVincentis*, 150 Wn.2d at 21.

limitation. Second, under the corresponding federal rules, courts have consistently allowed the admission of prior sex offenses committed decades earlier where sufficient similarity exists. *See United States v. Kelly*, 510 F.3d 433, 437 (4th Cir. 2007) (rejecting argument that prior sex offense was inadmissible because it occurred more than 20 years earlier); *United States v. Benally*, 500 F.3d 1085, 1092 (10th Cir. 2007) (affirming admission of testimony of two victims sexually assaulted 40 years earlier and a third victim sexually assaulted 21 years earlier); *United States v. Gabe*, 237 F.3d 954, 959-60 (8th Cir. 2001) (upholding district court's admission of evidence of sexual molestation committed 20 years earlier).

Finally, in *State v. DeVincentis*, the Washington Supreme Court held a sex offense committed by a defendant 15 years earlier was admissible under ER 404(b) in defendant's rape trial. The *DeVincentis* court reasoned that the prior sex offense was relevant to show the defendant had previously abused another girl under similar circumstances. 150 Wn.2d at 13. Consistent with these authorities, the length of time does not necessarily favor exclusion.

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(c) The frequency of the prior acts.

Welty claims the trial court dismissed the third factor of the analysis. *See* Brief of Appellant at 10-11. Again, the trial court did gloss over this factor. However, the error was harmless in light of the record.

R.P. testified Welty sexually abused her between the ages of six and ten. RP (10/4/2010) at 24. R.P. said the abuse happened “a lot.” RP (10/4/2010) at 25. While R.P. struggled to recall exactly how many times she was actually abused, it was clear the sexual abuse was not an isolated occurrence but spanned several years and occurred frequently. *See* RP (10/4/2010) at 24-25, 28. Similarly, A.G. testified Welty repeatedly abused her between the ages of four and thirteen. RP (10/4/2010) at 44-48. While A.G. was unable to say exactly how many times she was sexually abused, she testified that the abuse “happened quite often” over a duration of nine years. RP (10/4/2010) at 46.

This Court should hold that had the trial judge properly weighed this factor, he would have determined the evidence weighed in favor of its admissibility.

(d) The lack of intervening circumstances.

Here, the State explained the fourth factor generally applies when the defendant participates in sex offender treatment in between the prior

acts and the charged offenses. RP (10/5/2010) at 62-63. After this explanation the trial court stated, “I do not find there’s any intervening circumstance of any significance ... that would impact my ruling one way or the other.” RP (10/5/2010) at 63.

The record supports the trial court’s finding. While Welty told E.G. he was seeing a psychiatrist because of the terrible things he had done to her, the therapy (if true) appears to have occurred after the abuse ceased. *See* Ex. 13 at 3. Further, the defense never offered any evidence to show Welty sought and made progress in any type of sexual deviant therapy in between the prior acts and the charged offenses. There is nothing in the record to show the presence/absence of any intervening circumstances supported admission or exclusion.

(e) The necessity of the evidence.

Welty argues the trial court erred when it found the evidence of prior sexual misconduct to be necessary. *See* Brief of Appellant at 13. He appears to argue the strength of the State’s case made the evidence unnecessarily cumulative. *See* Brief of Appellant at 13. This argument is unpersuasive.

Washington’s appellate courts have repeatedly held that there is a substantial need for prior sex abuse evidence where, as here, there is no

physical evidence, a delay in reporting, and the cases rely heavily on the testimony of the child witness. *See Sexsmith*, 138 Wn. App. at 506; *Krause*, 82 Wn. App. at 696. Here, the trial court recognized the State's case relied heavily on the victim's credibility and testimony. RP (10/5/2010) at 59, 61. As such, the trial court did not err when it found this factor supported the admission of the evidence.

Welty's argument rests on hindsight and a selective review of the proceedings. He ignores the fact that the defense argued the judge could hear evidence of prior sexual misconduct during the trial and then "separate the wheat from the chaff." RP (10/4/2010) at 9-10, 12, 14. Additionally, while Welty "essentially admitted his transgressions" during the recorded phone conversations, he did not provide specifics regarding the sexual abuse. *See Ex 5-9*. Thus, the State's case rested primarily on E.G.'s ability to recall the specifics of the crimes that began when she was four years old. When the State introduced the evidence of the prior sexual misconduct involving R.P. and A.G., the prosecution could not have anticipated E.G. to withstand, as well as she did, the rigors of cross-examination or the challenge of confronting her abuser.

The trial court did not err when it found the testimony of prior sexual misconduct was necessary in the present case.

(f) Whether the prior act was a criminal conviction.

Welty claims the trial court ignored this factor during its analysis. *See* Brief of Appellant at 12-13. He further contends the trial court had no assurance that prior misconduct actually occurred because the proffered evidence was merely “bare accusations based on distant recollections.” *See* Brief of Appellant at 12-13. This argument is without merit.

The trial court expressly found the absence of any criminal convictions for Welty’s prior sexual acts against his sister and daughter did not favor exclusion of the evidence. RP (10/5/2010) at 61. The trial court recognized child sex abuse often remains buried for years, explaining why such crimes regularly fail to result in a conviction. *See* RP (10/5/2010) at 59, 61. Thus, the absence of a conviction does not mean the absence of a crime.

As argued above, RCW 10.58.090 requires the State to establish that prior sexual misconduct occurred by a preponderance of the evidence. *Scherner*, 153 Wn. App. at 639. The trial court found the State satisfied its burden, proving the prior misconduct by a preponderance of the evidence. RP (10/5/2010) at 60. Additionally, the law does not require a conviction before the State can introduce evidence of prior sex abuse. *See Scherner*, 153 Wn. App. at 658; *Kennealy*, 151 Wn. App. at 885.

(g) Probative value versus prejudicial effect.

Finally, the trial court repeatedly stated the evidence of prior sexual misconduct was more probative than prejudicial. *See* RP (10/5/2010) at 58-61. The trial court did not abuse its discretion when it made this finding. Because the State's case largely depended on E.G.'s testimony, credibility was a central issue. Thus, evidence of Welty's acts of similar sexual misconduct involving young female relatives while they were asleep, or immediately after he woke them from their sleep, was highly probative of the charges involving E.G.

While the evidence is prejudicial for the same reasons it is probative, *i.e.* it tended to show Welty's sexual attraction to young girls and that he preyed on them while they were in a vulnerable position, Welty fails to show its admission was unfairly prejudicial. As previously stated, Washington's appellate courts have repeatedly recognized that there is substantial need for prior sex abuse evidence where, as here, there is no physical evidence, delay in reporting, and the cases relies heavily on the testimony of a child witness. *See Sexsmith*, 138 Wn. App. at 506; *Krause*, 82 Wn. App. at 696.

Finally, the evidence was introduced during a bench trial and did not inflame the laypersons of the jury. Again, the defense conceded the trial court was able to separate the "wheat from the chaff" regarding the

evidence introduced under RCW 10.58.090. The trial court did not err when it found the evidence to be more probative than prejudicial.

In sum, the trial court did not abuse its discretion in admitting the evidence of Welty's prior sex crimes under RCW 10.58.090.

2. The trial court properly admitted the evidence under ER 404(b).

Welty also argues the trial court erred when it admitted the evidence of his prior sexual misconduct under ER 404(b). *See* Brief of Appellant at 14-17. He claims the trial court erred because commonalities between the prior sexual acts and the charged offenses are “not complex but coincidental[.]” *See* Brief of Appellant at 14-15. He further contends the prior sexual incidents “occurred long ago under drastically different circumstances.” *See* Brief of Appellant at 15. This argument is without merit.

A trial court's ruling on the admissibility of evidence will not be disturbed on appeal if it is sustainable on alternative grounds. *State v. St. Pierre*, 111 Wn.2d 105, 119, 759 P.2d 383 (1988). Evidence of prior crimes, wrongs, or acts may be admissible for such purposes as “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b). Pursuant to this rule, the trial court may admit evidence of a common plan or scheme to prove that

charged conduct actually occurred. *State v. Lough*, 125 Wn.2d 847, 862, 889 P.2d 487 (1995).

Evidence of a common scheme or plan is admissible only if (1) the State can show the prior acts by a preponderance of the evidence, (2) the evidence shows a common plan or scheme, (3) the evidence is relevant to prove an element of the crime charged, and (4) the evidence is more probative than prejudicial. *DeVincentis*, 150 Wn.2d at 17 (quoting *Lough*, 125 Wn.2d at 852). At issue in this case is the existence of a common scheme or plan.

“Evidence of a single plan that is used ‘repeatedly to commit separate, but very similar crimes’ is admissible to show a common scheme or plan if it contains common features and a substantial degree of similarity such that the acts can be ‘explained as caused by a general plan of which [the charged crime and the prior misconduct] are the individual manifestations.’ ” *Kennealy*, 151 Wn. App. at 887 (quoting *DeVincentis*, 150 Wn.2d at 19-20). However, a substantial similarity between the acts does not require uniqueness, and courts generally admit evidence of prior sexual misconduct in child sexual cases. *Kennealy*, 151 Wn. App. at 887.

In *Kennealy*, the trial court admitted evidence of uncharged sexual misconduct involving the defendant’s daughters and three nieces under the common plan or scheme exception. 151 Wn. App. at 875. The appellate

court held even though the defendant's behavior in each case was not identical, the trial court did not abuse its discretion in finding that evidence of the prior acts demonstrated a design to molest young children. 151 Wn. App. at 888. Important to the appellate court's reasoning were the following: (1) the defendant told the victims not to tell anyone what had happened; (2) the defendant committed the acts in a place or in a way that they went unnoticed by others; (3) the defendant committed the acts on children who were related to him, or that lived and played close to him; (4) the defendant committed the acts only after the children knew him and trusted him; (5) the defendant's victims were all between the ages of 5-12; (6) the defendant touched his victims both under and over their clothing and on their vaginas; and (7) the defendant committed sexual acts more than once with most of his victims. *Kennealy*, 151 Wn. App. at 889.

Here, Welty employed a common scheme in satisfying his sexual desire for young girls. As in *Kennealy*, he sexual abused young females that were related to him and with whom he shared a position of trust. Like *Kennealy*, he told his victims not to tell anyone about his "special" interactions with them. Like *Kennealy*, he committed the abuse in a manner that reduced his risk of detection – abusing his victims while they were sleeping or waking them up after other adults had left for work. Moreover, like *Kennealy*, Welty committed his sexual crimes more than

once with each of his victims, and the abuse was the same in each instance. As such, these offenses were admissible under ER 404(b).

This Court should reject Welty's arguments that the elapsed time between each of his sexual crimes demonstrates the absence of a common plan or scheme. As stated above, the law does not support Welty's argument. Appellate courts regularly affirm the existence of a common plan or scheme despite lengthy time periods between prior sexual misconduct and the actual crimes a defendant confronts at trial. *See e.g. supra, DeVincentis*, 150 Wn.2d at 13; *Kelly*, 510 F.3d at 437; *Benally*, 500 F.3d at 1092; *Gabe*, 237 F.3d at 959-60.

D. IF THE COURT ERRED WHEN IT ACCEPTED THE EVIDENCE OF PRIOR SEXUAL MISCONDUCT, THE ERROR WAS HARMLESS.

Assuming the trial court erred when it admitted the testimony under either RCW 10.58.090 or ER 404(b), the resulting error was harmless.

An evidentiary error is not grounds for reversal so long as there is no prejudice to the defendant. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall overwhelming evidence as a whole. *Bourgeois*, 133 Wn.2d at 403.

Here, the trial court stated, and the defense affirmed, that it could hear the testimony pertaining to Welty's prior sexual misconduct without giving it undue credit. RP (10/4/2010) at 9-10, 12, 14, 17; RP (10/5/2010) at 63-64. In finding the defendant guilty of the charged offenses, the trial court explained it only considered the evidence of prior sexual crimes for purposes of corroboration. RP (10/6/2010) at 11-12. In fact, the trial court made it abundantly clear that the evidence of prior uncharged sexual misconduct was not essential to its verdict. RP (10/6/2010) at 11-12. The evidence that the trial court found the most compelling were (1) E.G.'s testimony, (2) the absence of any motive for E.G. to fabricate her testimony, and (3) the recorded conversations in which Welty admitted to touching E.G. inappropriately. RP (10/6/2010) at 7-11, 13. Thus, the trial court would have reached the same conclusion with or without the evidence of prior sexual misconduct. This Court should affirm.

E. REMAND IS APPROPRIATE TO CORRECT AND CLARIFY THE CHALLENGED CONDITIONS OF COMMUNITY CUSTODY.

Welty argues the trial court exceeded its authority when it imposed certain community custody conditions. *See* Brief of Appellant at 27-34. Specifically, Welty challenges the condition that ordered him to (1) "abstain from the possession or use of drugs unless prescribed by a

medical professional”, and (2) “abstain from the possession or use of alcohol[.]” *See* Brief of Appellant at 27-34. He argues the trial court lacked the statutory authority to impose these two conditions. *See* Brief of Appellant at 27-29. He also claims the term “drugs” is vague because he could violate the condition by possessing simple over the counter medications. *See* Brief of Appellant at 28, 30-35. The State concedes remand is appropriate to correct the conditions of community custody.

The appellate courts review *de novo* whether the trial court had statutory authority to impose the challenged conditions of community custody. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

The law in effect at the time a criminal offense is committed controls the sentence. *State v. Schmidt*, 143 Wn.2d 658, 673-74, 23 P.3d 462 (2001). The last time period the State alleged Welty committed an offense was between May 28, 2005, and December 25, 2006. RCW 9.94A.703 was not effective until August 1, 2009, so it did not authorize the conditions of community custody challenged here.

The controlling statute is RCW 9.94A.712(6)(a) (2006), which provides:

Unless a condition is waived by the court, the conditions of community custody *shall* include those provided for in RCW 9.94A.700(4). The conditions *may* also include those provided for in RCW 9.94A.700(5). The court may also order the offender to participate in rehabilitative

programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community, and the department and the board shall enforce such conditions pursuant to RCW 9.94A.713, 9.95.425, and 9.95.430.

(Emphasis added). Pursuant to this directive, RCW 9.94A.700(4)(c) (2006) requires the trial court to order the offender "not to possess or consume controlled substances except pursuant to lawfully issued prescriptions[.]" Additionally, RCW 9.94A.700(5) (2006) gives the court the discretion to order the offender not to consume alcohol while under community custody.

In the present case, there was no evidence to show Welty sexually abused E.G. while under the influence of drugs or alcohol.

1. The trial court should strike the prohibition that pertains to the possession of alcohol.

The trial court is limited to the types of alcohol related community custody conditions it can order depending on the nature of the crime committed.

In *State v. Jones*, 118 Wn. App. 199, 202-03, 76 P.3d 258 (2003), the defendant pleaded guilty to first degree burglary and "other crimes," and the court imposed a prison sentence and conditions of community custody relating to alcohol consumption and treatment. Nothing in the

evidence suggested that alcohol contributed to the defendant's offenses. *Id.* at 207-08. The appellate court found the trial judge had the authority to prohibit alcohol consumption, but he could not order the defendant "to participate in alcohol counseling." *Id.* at 208. The court reasoned the legislature intended a trial court "to prohibit the consumption of alcohol regardless of whether alcohol ad contributed to the offense." *Id.* at 206. *See also State v. McKee*, 141 Wn. App. 22, 34, 167 P.3d 575 (2007) (finding that community custody provisions prohibiting purchasing and possession of alcohol were invalid when alcohol did not play a role in the crime).

Here, the trial court ordered Welty to "abstain from the possession or use of alcohol and remain out of places where it is the chief item of sale." CP 20. Only the condition prohibiting Welty from consuming alcohol is valid. *See* former RCW 9.94.700(5)(d); *Jones*, 118 Wn. App. at 208. The remaining alcohol prohibitions are invalid because there is no evidence to show that Welty abused E.G. while under the influence of alcohol. *See Jones*, 118 Wn. App. at 208; *McKee*, 141 Wn. App. at 34.

This Court should remand and instruct the trial court to strike the alcohol prohibitions except the single condition that prohibits Welty from consuming alcohol while on community custody.

2. The trial court should clarify that the defendant shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions.

As a condition of community custody, former RCW 9.94A.712(6)(a) and 9.94A.700(4)(c) require the trial court to order Welty to abstain from any “controlled substances” except pursuant to lawfully issued prescriptions. *See also State v. Vant*, 145 Wn. App. 592, 603-04, 186 P.3d 1149 (2008) (regardless of the offense committed, conditions prescribed under RCW 9.94A.700(4)(c) are required unless waived by the trial court).

Here, the trial court ordered Welty to “abstain from the possession or use of *drugs* unless prescribed by a medical professional[.]” CP 11 (emphasis added). While the State disagrees that Welty would ever be prosecuted for possessing aspirin/ibuprofen (for arthritis), a decongestant (for a cold) or antihistamine (for allergies), the State does agree that the term “drugs” is imprecise.

Because a new sentencing hearing is necessary to strike portions of the contested alcohol prohibition, the State does not oppose any clarification to the present condition. On remand, the trial court should clarify that Welty “shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions.” *See* former RCW 9.94A.700(4)(c).

IV. CONCLUSION:

The State respectfully requests that this Court affirm Welty's 18 convictions. However, the State agrees that a new sentencing hearing is necessary to correct/clarify the two challenged conditions of community custody.

DATED this 22nd day of August, 2011.

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