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NO. 50370-1-II

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

STATE OF WASHINGTON, Respondent

v.

NATHANIEL WESLEY MCCASLAND, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-1-00035-5

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The State presented sufficient evidence to support the jury's guilty verdict.**
- II. **The trial court properly found McCasland's prior conviction was comparable to a Washington strike offense.**
- III. **The trial court properly sentenced McCasland as a persistent offender.**
- IV. **The defendant's Sixth and Fourteenth Amendment Rights were not violated by inclusion of a factually comparable out-of-state offense.**
- V. **The trial court properly determined McCasland's prior criminal history instead of having a jury determine the same. *State v. Smith* controls the analysis here and *stare decisis* requires we follow that holding.**

STATEMENT OF THE CASE

The State charged Nathaniel McCasland (hereafter 'McCasland') with one count of Child Molestation in the First Degree for an incident that occurred on or about June 12, 2015 with his five-year-old daughter, D.M. CP 3. The State alleged McCasland caused his daughter to stroke his penis by having her move her hand in an up and down motion on his penis. CP 2. The matter proceeded to jury trial where the State called 12 witnesses: Shelly McCasland, Dr. Jack Stump, Lena Maynard, Robert Mullikin, Kymberly Adams, D.M., Aubrey Holmquist, Kim Holland, Monica Hernandez, Deanna Watkins, Dawn Tec Yah, and Luz Escobar.

The jury heard from McCasland's wife, Shelly McCasland,¹ that D.M., McCasland's daughter, arrived at Shelly and McCasland's residence for a visit on June 6, a Saturday. RP 593. During that first week D.M. was very excited to be with McCasland. RP 593. On Friday, June 12, Shelly left McCasland home alone with D.M. for the first time since D.M.'s arrival. RP 594. The next day, D.M. blurted out to Shelly that McCasland "showed her his privates," and made a motion with her hand saying her father said "this feels good." RP 596. Shelly had D.M. repeat what she said so that Shelly was sure she understood, and then took D.M. to her father and asked D.M. to repeat it again. RP 597-98. When McCasland heard what D.M. said and saw the gesture she made, he denied it and seemed upset and shocked. RP 598. Later Shelly was alone with D.M. and told her that if anyone tried to show her their privates that she was to firmly and loudly say "no." RP 599-600.

Later that night, Shelly had a conversation with McCasland about the situation. At that point in time, McCasland claimed not to remember doing what D.M. said. RP 600. McCasland was no longer angry and upset, but seemed to be humble. RP 600. The next day, Shelly took D.M. and McCasland to the hospital - D.M. to speak to someone about what happened, and McCasland because he was having suicidal thoughts. RP

¹ Referred to by her first name in the State's brief to avoid confusion; the State intends no disrespect.

601. After D.M. spoke to a doctor, a CPS caseworker took D.M. into custody; Shelly and McCasland went back home. RP 602-03. McCasland later made additional statements to Shelly about his claims. He told Shelly that D.M. said that since he saw her in her underwear that she wanted to see him in his underwear. RP 603. McCasland then showed D.M. his underwear at which time she asked to see his penis. RP 603. McCasland showed D.M. his penis and D.M. reached out and grabbed his penis and pulled on it. RP 604. McCasland told D.M. not to do that; when D.M. asked why he told her “because that’s what we do to make it feel good.” RP 604.

Dr. Jack Stump testified that he is an emergency medicine physician working at Southwest hospital. RP 631. While working at Southwest on June 14, 2015 he saw D.M. as a patient; D.M. was brought in for a concern about an alleged sexual encounter. RP 632. Dr. Stump testified that D.M. told him that “Dad showed me his privates. I told him not to do that. He didn’t stop. He showed me to touch them. I didn’t like it.” RP 637. Lena Maynard was a nurse on duty in the Emergency Department at Southwest hospital on June 14, 2015. RP 652-53. Ms. Maynard testified that she went in with Dr. Stump to see D.M. and McCasland’s wife, Shelly. RP 690-91. As D.M. told Ms. Maynard and Dr.

Stump what happened, she demonstrated an up and down movement with her hand. RP 692.

KyMBERly Adams, a Child Protective Services investigator, received a call on June 14, 2015 about D.M. RP 701. Ms. Adams went to the hospital where she made contact with D.M. and Shelly. RP 701-20. When Ms. Adams spoke to D.M., D.M. told her that her father had exposed his genitalia to her and asked her to hold and stroke his penis. RP 702. D.M. used the actual words “hold” and “stroke” in referring to what her father asked her to do. RP 702-03. D.M. was taken into CPS custody at that time. RP 705.

At the time of trial, D.M. was 7 years old and in the second grade. RP 708, 739. Her birthday is July 29, 2009. RP 708, 737. D.M. told the jury she lives with her mom, Aubrey, her step-dad, Justin, and two snakes and one dog in New Mexico. RP 209. D.M. has never been married. RP 710. D.M. identified McCasland as her “real dad.” RP 711. D.M. testified that she stayed with her dad for six or seven days in Washington on a visit. RP 711-12. During that visit, her dad did a thing that was “very super-duper wrong,” and “a really bad thing.” RP 713-14. After her dad did this “bad thing,” D.M. ran out of the bathroom and went outside to tell her step-mom what happened. RP 714-15. Her step-mom got really upset. RP 714. D.M. decided to tell Shelly what happened because the defendant was

trying to keep it a secret. RP 715. D.M. testified that her father did not want her to tell anyone about it and said “don’t tell anybody that I did that.” RP 715.

D.M. testified that “private parts” are what people use for going to the restroom. RP 716. D.M. saw her dad’s private parts in the bathroom. RP 716. At the time, her dad locked the door. RP 716-17. D.M. testified that she remembered her dad showing her his privates, but did not remember touching him. RP 717. D.M. did remember talking to doctors and telling them that her dad showed her “how to touch it” and that she did not like it. RP 718. D.M. said she also told Ms. Adams that her father showed her his privates and had her hold and stroke his privates. RP 718-19. D.M. also told her mom that her dad had her touch his privates. RP 721.

D.M.’s mom, Aubrey Holmquist, testified at trial. RP 737. In June 2015, she arranged for D.M. to visit her father, McCasland, in Clark County, Washington. RP 741-42. Ms. Holmquist spoke to D.M. every night she was visiting McCasland; in the beginning D.M. was very excited and very happy on the phone calls, saying she was having a good time. RP 746. Then there was a phone call Ms. Holmquist had with D.M. where her mood was different. RP 758. That phone call happened the same night McCasland asked Ms. Holmquist on the phone if D.M. ever made up

things about people when she was mad at them. RP 758-59. Ms. Holmquist learned from Shelly what happened either the next day or the day following that. RP 759.

Kim Holland is a child forensic interviewer at the Children's Justice Center in Clark County, Washington. RP 833. In that capacity, Ms. Holland interviewed D.M. on June 24, 2015 at the Children's Justice Center. RP 841. The interview was audio and video recorded. RP 841. Only Ms. Holland and D.M. were in the room when the interview was going on, but Detective Hernandez was behind the one-way glass watching and listening. RP 841. The recording of the interview with D.M. was admitted into evidence as Exhibit 15. RP 841-42.

Detective Monica Hernandez is a police officer for the Vancouver Police Department, assigned to the Children's Justice Center. RP 871. Det. Hernandez was assigned as the lead detective in McCasland's case. RP 873. Det. Hernandez set up and then observed the forensic interview of D.M. that Ms. Holland handled, and she spoke with Shelly and McCasland. RP 875. On July 20, Det. Hernandez met with both Shelly and McCasland in the lobby of the family court annex. RP 875. Another detective accompanied Det. Hernandez as she interviewed first Shelly and then McCasland. RP 876. Det. Hernandez recorded her interview with

McCasland. RP 878. That recording was admitted into evidence as Exhibit 7 and played for the jury. RP 879.

During this police interview, when McCasland described how D.M. told Shelly and him what he had done, D.M. said it was “something about [him] showing her [his] privates and, umm, her grabbing it and doing this.” RP 779. When McCasland made that statement, he made a gesture with his hand, putting his fingers in a circle and moving the hand diagonally up and down. RP 880.

Dawn Tec Yah is a counselor who worked as such at the hospital where D.M. and McCasland were initially taken in June 2015. RP 903-04. Ms. Tec Yah saw McCasland at the hospital on June 14, 2015 as McCasland came to the ER reporting depression and suicidal ideation. RP 906. McCasland told Ms. Tec Yah that D.M. came in on him when he was using the bathroom and that he was worried D.M. was going to tell someone she had seen his privates. RP 906-07.

Luz Escobar is a nurse working in the emergency department where D.M.. and McCasland were seen on June 14, 2015. RP 997. Ms. Escobar testified that McCasland presented at the hospital as feeling suicidal. RP 999. McCasland explained that he exposed his penis to his daughter who was there on a visit and that he didn't want to go to jail. RP 999.

The jury found McCasland guilty of Child Molestation in the First Degree and returned a special verdict finding the defendant and victim were members of the same family or household and that the defendant used a position of trust to facilitate the commission of the crime. RP 1313-14; CP 141-43. The trial court found the defendant had a prior conviction from Oregon for Sodomy in the First Degree and found that it was factually comparable to Rape of a Child in the Second Degree. RP 1352-54. The court sentenced McCasland to life without the possibility of parole as a persistent offender. RP 1354; CP 217-230.

ARGUMENT

I. The State presented sufficient evidence to support the jury's guilty verdict.

McCasland argues that the State failed to present sufficient evidence that he committed Child Molestation in the First Degree. Specifically, he argues there was insufficient evidence that the touching was done for sexual gratification. The State presented sufficient evidence of all the elements of Child Molestation in the First Degree and the jury reasonably found the crime was committed. McCasland's claim fails.

In reviewing a claim of insufficient evidence, this Court considers the evidence in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency of the

evidence admits the truth of the State's evidence. *State v. Pacheco*, 70 Wn.App. 27, 38-39, 851 P.2d 734 (1993), *rev'd on other grounds*, 125 Wn.2d 150, 882 P.2d 183 (1994). All reasonable inferences from the evidence must be drawn in favor of the State. *Salinas*, 119 Wn.2d at 201. This Court also defers to the jury's resolution of conflicting testimony, evaluation of the credibility of witnesses, and its view on the persuasiveness of the evidence. *State v. Lubers*, 81 Wn.App. 614, 619, 915 P.2d 1157 (1996). This Court should affirm the convictions if any rational trier of fact could have found the essential elements of the crime were proven. *Salinas*, 119 Wn.2d at 201. Circumstantial evidence is as probative and reliable as direct evidence, and the State may rely upon both in presenting its case. *State v. Kroll*, 87 Wn.2d 829, 842, 558 P.2d 173 (1976); *State v. Zamora*, 63 Wn.App. 220, 223, 817 P.2d 880 (1991); *State v. Thompson*, 88 Wn.2d 13, 16, 558 P.2d 202 (1977).

To prove McCasland committed the crime of Child Molestation in the First Degree, the State had to prove that McCasland had sexual contact with D.M., a child under the age of 12, to whom McCasland was not married, and that McCasland was at least 24 months older than D.M. RCW 9A.44.083. McCasland contends on appeal that the State did not present sufficient evidence that the touching involved in this case between McCasland and his five-year-old daughter constituted "sexual contact" as

that term is defined by RCW 9A.44.010(2). “Sexual contact” is defined 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.” RCW 9A.44.010(2). McCasland’s denial that the touching was for his sexual gratification does not make it true nor does that render the evidence insufficient as to that element. The jury was presented with sufficient evidence from which they reasonably found sexual contact occurred.

The jury heard evidence that McCasland took his then five-year-old daughter, D.M., into the bathroom, locked the door, and showed her his penis, having her use her hand to rub up and down on his penis. Many witnesses testified and demonstrated to the jury the gesture D.M. used in showing them what McCasland had her do. McCasland argues there was insufficient evidence that this touching was for sexual gratification. It is well-understood that rubbing “up and down” on a penis is done for sexual gratification, absent some medical or hygienic purpose. There can be no argument that five-year-old D.M. was providing medical or hygienic help to her father’s penis; such an argument was never advanced by McCasland and no jury would find such an argument reasonable. Instead, the jury permissibly considered the totality of the evidence, including the hand gesture D.M. showed to Lena, the doctor, the nurse, the CPS worker, her mom, and the forensic interviewer, and appropriately concluded all the

elements of child molestation had been met, including that there was “sexual contact.”

Traditionally, touching that involves rubbing is sufficient to show the touching was for sexual gratification. *See, e.g., State v. Harstad*, 153 Wn.App. 10, 218 P.3d 624 (2009). Additionally, the circumstances of the incident show this was done for sexual gratification: McCasland took his daughter into a private room, locked the door, intentionally exposed his penis and intentionally had his daughter touch his penis. Such circumstantial evidence is sufficient to support a finding of sexual gratification. *See State v. T.E.H.*, 91 Wn.App. 908, 960 P.2d 441 (1998) (finding sufficient evidence of sexual gratification when touching was not inadvertent, victim was made to disrobe and respondent used hands and penis to complete the act). That the touching was of McCasland himself, and of his sex organ, is further support that the touching was for McCasland’s sexual gratification. Under these facts a rational juror could have found beyond a reasonable doubt that the defendant had D.M. touch his penis for the purpose of sexual gratification. The State presented sufficient evidence of McCasland’s guilt and the jury properly convicted him of Child Molestation in the First Degree.

II. The trial court properly found McCasland's prior conviction was comparable to a Washington strike offense.

McCasland argues the trial court improperly found his prior conviction for Sodomy in the First Degree from the State of Oregon was comparable to a Washington strike offense. Had McCasland committed the same conduct in the State of Washington that resulted in his conviction for two counts of Sodomy in the First Degree in Oregon, he would have been convicted of Rape of a Child in the Second Degree. As McCasland's prior Oregon offense is factually comparable to a Washington Rape of a Child in the Second Degree, the trial court properly found the defendant's present conviction for Child Molestation in the First Degree was his second strike of offenses for which one is deemed a persistent offender upon the second strike. McCasland was properly sentenced as a persistent offender.

A persistent offender includes someone who has been convicted of child molestation in the first degree and who was, before the commission of the child molestation in the first degree, "been convicted as an offender on at least one occasion, whether in this state or elsewhere, of an offense listed in (b)(i) of this subsection or any federal or out-of-state offense or offense under prior Washington law that is comparable to the offenses listed in (b)(i) of this subsection...." RCW 9.94A.030(38). McCasland

was convicted of Child Molestation in the First Degree for the offense involving D.M. that occurred on June 12, 2015. CP 141. McCasland was convicted in Oregon in 1992 of Sodomy in the First Degree. CP 160-67. If McCasland's prior Oregon Sodomy in the First Degree is comparable to an offense listed in RCW 9.94A.030(38)(b)(i), then he is a persistent offender.

RCW 9.94A.030(38)(b)(i) lists the following offenses: rape in the first degree, rape of child in the first degree, child molestation in the first degree, rape in the second degree, rape of a child in the second degree, indecent liberties by forcible compulsion, or an attempt to commit any of those crimes. The trial court found McCasland's prior Oregon Sodomy in the First Degree conviction was comparable to a Washington Rape of a Child in the Second Degree. RP 1352-54.

To determine whether a foreign conviction should count as a strike offense, the court employs a two-part comparability analysis. *State v. Johnson*, 150 Wn.App. 663, 676, 208 P.3d 1265, *rev. denied*, 167 Wn.2d 1012 (2009). The court first determines whether the elements of the Oregon offense are substantially similar to a Washington offense. *Id.* If the elements of the Oregon offense are broader, the crime is not legally comparable and the court then determines whether the offense is factually comparable. *Id.* The crux of factual comparability is whether the conduct

underlying the out-of-state offense would have violated a Washington statute. *Id.* In conducting a factual analysis, the court considers facts admitted or stipulated to by the defendant, or proved beyond a reasonable doubt. *Id.* The court may also look to the defendant's conduct, as evidenced by the indictment or information, to determine whether his conduct would have violated the comparable Washington statute. *State v. Mutch*, 87 Wn.App. 433, 437, 942 P.2d 1018 (1997). At sentencing, the State agreed that Sodomy in the First degree in Oregon is broader than Washington's Rape of a Child in the Second Degree and therefore is not legally comparable. CP 147; RP 1337. The State argued, and the trial court agreed, that McCasland's prior conviction was factually comparable to Washington's Rape of a Child in the Second Degree. CP 147; RP 1337-41, 1352-54.

McCasland entered guilty pleas in Oregon to two counts of Sodomy in the First Degree. CP 160-61. The First count alleged that McCasland did,

...on or between the 5th day of June, 1991 and the 31st day of July, 1991 in the County of Clackamas, State of Oregon, did unlawfully and knowingly engage in deviate sexual intercourse with [victim], to-wit: by sucking the penis of [victim], a child of the age of twelve years, the said [victim], being the said defendant's brother of the half blood....

CP 157. The Second count alleged that McCasland did,

...on or between the 5th day of June, 1991 and the 31st day of July, 1991 in the County of Clackamas, State of Oregon, did unlawfully and knowingly engage in deviate sexual intercourse with [victim], to-wit: by causing [victim] to put his penis in the anus of the defendant, a child of the age of twelve years, the said [victim], being the said defendant's brother of the half blood....

CP 158. McCasland wrote a statement in a petition to enter plea of guilty in which he admitted:

During July 1991 I sucked the penis of my 12 year old brother and I caused him to place his penis in my anus.

CP 161. McCasland also admitted he was 20 years old when he entered the plea on February 20, 1992. *Id.* McCasland's date of birth is September 25, 1971, making him 19 years old between June 5, 1991 and July 31, 1991. CP 160. Had McCasland sucked his 12 year old brother's penis when he was 19 years old in the State of Washington he would have committed the crime of Rape of a Child in the Second Degree. Had McCasland caused his 12 year old brother to place his penis inside McCasland's anus in the State of Washington when McCasland was 19 years old, he would have committed the crime of Rape of a Child in the Second Degree.

A person commits the crime of Rape of a Child in the Second Degree when he has "sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the

victim.” RCW 9A.44.076. This statute has remained the same since 1990, thus the above quoted provisions comprise the substance of the crime as it existed in 1991. Therefore, for McCasland to have been convicted of Rape of a Child in the Second Degree in the State of Washington in 1991 he would have had to 1) have sexual intercourse with a child under the age of 14; 2) be more than thirty-six months older than the child; and 3) not be married to the child. McCasland’s petition to enter a guilty plea indicated the victim of his Oregon crimes was 12 years old. As discussed above, this admission constitutes a fact the sentencing court properly considers in determining factual comparability of an out-of-state conviction. *Johnson*, 150 Wn.App. at 676. Therefore, it is established that the involved child fit within the age range required for a Rape in the Second Degree conviction. In McCasland’s petition to enter a guilty plea in Oregon, dated February 20, 1992, McCasland admitted he was 20-years-old. CP 160. This shows that McCasland was at least 36 months older than the victim, who was twelve years old in June and July, 1991. McCasland’s admission therefore shows he was at least 36 months older than the victim of his Oregon Sodomy in the First Degree Convictions. *See State v. Restorff*, 185 Wn.App. 1044, slip op. p. 7 (2015) (finding a defendant’s statement of age at the time of entering a guilty plea constituted an admission which

showed he was more than 36 months older than the victim at the time of the offense).²

“Sexual intercourse” in 1991 was defined in RCW 9A.44.010 and included “its ordinary meaning,” occurring upon “any penetration, however slight,” and also means “penetration of the...anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex...” and also means “any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are the same or opposite sex.” When one person’s penis is inserted into another person’s anus that constitutes “sexual intercourse” as it is now defined and as it was defined in 1991. When one person sucks on the penis of another person that constitutes “sexual intercourse” as that is now defined and as it was defined in 1991. McCasland admitted to causing a twelve year old’s penis to penetrate his anus; this falls within the definition of “sexual intercourse.” McCasland admitted to sucking a twelve-year-old’s penis; this falls within the definition of “sexual intercourse.” Therefore it’s established that McCasland had “sexual intercourse” with a twelve-year-old child when he was more than 36 months older than the victim.

² GR 14.1 allows for citation to unpublished opinions of the Court of Appeals issued after March 1, 2013. This unpublished opinion is not binding on this Court and may be given as much persuasive value as this Court sees fit.

The last element of a Washington Rape of a Child is that McCasland was not married to the twelve-year-old child. It was in 1991, and still is, a legal impossibility for McCasland to have been married to the victim in his Oregon Sodomy case. Therefore, all the elements of Rape of a Child in the Second Degree are met and it is clear that had the conduct occurred in Washington, McCasland would have been convicted of Rape of a Child in the Second Degree.

The admissions by McCasland show that the victim was McCasland's twelve-year-old half-brother, therefore a male. ORS 163.525 prohibits marriage between siblings of either the whole or half blood. RCW 26.04.020 also prohibits marriage between siblings. Additionally, both Oregon and Washington prohibited same-sex marriage in 1991. *See* former RCW 26.04.020 and former ORS 106.010. The State also demonstrated to the trial court that all fifty states in the United States prohibit marriage between siblings. CP 171-72. Furthermore, no state in the United States permitted same-sex marriages in 1991. *Id* (showing no state legalized same-sex marriage until 2004). Both at the trial court level, and here on appeal, the State has demonstrated that it was impossible for McCasland to have been married to his same-sex sibling in 1991. Based on this impossibility, the trial court properly found this element of Rape of a Child in the Second Degree was met.

Part of proving factual comparability of Rape of a Child in the Second Degree and McCasland's Oregon Sodomy in the First Degree conviction is showing the additional Washington requirement that the victim was not married to the defendant. *See State v. Arndt*, 179 Wn.App. 373, 389, 320 P.3d 104 (2014). In *Arndt*, this Court found the State had not established factual comparability between a defendant's prior Oregon sex offense and a Washington offense because the State had not demonstrated that the victim was not married to the defendant. *Id.* This Court noted as a basis for its finding that the State had not shown it was impossible for the defendant and the victim to be married, noting underage marriage was permitted in California. *Id.* at 389 n. 10. Similarly, in *In re Personal Restraint of Crawford*, 150 Wn.App. 787, 209 P.3d 507 (2009), the defendant's Kentucky conviction for sex abuse in the first degree did not include the element of non-marriage. Thus, while determining whether the Kentucky offense was comparable to a Washington offense, this Court noted that the State had not researched or verified whether Kentucky law permitted marriage between a seven-year-old and a twenty-five-year old. *Crawford*, 150 Wn.App. at 798. With no proof that marriage between Crawford and his victim was impossible, the Court found his out-of-state conviction was not comparable to its Washington counterpart.

McCasland's case differs significantly from *Arndt, supra* and *Crawford, supra*. In McCasland's case, the State did prove the legal impossibility of McCasland's marriage to his brother. Therefore, McCasland's admissions in his petition to plead guilty to his Oregon Sodomy in the First Degree convictions establish the factual comparability of his conduct in Oregon with Washington's crime of Rape of a Child in the Second Degree. Had McCasland committed the same conduct in the State of Washington, he would have committed Rape of a Child in the Second Degree. The trial court therefore properly found McCasland's prior was factually comparable to Rape of a Child in the Second Degree.

III. The trial court properly sentenced McCasland as a persistent offender.

McCasland's prior Oregon convictions for Sodomy in the First Degree are comparable to a strike offense under the persistent offender accountability act (POAA). Therefore the trial court properly sentenced McCasland as a persistent offender.

Under the POAA, an out-of-state conviction may be used as a strike offense if the State proves by a preponderance of the evidence that the conviction would be a strike offense under the POAA. *State v. Ford*, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999). Therefore, a foreign conviction counts as a strike offense if it is comparable to a Washington strike

offense. RCW 9.94A.030(38). “Defendants with equivalent prior convictions are to be treated the same way, regardless of where their convictions occurred.” *In re Personal Restraint of Lavery*, 154 Wn.2d 249, 254, 111 P.3d 837 (2005) (citing *State v. Villegas*, 72 Wn.App. 34, 38-39, 863 P.2d 560 (1993)). McCasland was properly treated as if his prior conviction had occurred in Washington. The trial court’s finding that McCasland’s prior Oregon convictions were factually comparable to Rape of a Child in the Second Degree was proper.

When a defendant is found to be a persistent offender, the court must sentence the defendant to life in prison without the possibility of parole. RCW 9.94A.120(4). McCasland is a persistent offender as he was convicted in this case of child molestation in the first degree and was previously convicted of an offense comparable to rape of a child in the second degree. *See* RCW 9.94A.030(38). “The goal of the POAA is to appropriately punish repeat offenders, including those with out-of-state convictions for violent offenses.” *State v. Berry*, 141 Wn.2d 121, 132, 5 P.3d 658 (2000). That goal is served by including comparable out-of-state convictions that meet the criteria under RCW 9.94A.030(38). As McCasland’s prior conviction was properly deemed to be comparable to a rape of a child in the second degree, the trial court properly found McCasland to be a persistent offender.

IV. The defendant's Sixth and Fourteenth Amendment Rights were not violated by inclusion of a factually comparable out-of-state offense

McCasland argues that federal law prohibits consideration of a foreign conviction for sentencing under the POAA if that foreign conviction is not legally comparable to a Washington strike offense. McCasland's argument is based on inapplicable law analyzing a federal sentencing statute.

Washington's POAA allows for use of factually comparable out-of-state convictions in a trial court's determination of a defendant's persistent offender status.

McCasland relies almost exclusively on *Deschamps v. U.S.*, 570 U.S. 254, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013) to support his argument that using factual comparability of an out-of-state prior conviction violates his constitutional rights. The Washington Supreme Court has already addressed this same argument in *State v. Olsen*, 180 Wn.2d 468, 325 P.3d 187 (2014). The Washington Supreme Court

granted review in [*Olsen*] to consider the comparability of the [out-of-state] conviction, including the propriety of examining the facts of the foreign conviction in light of *Deschamps*. We consider, in part, whether our current comparability analysis survives *Deschamps*. We hold that it does.

Olsen, 180 Wn.2d at 474. In *Deschamps*, the United States Supreme Court held that when statutes do not set forth alternative means for the

commission of a crime, sentencing courts may not look to outside documents to consider the basis for a conviction. *Id.* at 475 (discussing *Deschamps*, 133 S.Ct. at 2282). Instead, if a prior offense includes statutory elements that are broader than the generic offense, it may not be used as the basis for an increased sentence under the ACCA, regardless of the facts of the underlying conviction. *Id.* In *Olsen* then, our Supreme Court considered the impact the *Deschamps* holding had on Washington’s comparability test which allows for an examination of the underlying criminal conduct to determine whether an offense is factually comparable to a Washington offense.

In finding that Washington’s comparability analysis is not called into question by *Deschamps*, our Supreme Court highlighted that Washington’s framework “limits our consideration of facts that might have supported a prior conviction to only those facts that were clearly charged and then clearly proved beyond a reasonable doubt to a jury *or admitted by the defendant.*” *Olsen*, 180 Wn.2d at 476 (emphasis added). Furthermore, the Supreme Court held that the provisions for factual comparability set forth in *Lavery, supra*, and *State v. Thieffault*, 160 Wash.2d 409, 158 P.3d 580 (2007) “guarantee that judicial determinations will not usurp the role of the jury in violation of the Sixth Amendment.” *Id.* at 477.

Our Supreme Court has previously addressed this issue. There is no indication, nor does McCasland argue, that the *Olsen* decision is incorrect and harmful. In order to ignore past precedent, a prior decision must be found to be both incorrect and harmful. *In re Rights to Waters of Stranger Creek*, 11 Wn.2d 649, 653, 466 P.2d 508 (1970). *Olsen*'s holding is neither incorrect nor is it harmful. Accordingly, that decision must be adhered to.

V. The trial court properly determined McCasland's prior criminal history instead of having a jury determine the same. *State v. Smith* controls the analysis here and *stare decisis* requires we follow that holding.

McCasland argues that the trial court erred in determining whether he had a prior criminal conviction to be used in computing McCasland's sentencing range instead of having the jury determine McCasland's prior criminal convictions beyond a reasonable doubt. In setting forth this argument, McCasland dismisses the application of *State v. Smith*, 150 Wn.2d 135, 75 P.3d 934 (2003), *cert. denied*, *Smith v. Washington*, 124 S.Ct. 1616 (2004) and instead argues that *State v. Roswell*, 165 Wn.2d 186, 196 P.3d 705 (2008) should be applied to both prior convictions that are elements of crimes and the court's determination of an offender's prior criminal history for sentencing purposes. McCasland's argument ignores the Supreme Court's direct rejection of his exact argument in *Smith, supra*

and in *State v. Witherspoon*, 180 Wn.2d 875, 329 P.3d 888 (2014), and argues this Court choose to reject the Supreme Court's decision and find to the contrary. The doctrine of stare decisis requires this Court follow the Supreme Court's prior holdings on this issue. McCasland's claim should be denied.

Neither the U.S. Constitution nor the Washington State Constitution dictate that a defendant is entitled to jury determination by proof beyond a reasonable doubt of prior convictions when used to determine an offender's offender score. In *Almendarez-Torres v. U.S.*, 523 U.S. 222, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), the United State Supreme Court found that prior convictions used to enhance a sentence are not elements of a crime and do not need to be proved to a jury beyond a reasonable doubt. *Almendarez-Torres*, 523 U.S. at 247. In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the U.S. Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. In *Smith*, our State Supreme Court addressed the very issue McCasland raises here: whether a jury should find the existence of prior convictions when used to determine that he is a persistent offender. *Smith*, 150 Wn.2d at 141-56. There, the

Supreme Court found that there is no constitutional requirement for process of a jury trial for determining prior convictions. *Id.* at 143. The Court noted that while for aggravating and mitigating factors and the weight those should be accorded are “matters of opinion about which reasonable minds could differ,” the existence of prior convictions for determining a sentence do not require a jury finding under the U.S. Constitution. *Id.* The *Smith* Court thereby affirmed its prior findings in *State v. Ammons*, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986) (upholding the constitutionality of the SRA’s provision that a court conduct sentencing hearings), and *State v. Thorne*, 129 Wn.2d 736, 921 P.2d 514 (1996) (holding the statutory procedures of the SRA providing that prior convictions be proved to a sentencing court by a preponderance of the evidence do not violate constitutional guarantees and that no additional safeguards would be available to a defendant in a jury trial on the question of the existence of prior convictions), and *State v. Wheeler*, 145 Wn.2d 116, 34 P.3d 799 (2001) (holding the U.S. Constitution does not require jury determination of a defendant’s status as a persistent offender).

The *Smith* Court also analyzed whether Article I, section 21 of the Washington Constitution requires a jury determine a defendant’s persistent offender status. *Id.* at 143-44. The Court conducted a *Gunwall* analysis,

considering (1) textual language of the State constitution and the U.S. constitution, (2) differences between the two, (3) constitutional history, (4) preexisting State law, (5) structural differences, and (6) matters of particular state or local concern. *Smith*, 150 Wn.2d at 149 (citing *Oregon v. Hass*, 420 U.S. 714, 719, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975) and discussing *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986)). The Washington constitution provides a defendant's jury trial right must remain "inviolable," but only for charged offenses, and not for sentencing proceedings. *Smith*, 150 Wn.2d at 150. Though the Washington constitution provides a broader right to a jury trial than the federal constitution, it does not extend to requiring a jury's determination on prior convictions for sentencing.

Prior to the adoption of the Washington state constitution, our state abolished the jury's role in sentencing. *Smith*, 150 Wn.2d at 154 (citing Laws of 1866, sec 239, *in* STATUTES OF THE TERRITORY OF WASHINGTON 102 (1866) and DAVID BOERNER, SENTENCING IN WASHINGTON: A LEGAL ANALYSIS OF THE SENTENCING REFORM ACT OF 1981, sec. 2.2(a) (1985)). Thus the prior common law rule of England, providing juries determined prior convictions, did not apply as Washington territorial law had specifically provided otherwise. *Smith*, 150 Wn.2d at 154. The *Smith* Court also noted that our state's first

habitual offender law, which required a jury find a defendant's prior convictions, did not go into effect until after the state constitution was drafted and therefore could not have had any effect on the drafters' intent. *Id.* Finally, the *Smith* Court held that the law in effect prior to the adoption of the constitution, providing that only juries were to determine issues of fact, applied to facts in the indictment, not facts in relation to sentencing. *Id.* at 155 (discussing *City of Seattle v. Gardner*, 54 Wn.2d 112, 114, 338 P.2d 125 (1959)).

Thus, in applying all six factors of a *Gunwall* analysis, the Supreme Court determined that the Washington constitution, while broader in some respects regarding jury trials, does not include the right to a jury trial on the fact of prior convictions at sentencing. *Id.* at 156. Therefore a sentencing court is the proper fact-finder to determine the existence of a defendant's prior criminal history when using that prior history to determine and impose a sentence.

Our Supreme Court affirmed its *Smith* holding in *Witherspoon*, 180 Wn.2d at 891-94. There, the Court addressed whether a defendant's jury trial right was violated when his prior convictions were proven to a judge and not a jury, and based on the judge's findings of the existence of his prior convictions he was sentenced as a persistent offender. *Witherspoon*, 180 Wn.2d at 891-94. The Court again held that the persistent offender

accountability act does not violate state or federal due process by not requiring a jury finding on the fact of the existence of a prior strike offense. *Id.* at 892. There, the Court stated,

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

Id. at 893. The Court further stated,

United States Supreme Court precedent, as well as this court's own precedent, dictate that under the POAA, the State must prove previous convictions by a preponderance of the evidence and the defendant is not entitled to a jury determination on this issue.

Id. at 894.

Witherspoon remains good law in our state. In May 2018, in an unpublished opinion, Division I of this Court addressed whether a defendant has a constitutional right to have a jury determine whether he is a persistent offender. Division I, finding no violation to the defendant's constitutional rights, indicated there was no compelling reason to challenge the existing precedent of *Witherspoon* and *Apprendi, supra*. See

State v. Jackson, 3 Wn.App.2d 1050 (2018).³ Similarly, Division II of this Court addressed the same issue in the unpublished opinion in *State v. Moretti*, 1 Wn.App.2d 1007 (2017).⁴ This Court also held that sentencing under the POAA does not violate a defendant's right to a jury trial or to due process, and prior convictions for this purpose do not need to be submitted to a jury. *Id.* (citing to *Witherspoon*, 180 Wn.2d at 893-94). Division III of this Court has likewise rejected a defendant's claim that his sentence as a persistent offender violated due process, equal protection and his right to a jury trial. *State v. Mancilla*, 197 Wn.App. 631, 652, 391 P.3d 507 (2017) (citing to *Witherspoon*, 180 Wn.2d at 892-94, *State v. Brinkley*, 192 Wn.App. 456, 369 P.3d 157, *rev. denied*, 185 Wn.2d 1042, 377 P.3d 759 (2016), and *State v. Williams*, 156 Wn.App. 482, 496-98, 234 P.3d 1174 (2010)).

Under the doctrine of stare decisis, an established rule must be shown to be both incorrect and harmful before it may be abandoned by our courts. *Waters of Stranger Creek*, 11 Wn.2d at 653. It's clear our courts have considered the same argument McCasland now makes time and time again, choosing to follow established precedent. There is no reason this

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Court should deviate from long-established law in this regard. Under the doctrine of stare decisis, there must be a clear showing that an established rule is both incorrect and harmful before it can be abandoned. Neither has been shown here. McCasland's claim is directly contradicted by legal precedent. His claim should be denied.

CONCLUSION

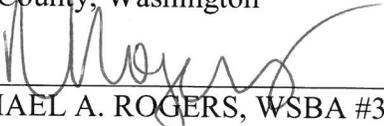
McCasland was properly convicted of child molestation in the first degree upon sufficient evidence. The trial court correctly determined McCasland's out-of-state conviction was comparable to a strike offense under the POAA and properly sentenced McCasland as a persistent offender. The trial court should be affirmed.

DATED this 20th day of July, 2018.

Respectfully submitted:

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