No. 45048-8-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DAVID HAVILAND,

Respondent.

Appeal from the Superior Court of Washington for Lewis County

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Respondent's Brief

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B. Did the trial court improperly convict Haviland on propensity evidence elicited by the State from S.L.B.?

C. Can a criminal defendant facing a felony waive jury trial under the Washington State constitution?

II. STATEMENT OF THE CASE

On November 29, 2012, Deputy Lauer of the Lewis County Sheriff's Office was dispatched to the Human Response Network (HRN) in Morton after receiving a report that R.J.H. [1] (DOB: 11/4/1996) had been raped by her biological father, David Haviland (DOB 10/29/1974). RP 11, 13, 82-83, 98, 135-36 258-59; CP 26-27. [2] Deputy Lauer conducted an interview with R.J.H. and her mother, B.J.H. RP 259-60; CP 27. R.J.H. was crying and appeared to be upset. RP 259; CP 27.

R.J.H. resided at 118 Kelly Lane in Randle, Washington, and most of the sexual contact took place at that address. RP 11-12,

[1] The State will refer to the minor victim, her friend, and the minor victim's mother by their initials to protect the identity and privacy of the minor victim.

[2] The State will refer to the verbatim report of proceedings, occurring 5/6/13, 5/7/13, and 5/8/13, which are continually numbered, for the bench trial as RP. Any other hearing will be cited as RP and the date of the hearing.

82; CP 27. The first time Haviland raped R.J.H. she was about 13 years old. RP 13, 71; CP 27. On that occasion, R.J.H. and her friend, S.L.B. (DOB: 02/07/1996), went to the shop to ask Haviland for chewing tobacco. RP 14, 71; CP 27. Haviland told R.J.H. and S.L.B. that "they would have to earn it." RP 14, 72; CP 27. Haviland told S.L.B. to watch for B.J.H., R.J.H.'s mother, and directed R.J.H. to a back room in the shop. RP 72; CP 27. Haviland then pulled down R.J.H.'s pants and inserted his penis into her anus. RP 15-16. R.J.H. said it hurt her anus and it felt gross. RP 16; CP 27. Haviland ejaculated on the floor of the shop. RP 18; CP 27. S.L.B. was then called into the back room of the shop, while R.J.H. stood watch. RP 41, 72; CP 27. Haviland made S.L.B. watch as he masturbated. RP 71.

The next rape also occurred when R.J.H. was 13 years old. RP 20; CP 27. Haviland penetrated R.J.H.'s anus with his penis and on this occasion her rectum bled. RP 20, 22; CP 27. Haviland ejaculated on the floor of the shop and told R.J.H. not to tell anyone. RP 65; CP 27.

The next rape occurred when R.J.H. was approximately 13 to 14 years old in the bathroom at the Haviland home. RP 23; CP 27. Haviland put his penis inside R.J.H.'s vagina while looking in

the bathroom mirror and told R.J.H. to look, that he got it all the way in. RP 24; CP 27.

The next rape occurred around black Friday in November 2011. RP 27-28; CP 27. R.J.H. came home and defendant was on the couch watching television in the living room. RP 51; CP 27. After her mother went into her bedroom, Haviland forced his penis into R.J.H.'s anus, which hurt R.J.H. and made her anus bleed. RP 25-26. Haviland told R.J.H. to watch down the hall for her mother. RP 65; CP 27. Haviland ejaculated on the living room floor. RP 26, 53; CP 27.

The last sexual contact occurred while R.J.H. and Haviland were bear hunting around Cispus in 2011. RP 29-30; CP 27. R.J.H. and Haviland were sitting in the grass when defendant began masturbating himself. RP 30; CP 27. Haviland then made R.J.H. masturbate him by touching his penis with her hand. RP 30-31; CP 27. Haviland forced R.J.H. to put his penis in her mouth. RP 31; CP 27.

R.J.H. told her friend April about the abuse and then told her mother in November 2012. RP 32. B.J.H. confronted Haviland about the allegations regarding R.J.H. and he responded, "it was not that bad." RP 85-86; CP 28. Haviland told B.J.H. that "it was

only her bottom and it wasn't that many times". RP 86; CP 28. When Haviland was contacted by Deputy Lauer, he admitted to previously assaulting his wife, but denied the allegations involving R.J.H. RP 265-66; CP 27. Haviland stated he was not angry at his wife or daughter, as he did not believe they would fabricate the allegations. RP 261-62; CP 27.

The State charged Haviland in the Third Amended Information with, Counts I and II – Rape of a Child in the Second Degree – Domestic Violence, and Counts III, IV, and V – Rape of Child in the Third Degree – Domestic Violence. CP 4-7. There was a hearing regarding the admissibility of certain evidence. *See* RP (5/3/13). Findings of Fact and Conclusions of Law were entered for that hearing. CP 1-3.

Haviland elected to have his case tried to a judge sitting without a jury and executed a written waiver of jury trial. CP 88. The trial court also conducted a colloquy with Haviland to discuss the jury trial waiver. RP (5/3/13) 25-27. The State and Haviland presented testimony at trial. *See* RP. Haviland was able to elicit testimony from four people, three of which were family members of Haviland, that B.J.H. and R.J.H. had reputations for dishonesty within the community. RP 152, 163-64, 169-70, 183-84. The judge

gave little weight to this testimony because there was an obvious bias due to the witnesses being family member. RP 301; CP 28.

The trial judge found Haviland guilty as charged. RP 304-05; CP 28. Haviland was sentenced to 280 months to life on Counts I and II, and 60 months on Counts III, IV, and V. CP 12. The judge handed down an exceptional sentence, finding that due to Haviland's high offender score, some of his crimes would go unpunished. CP 11, 25. Therefore, Count V was ordered to run consecutive to Counts I and II. CP 12. Haviland timely appeals his conviction. CP 30-46.

The State will supplement the facts in its argument below.

III. ARGUMENT

A. SECOND SUBSTITUTE SENTATE BILL NO. 6259 DOES NOT VIOLATE THE SINGLE-SUBJECT RULE OR THE SUBJECT-IN-TITLE RULE OF ARTICLE II, SECTION 19 OF THE WASHINGTON STATE CONSTITUTION.

Haviland argues that the bill enacting the statute criminalizing Rape of a Child in the Second Degree violated the single-subject rule and the subject-in-title rule and therefore RCW 9A.44.076 is unconstitutional. Appellant's Brief 10-14.

Substitute Senate Bill No. 6259 does not violate the Washington State constitutional single-subject or subject-in-title

requirement. The statute criminalizing Rape of a Child in the Second Degree is constitutional and Haviland's convictions should be affirmed.

1. Standard Of Review

Constitutional challenges are reviewed de novo. *Lummi Indian Nation v. State*, 170 Wn.2d 247, 257-58, 241 P.3d 1220 (2010).

A claim of a manifest constitutional error is reviewed de novo. *State v. Edwards*, 169 Wn. App. 561, 566, 280 P.3d 1152 (2012).

2. Second Substitute Senate Bill No. 6259 Does Not Violate Washington State Constitution Article II, Section 19.

The Washington State constitution requires a bill to only embrace one subject and that subject must be expressed in the title of the bill. Const. art. II, § 19.

> The constitutional provision that no act shall embrace more than one subject, which shall be expressed in the title, prohibits the passage of an act containing provisions not fairly embraced in the title, and any such provisions are void, and it also prohibits the passage of an act relating to different subjects expressed in the title, in which case the whole act is void."

Power, Inc. v. Huntley, 39 Wn.2d 191, 200, 235 P.2d 173 (1951).

Article II, section 19 serves three distinct purposes:

> (1) to protect and enlighten the members of the legislature against provisions in bills of which the titles give no intimation; (2) to apprise the people, through such publication of legislative proceedings as is usually made, concerning the subjects of legislation that are being considered; and (3) to prevent hodge-podge or log-rolling legislation.

City of Fircrest v. Jensen, 158 Wn.2d 384, 390, 143 P.3d 776 (2006), *citing Patrice v. Murphy,* 136 Wn.2d 845, 851–52, 966 P.2d 1271 (1998).

A statute is presumed constitutional and it is the burden of the party attacking the statute to prove the statute is unconstitutional beyond a reasonable doubt. *City of Bellevue v. Lee*, 166 Wn.2d 581, 585, 210 P.3d 1011 (2010), *citing Island County v. State*, 135 Wn.2d 141, 146, 955 P.2d 377 (1998).

> This doctrine applies with particular force when the issue relates to constitutional form, because legislative procedure is involved, i.e., 'the methods of transacting public business by co-ordained branch of the state government', and not 'those constitutional guaranties of personal right which it is the peculiar province of courts to protect'.

Wash. Fed'n of Employees v. State, 127 Wn.3d 544, 556, 901 P.2d 1028 (1995), *quoting Holzman v. Spokane*, 91 Wash. 418, 421, 157 P. 1086 (1916).

Titles may be general or restrictive. *State v. Thomas*, 103 Wn. App. 800, 807, 14 P.3d 854 (2000), *review denied,* 143 Wn.2d 1022 (2001). "A general title is one which is broad rather than narrow." *State v. Lanphar,* 124 Wn. App. 669, 673, 102 P.3d 864 (2004); *Citizens for Responsible Wildlife Mgmt. v. State,* 149 Wn.2d 622, 632-33, 71 P.3d 644 (2003); *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 207, 11 P.3d 762 (2000).

"A general title broadly allows subjects that are 'reasonably germane' to its title to be contained in the bill's body and even 'incidental subjects or subdivisions' may be allowed." *Lanphar*, 124 Wn. App. at 674; citing *Citizens for Responsible Wildlife* at 632-33.

> "[A] title complies with the constitution if it gives notice that would lead to an inquiry into the body of the act, or indicate to an inquiring mind the scope and purpose of the law." *Wash. Fed'n of State Employees v. State,* 127 Wn.2d 544, at 555, 901 P.2d 1028 (1995) (quoting *Young Men's Christian Ass'n v. State,* 62 Wn. 2d 504, 506, 383 P.2d 497 (1963)).

Lanphar, 124 Wn. App. at 674. "Where a legislative act's title expresses a single general subject, the act may include all matters that are naturally and reasonably connected with the title and all measures that may facilitate accomplishing the title's stated purpose." *State v. Stannard,* 134 Wn. App. 828, 836, 142 P.3d 641 (2006); *Amalgamated* at 210.

General titles are given liberal construction. "The title need not be an index to the bill's contents or detail the bill's provisions. All that is required is that there be some 'rational unity' between the general subject and the incidental subdivisions." *Lanphar*, 124 Wn. App. at 674, citing *Wash Fed'n* at 556 (other internal citations omitted). A restrictive title, in contrast, is not afforded liberal construction. *State v. Broadaway*, 133 Wn.2d 118, 127, 942 P.2d 363 (1997). "A restricted title encompasses ""a particular part or branch of a subject...carved out and selected as the subject of the legislation."" *Lanphar*, 124 Wn. App. at 674, citing *Broadaway* at 127.

a. Second Substitute Senate Bill No. 6259, which amended the statute criminalizing Rape Of A Child In The Second Degree, does not violate the single-subject rule.

The title of Second Substitute Senate Bill No. 6259 is "AN ACT Relating to criminal offenders; ..." Laws of 1990, ch. 3. Haviland argues there are a number of different subjects encompassed within the bill and it therefore violates the single-subject rule. Appellant's Brief 11-13. Haviland's argument fails because all of the sections of the bill are all related to the broad subject of "Relating to criminal offenders." Each section of the bill is

reasonably germane to the title and there is rational unity between the subject and the incidental subdivisions.

Haviland argues eight different ways in which the single-subject rule is violated. First, it is important to look at the plain meaning of the language in the title, as criminal offender is not defined within the bill. *See State v. Sullivan*, 143 Wn.2d 162, 175, 19 P.3d 1012, 1019 (2001). Criminal is defined as, "1: involving or being a crime < ~ carelessness> 2: relating to crime or its punishment..." Webster's Third New International Dictionary, 536. Offender is defined as, "one that offends : one that violates a law, rule, or code of conduct : one that commits an offense..." Webster's Third New International Dictionary, 1566. The bill is not titled "AN ACT Relating to convicted criminal offenders." Criminal offenders are people who violate a criminal law or rule. The different sections of the bill do have rational unity with this general subject.

Haviland takes issue with the bill amending sections of the Juvenile Justice Act, including the sections related to release of information about offenders and sentencing. Appellant's Brief 11. Section 102 authorizes the department to release relevant information necessary to protect the public from juveniles adjudicated of sex offenses. Laws of 1990, ch. 3, § 102. Section

301 amends the definitional section of RCW 13.40 (the Juvenile Justice Act) which includes definitions for serious offender, listing the crimes one must commit to be considered a serious offender, juvenile offender, offender, and restitution. Laws of 1990, ch. 3, § 301. These sections have rational unity with the general subject.

Next, Haviland takes issue with two sections of chapter 3 he asserts regard the release of information and notice of release from custody in civil detention cases. Appellant's Brief 11. While it is true these sections, §§109 and 120, are in regards to civil commitments, they address civil commitments where a person has either been found not guilty by reason of insanity or are considered a sexual psychopath, both of which are related and rational unity to criminal offenders, because one does not become either without having committed a criminal offense. Laws of 1990, ch. 3, §§ 109 and 120; RCW 10.77; RCW 71.06.

Haviland complains the bill amends different sections which relate to crime victims. Brief of Appellant 11-12 (citing to ch. 3, §§ 501-04; 1201-10[3]). Any provision regarding a crime victim has rational unity to criminal offenders as a person would not become a

[3] The sections dealing with administration of grants actually relates to services for sex offender treatment within the community. Further section 1202 was vetoed by the governor and that portion directed to be promulgated by an Executive Order to the Department of Community Development. *See* Laws of 1990, ch. 3.

crime victim but-for a person criminally offending. Also, matters dealing with compensation for crime victims directly relates to criminal offenders, as they may to pay restitution. *See* RCW 9.94A.753.

Haviland argues that the portion of the bill, adding a new chapter to RCW Title 18, which creates a statutory scheme for certifying sex offender treatment providers is not relating to criminal offenders. Appellant's Brief 12. Sex offenders are criminal offenders and most are ordered to undergo treatment as part of their conditions of community custody. *See* RCW 9.94A.820. Creating a statutory scheme for certified treatment for sex offenders does relate to criminal offenders.

The section creating a new chapter of RCW Title 71, adding a statutory scheme for civil commitment of sexually violent predators is also related to criminal offenders contrary to Haviland's argument. *See* Laws of 1990, ch. 3, §§ 1001-13; Brief of Appellant 12. "'Sexually violent predator' means any person who has been convicted or charged with a crime of sexual violence and who suffers from mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence." Laws of 1990, ch. 3, § 1002(1). These sections of the bill

have rational unity with the title and fall under the subject, "Relating to criminal offenders".

The sections in the bill relating to background checks only release information, including in disciplinary board decisions, when a person has been convicted of a crime against children or other persons; convicted of crimes related to financial exploitation of vulnerable adults, when a person has been found to have physically or sexually abused or exploited a minor or developmentally disabled person, or financially exploited or abused any vulnerable adult. Laws of 1990, ch. 3, §§ 1101-04. These sections relate to criminal offenders.

Lastly, Haviland argues that the portion of the bill that addresses the treatment and supervision of parents found to have abused children is not contained within the subject – relating to criminal offenders. Appellant's Brief 12-13. A person found to have sexually or physically abused a child is a criminal offender under the plain language of the bill. One does not need to be convicted of a crime to be a criminal offender.

All of the sections of Chapter 3 of the Laws of 1990 relate to criminal offenders. All matters contained within the sections of the bill are naturally and reasonably connected with the broad subject,

"Relating to criminal offenders," The bill contains a single subject and therefore, does not violate the single-subject rule. The bill amending Rape of a Child in the Second Degree is not void.

b. Second Substitute Senate Bill No. 6259, which amended the statute criminalizing Rape Of A Child In The Second Degree, does not violate the subject-in-title rule.

Haviland argues that Second Substitute Senate Bill No. 6259 violates the subject-in-title rule because it encompasses subjects not contained within the general subject, "Relating to criminal offenders". Appellant's Brief 13-14. Haviland states the bill encompasses subjects relating to juvenile offenders, civil commitment, treatment providers, crime victims assistance, employee background checks, and funding for community organizations, which are not related to criminal offenders. Appellant's Brief 13-14. Haviland then states that the entire act is unconstitutional and Haviland's convictions for Rape of a Child in the Second Degree should be dismissed with prejudice. Appellant's Brief 14. All of Haviland's arguments are incorrect. As argued above the sections of the bill relate to the single general subject of the bill, "Relating to criminal offenders". Further, the appropriate remedy is to first evaluate if the individual sections can be eliminated without rendering the entire statute unconstitutional.

The title of Second Substitute Senate Bill No. 6259 is "AN ACT Relating to criminal offenders; ..." Laws of 1990, ch. 3. This is a general title and should be given liberal construction. There must be rational unity between the title and the general subject and the subjects addressed in the individual sections of the bill. *Lanphar* at 674. As argued extensively above, each section attacked by Haviland meets the rational unity test because the sections are reasonably germane to the broad general title. *Id.* The definition of criminal offender does not require a person to be convicted of a crime, but to have committed a criminal act. Further, there are many wide ranging things that can relate to a criminal offender. A criminal offender is related to the crime victim and any restitution owed. A criminal offender is related to the not guilty by reason of insanity provisions and the commitments under sexual psychopaths or sexually violent predators. A criminal offender is related to those incidents specifically provided for in information disseminated by the Washington State Patrol in background checks for an employee or volunteer. A criminal offender is related to treatment for sexual deviancy and a statutory scheme for certifying sex offender treatment providers.

Arguendo, if any of these sections are found to not meet the subject-in-title requirement of Article II, section 19, the proper test is to see if the invalid provisions are severable. *Amalgamated Transit Union*, 142 Wn.2d at 227-28.

> A legislative act is not unconstitutional in its entirety unless the invalid provisions are unseverable and it cannot be reasonably believed that the legislative body would have passed one without the other, or unless elimination of the invalid part would render the remaining part useless to accomplish the legislative purpose.

Id. (citations omitted). It is not necessary for there to be a severability clause for a determination of whether the legislative body would have enacted the act without the severed sections. *Id.* at 228. There are 14 parts to the bill with 115 different sections, and if this court were to sever any one of the enumerated sections Haviland argues do not fall within the subject-in-title rule, it would not render the bill unconstitutional. The legislative purpose, "Relating to criminal offenders" would still be accomplished without any one or all of the provisions enumerated by Haviland.

The bill in not void for violating the subject-in-title rule and, therefore, the statute criminalizing Rape in the Second Degree is constitutional. Haviland's convictions for Rape of a Child in the Second Degree should be affirmed.

B. HAVILAND WAS NOT CONVICTED USING PROPENSITY EVIDENCE BECAUSE THE TRIAL COURT'S RULING ALLOWING S.L.B.'s TESTIMONY WAS PROPER.

Haviland argues that the trial judge improperly used propensity evidence to convict him, in violation of Haviland's due process rights under the Fourteenth Amendment of the United States Constitution. Appellant's Brief 16. Haviland asserts the trial court used the wrong legal standard and in the alternative admitted the evidence under two ER 404(b) exceptions which do not apply to his case. Appellant's Brief 16-22.

The trial court did not err in admitting the testimony of S.L.B. The court did the proper analysis and the alternative reasons the court admitted the 404(b) evidence was permissible given the facts and circumstances of Haviland's case.

1. Standard Of Review.

"[I]nterpretation of an evidentiary rule is a question of law" subject to de novo review. *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012). Once it is determined the trial court correctly interpreted the rule, a determination regarding the admissibility of evidence by the trial court are reviewed under an abuse of discretion standard. *Gresham*, 173 Wn.2d at 419; *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999) (citations omitted). "A

trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003), *citing State v. Stenson,* 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

If the trial court's evidentiary ruling is erroneous, the reviewing court must determine if the erroneous ruling was prejudicial. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An error is prejudicial if "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *Bourgeois*, 133 Wn.2d at 403 (citations omitted).

2. The Trial Court Properly Admitted The Evidence Regarding S.L.B.'s Testimony Which Was Not 404(b) Evidence.

A party may not admit evidence of other crimes, wrongs, or acts of a person to show action in conformity therewith. *State v. Yarbrough*, 151 Wn. App. 66, 81, 210 P.3d 1029 (2009). The purpose and scope of ER 404(b) is that it "governs the admissibility of evidence of other crimes or misconduct for purposes other than proof of general character." 5D Karl B. Tegland, Washington Practice: Courtroom Handbook on Washington Evidence, § 404:6, at 184 (2013-2014). Evidence of other crimes or misconduct is not

admissible to demonstrate a defendant's propensity to commit the crime they are currently charged with. ER 404(b); *State v. Powell*, 166 Wn.2d 73, 81, 206 P.3d 321 (2009). Evidence of other crimes, acts, or wrongs by a person may be admissible for purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or accident. ER 404(b).

Prior to admitting ER 404(b) evidence a trial court must conduct a four part test. *Id.* at 81-82. The trial court must,

> (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.

Id. at 81-82. The reviewing court defers to the trial court regarding the admission of evidence. *Powell*, 166 Wn.2d at 81. This deference acknowledges that the trial court is best suited to determine a piece of evidence's prejudicial effect. *Id.*

The trial judge in this case ruled that S.L.B.'s testimony regarding going to the shop, being told to act as a lookout, then being called into the shop where Haviland had sexually assaulted R.J.H., and Haviland revealing his penis and masturbating in front of S.L.B. was admissible because they were relevant under ER 402 and did not implicate a prior bad act because the acts were so

close in time and space. RP (5/3/13) 13-14; CP 2-3. The trial judge further ruled that even if the testimony was 404(b) evidence that the probative value outweighed the prejudicial effect and the evidence was admissible under the res gestae or common scheme or plan exceptions. RP (5/3/13) 13-14; CP 2-3.

While the trial judge may have not used the magic words in his analysis of the evidence to be presented by the State, he did the required analysis. The trial judge would not have allowed the evidence to be presented if he did not find by a preponderance of the evidence that the misconduct occurred. RP (5/3/13) 10, 13-14; CP 1-3. The trial judge identified the purpose for which the evidence is sought to be introduced, to corroborate R.J.H.'s version of the events the day of the alleged rape. RP (5/3/13) 14; CP 3. The corroboration would be relevant to proving any of the elements of Rape of a Child in the Second Degree. RP (5/3/13) 14; CP 2-3. Finally, the trial judge found the evidence more probative than prejudicial. RP (5/3/13) 14; CP 3.

The trial judge also excluded all testimony regarding prior bad acts of Haviland in regards to an alleged Child Molestation in the Third Degree, which the state argued should be admissible under ER 404(b). RP (5/3/13) 2-5; CP 1-2. The trial judge ruled that

while the evidence may be relevant, the probative value was far outweighed by the prejudicial nature of the testimony and even the most carefully drafted jury instruction would not prevent the jury from using the evidence as propensity evidence. RP (5/3/13) 6; CP 1-2.

The testimony was sought to corroborate R.J.H.'s version of the events on the day the first rape occurred, and that is what S.L.B.'s testimony did. S.L.B. testified that the girls went out to the shop to get chew and Haviland said they would have to work for it. RP 71. That testimony corroborates R.J.H.'s testimony. RP 14. S.L.B. was directed to be a lookout while R.J.H. was in the room of the shop with Haviland, and when the girls switched places, R.J.H. was directed to act as a lookout. RP 41, 72. R.J.H. described how Haviland anally raped her, then called S.L.B. to the room, where, as S.L.B. described, Haviland continued on with his sexual misconduct by showing S.L.B. his penis and masturbating. RP 15-6, 41, 71-72.

This evidence supported the allegation of sexual misconduct against R.J.H. and was not propensity evidence. While the conclusions of law do state "corroborative observations of sexual misconduct generally", that portion of the finding needs to be read in conjunction with the entire conclusion of law. CP 3. The trial

judge was stating that it was not 404(b) evidence because the acts were practically contemporaneous and corroborate, generally, the sexual misconduct R.J.H. testified about. CP 3. The "generally" statement may have been inartfully worded, but the State's reading of the finding is that while the two acts were not identical, the continuing sexual misconduct that S.L.B. described corroborates, generally, the evidence presented through R.J.H.'s testimony. CP 3.

a. The trial court properly admitted S.L.B.'s testimony under the res gestae exception.

In the alternative, the trial judge appropriately admitted the evidence under what he termed, the res gestae exception[4] to 404(b). RP (5/3/13) 14; CP 3. Haviland argues that the trial judge improperly admitted the evidence under the res gestae exception. Appellant's Brief 19-21. Haviland's argument is incorrect.

Evidence of misconduct or other crimes is admissible when it completes the crime story under the res gestae exception. *State v. Hughes*, 118 Wn. App. 713, 725, 77 P.3d 681 (2003) *citing State v. Brown,* 132 Wn.2d 529, 571, 940 P.2d 546 (1997). "Where another offense constitutes a "link in the chain" of an unbroken sequence of

[4] The State would note that res gestae and other proper purposes for admission of 404(b) evidence are not technically exceptions, even though they are commonly called exceptions to the 404(b) rule. *See Gresham,* 173 Wn.2d at 421.

events surrounding the charged offense, evidence of that offense is admissible in order that a complete picture be depicted for the jury." *Hughes,* 118 Wn. App at 725 (citations and internal quotations omitted). Even when a court does not fully articulate the balance of the probative value versus the prejudicial value of the evidence on the record the court's record can provide adequate reasoning that satisfies this requirement. *Id.* (citations omitted).

In *Hughes* the State argued that the uncharged burglary and weapons charges were part of the same transaction as the charged crime and therefore admissible under the res gestae exception. *Id.*, footnote 8. Hughes argued that the evidence was prejudicial and irrelevant. The Court of Appeals noted that the record reflected that the trial court adopted the State's argument, which was sufficient. *Id.*

In *Brown*, the trial court allowed testimony of Susan Schnell under the res gestae exception. *Brown*, 132 Wn.2d at 569-71. Brown had already murdered the victim in the case, Ms. Washa, in SeaTac, Washington on May 24, 1991 when he flew down to Palm Springs, California, to spend time with Ms. Schnell on May 25, 1991. *Id.* 543-47. Brown had murdered Ms. Washa after he tortured and raped her. *Id.* 543-46. Brown slit Ms. Washa's throat and

stabbed her several times. *Id.* at 546. Brown's time with Ms. Schnell started out consensual, until he became violent with her. *Id.* at 547. Brown slit Ms. Schnell's throat, then tied her up and raped her in a similar fashion as he had Ms. Washa. *Id.* at 547. Brown also attempted to rob Ms. Schnell similar to his robbery of Ms. Washa. *Id.* at 543-47. The Supreme Court held that the trial court did not abuse its discretion by allowing Ms. Schnell's testimony under a number of exceptions including res gestae. *Id.* at 573, 575. The Court held the testimony "qualified as res gestae evidence because it provided the jury with a more complete picture of the events surrounding the crimes committed against Ms. Holly C. Washa." *Id.*

If the trial court in *Brown* did not abuse its discretion when it admitted Ms. Schnell's testimony, this trial judge in Haviland's case certainly did not abuse his discretion when he allowed S.L.B.'s testimony regarding the events surrounding and immediately following Haviland's rape of R.J.H. under the res gestae exception. S.L.B.'s testimony qualified as res gestae because it gave a more complete picture of the events surrounding R.J.H.'s rape. This Court should affirm Haviland's conviction.

b. The trial court properly admitted the testimony of S.L.B. as it was evidence of a common plan or scheme.

Haviland argues that the trial judge improperly ruled that the testimony of S.L.B. was admissible under the proper purpose of establishing a common scheme or plan. Appellant's Brief 19. The testimony of S.L.B. and R.J.H. establish a common scheme or plan. The trial judge did not err when he ruled the testimony of the misconduct was admissible as common scheme or plan.

A trial judge may properly admit evidence of misconduct to show the existence of a common scheme or plan. *Gresham*, 173 Wn.2d at 421.

> There are two instances in which evidence is admissible to prove a common scheme or plan: (1) where several crimes constitute constituent parts of a plan in which each crime is but a piece of the larger plan and (2) where an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes.

Id. at 421-22 (citation and internal quotations omitted). The evidence regarding the misconduct must demonstrate the "occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the two are simply individual manifestations[]" to be of common scheme or plan

under the second definition above. *Id.* at 422 (citations and internal quotations omitted).

In *Gresham* the evidence admitted was that Scherner had molested four other girls in a similar fashion as he molested the victim in the case. *Id.* at 414-16, 422-23. Scherner had taken trips with the young girls and when the adults were asleep approached the girls and fondled the girls' genitals. *Id.* at 422. The Supreme Court noted that there were some differences between different instances of sexual misconduct, but the differences were not of such a nature "to dissuade a reasonable mind from finding that the instances are naturally explained as individual manifestations of the same plan." *Id.*at 423 (citations and internal quotations omitted). There was oral sex in some of the instances and two occurred in Scherner's home, but the remaining details shared common occurrence of fact with the victim's molestation. *Id.* The Court held the trial court did not abuse its discretion.

Haviland lured the girls to the barn with the promise of chewing tobacco. RP 14, 71. R.J.H. and S.L.B. were only four months apart in age. RP 71. Haviland told the girls they would have to earn or work for the tobacco. RP 14, 72. Haviland told S.L.B. to act as lookout and watch for R.J.H.'s mother while he had R.J.H. go

into the room of the shop alone with Haviland. RP 72. Haviland anally raped R.J.H. and ejaculated on the floor. RP 15-16, 18. Immediately after R.J.H. was sent out of the room, Haviland called S.L.B. into the room of the shop. RP 41, 72. S.L.B. testified, "He took us, one of watched the door and took another one in a room in the shop." RP 72. Once in the room, Haviland showed S.L.B. his penis, masturbated, and ejaculated on the floor of the shop. RP 71, 74-76.

While the two incidents are not identical, the details shared common occurrence of fact with each other. The differences are also not of such a nature that would dissuade a reasonable mind from finding the instances are naturally explained as individual manifestations of the same plan. The testimony of S.L.B. fits squarely into the common scheme or plan evidence, which is allowable under ER 404(b) after the court makes the requisite findings, which the trial judge did in this case. RP (5/3/13)14. Haviland's convictions should be affirmed.

c. If the trial court erred in admitting the ER 404(b) evidence Haviland cannot show prejudice.

The State maintains the trial court did not err when it admitted the ER 404(b) evidence, arguendo, if the trial court did err,

Haviland does not make the requisite showing that he was prejudiced by the wrongfully admitted evidence. Haviland must show that, within reasonable probabilities, he would not have been convicted of two counts of Rape of a Child in the Second Degree and three counts of Rape of Child in the Third Degree if the trial court had not admitted the erroneous ER 404(b) evidence. Haviland cannot meet this burden.

The overwhelming evidence proved Haviland committed the crime of Rape of a Child in the Second Degree. Haviland had sexual intercourse with a child, R.J.H., who was at least 12 years old but less than 14 years old, they were not married, and Haviland is at least thirty-six months older than R.J.H. *See* WPIC 44.12. R.J.H. testified that Haviland put his penis into her anus on two different occasions while she was about 13 years old. RP 13, 15-16, 20, 22; CP 27. This testimony alone is enough. Coupled with S.L.B.'s testimony, minus the testimony about Haviland showing his penis to her and masturbating, corroborates R.J.H.'s testimony. RP 13, 15-16, 41, 71-72; CP 27. Haviland cannot show he was prejudiced by the trial court's erroneous ER 404(b) ruling and his convictions should therefore be affirmed.

C. THE WASHINGTON STATE CONSTITUTION DOES NOT REQUIRE FACTUAL ISSUES IN A FELONY TO BE TRIED TO A JURY, THEREFORE HAVILAND'S WAIVER OF HIS RIGHT TO A JURY TRIAL AND CONVICTION WERE CONSTITUTIONAL.

Haviland executed a knowing, voluntary and intentional waiver of his right to a jury trial. Contrary to Haviland's argument, the Washington State Constitution does not prohibit a defendant in a felony matter from waiving his or her right to a jury trial.

1. Standard Of Review.

Constitutional issues are reviewed de novo. *State v. Benitez*, 175 Wn. App. 116, 126, 302 P.3d 877 (2013). Validity of a jury trial waiver is also reviewed de novo. *State v. Vasquez*, 109 Wn. App. 310, 319, 34 P.3d 1255 (2001); *affirmed* 148 Wn.2d 303, 59 P.3d 648 (2002).

2. The Constitutional Right To A Jury Trial Provided Under The Washington State Constitution Does Not Prohibit A Defendant In A Felony Matter From Waiving His Or Her Jury Trial Right.

A criminal defendant has a constitutional right to a trial by jury. U.S. Const. amend. VI; Const. art. 1, § 21 and § 22. Washington's state constitutional right to a jury trial is broader than the federal constitutional right to a jury trial. *State v. Pierce*, 134 Wn. App. 763, 770, 142 P.3d 363 (2006).

Haviland appears to read the phrase, "[t]he right of trial by jury shall remain inviolate" as a person charged with a felony cannot waive his right to a jury trial, ever. Appellant's Brief 22-41. Haviland argues that under article 1, section 21 and section 22, of the Washington State constitution a person can never waive jury trial when facing a felony charge. Appellant's Brief 22-41. Haviland argues that this Court has incorrectly applied the law, the Court is required to do a *Gunwall*[5] analysis, and once the analysis is completed it is clear that *Pierce* and *Benitez* have been incorrectly decided and should be reversed because a defendant faced with a felony cannot waive his right to a jury trial. *Id.* The State respectfully disagrees with Haviland. There is no need to reverse *Benitez* and *Pierce*, the law on this matter has been correctly decided, and a criminal defendant charged with a felony has the right to waive jury, if the waiver is a knowing, voluntary, and intelligently made.

This Court has declined the invitation to go through the *Gunwall* factors when analyzing whether a defendant has the right to waive jury trial. *Benitez*, 175 Wn. App. at 126-28.[6] *Benitez* made the same argument that Haviland is making, and this Court held

[5] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

[6] This court has declined this invitation numerous times over the last three years (at least eight), but those cases are unpublished and therefore the State is not permitted to cite to them as authority. GR 14.1.

that Washington law allows a criminal defendant to waive jury trial. *Id.* at 127. This Court reasoned that Benitez's reliance on *Gunwall* was misplaced, stating:

> *Gunwall* addresses "the extent of a right and not how the right in question may be waived. In *Pierce* this court explained that although Washington's constitutional right is more expansive than the federal right, it does not follow that additional safeguards are required to validly waive the more expansive right. Thus, the extent of the protection offered under the Washington constitution has no bearing on the legal standard for waiving the right. Accordingly, a *Gunwall* analysis does not apply to the issue of waiver of a state or federal constitutional right.

Benitez, 175 Wn. App. at 126-27. There is no need to go through a *Gunwall* analysis in this case because this court has already settled this matter.[7]

Haviland asserts that this court has failed to articulate any test for determining the requisites for a proper waiver of the state constitutional right to trial by jury. Appellant's Brief 41. Contrary to Haviland's argument, Washington State has rules governing how a criminal defendant can waive his jury trial right. *Pierce*, 134 Wn. App. at 771. A defendant may waive jury trial orally or by filing a

[7] Under the principles of *stare decisis*, a court cannot overturn a prior holding unless it is shown by clear evidence that it is both incorrect and harmful. *In re Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). Haviland has not done this and the State will therefore not do an independent *Gunwall* analysis as binding precedent has found it to be unnecessary. If this court were to determine such an analysis would be beneficial to the court the State would be happy to provide the court with a supplemental brief.

written waiver. *State v. Wicke*, 91 Wn.2d 638, 645-46, 591 P.2d 452 (1979); CrR 6.1(a). Compliance with CrR 6.1(a) constitutes strong evidence of a validly waived right. *State v. Choi*, 55 Wn. App. 895, 903, 781 P.3d 505 (1989). A waiver is a voluntary or intentional relinquishment of a known right. *State v. Horsley*, 137 Wn.2d 500, 510, 974 P.2d 316 (1999). Therefore, a defendant can waive his right to a jury trial if the waiver is made voluntarily, intelligently, knowingly, and free from improper influences. *Pierce*, 134 Wn, App. at 771. Haviland's convictions should be affirmed.

3. Haviland Executed A Knowing, Voluntary, And Intelligent Waiver Of His Right To Have His Case Tried To A Jury.

The State has the burden of establishing that a defendant validly waived his or her right to a jury trial. *State v. Hos*, 154 Wn. App. 238, 249, 225 P.3d 389 (2010). The reviewing court "will indulge every reasonable presumption against such waiver, absent a sufficient record. *Hos*, 154 Wn. App. at 249-50.

The court considers if the defendant was advised of his constitutional right to have his cased tried to a jury. *Pierce*, 134 Wn. App. at 771. The court also examines the facts and circumstances of the case and the waiver, including a defendant's experience and capabilities. *Id.* As stated above, if a defendant signs a written

waiver of his right to a jury trial, as required by CrR 6.1(a), "it is strong evidence that the defendant validly waived the jury trial right: but it is not determinative. *Id.* The court also considers an attorney's representation that the defendant intelligently, knowingly, and voluntarily relinquished his right to a jury trial. *Id.* While a trial court is not required to have a colloquy with the defendant regarding the waiver of his jury trial right, personal expression of the waiver from the defendant is required. *Id., citing State v. Stegall*, 124 Wn.2d 719, 725, 88 P.2d 979 (1994).

Haviland argues that if a defendant is able to waive his jury trial right under Washington law the defendant must have a thorough understanding of the right and all it entails in Washington State. Appellant's Brief 37-39. Haviland argues for a waiver to be valid the court must have affirmative proof that the defendant understand a laundry list of rights which attach to the jury trial right under the state constitution. Appellant's Brief 37. Included in this list are:

> 1. The right to a local jury from the county where the offense occurred.
> 2. The right to participate in selecting jurors.
> 3. The right to a jury of twelve.
> 4. The right to a fair and impartial jury.
> 5. The right to be presumed innocent by the jury unless proven guilty beyond a reasonable doubt.
> 6. The right to a unanimous verdict.

Appellant's Brief 37. Haviland argues without a showing he understood the enumerated rights above there is no valid waiver of his right to a jury trial. Appellant's Brief 39.

This court rejected Haviland's argument in *Benitez*. This court stated, "we have not required that a defendant be apprised of every aspect of the jury trial right in order for the defendant's waiver to be valid." *Benitez*, 175 Wn. App. at 129. This court explained the right to have a case tried to an impartial trier of fact and the right to be presumed innocent until proven guilty are rights that are inherent in all trials and therefore there is no requirement to separately inform Benitez of these rights in order for the waiver to be valid. *Id.* Further, *Pierce* rejected the argument that a waiver is not valid if a defendant is not informed that he has the right to participate in the selection of the jury. *Id.*

Haviland signed a written jury trial waiver. The waiver stated:

> I am the defendant in the above named case and acknowledge that I have been informed of my right to a jury trial in my case, and I understand that I may waive this right. I have fully discussed this waiver with my attorney and I want to waive my right to a jury trial in this matter.
>
> **I UNDERSTAND I HAVE A RIGHT TO A JURY TRIAL AND I HEREBY WAIVE MY RIGHT TO A JURY TRIAL, AND ASK THAT MY CASE BE TRIED BEFORE A JUDGE WITHOUT A JURY.**

CP 88 (emphasis original). The document is signed by Haviland, his attorney and the trial judge. The trial judge also conducted the following colloquy with Haviland:

> THE COURT: Mr. Haviland, I've been handed a waiver of jury trial in this matter.
>
> And again, just so we're clear, we're dealing with the original information, the original five count information.
>
> MR. O'ROURKE: Yes
>
> THE COURT: So Mr. Haviland, you understand that you have a right to a jury trial, to have this matter tried to a jury of 12 people?
>
> MR. HAVILAND: Yes, Your Honor.
>
> THE COURT: Do you understand that by signing this waiver of jury trial, you're giving that up and you're agreeing that I would decide this case?
>
> MR. HAVILAND: Yes, sir.
>
> THE COURT: Do you understand that there can be some real advantages to having this tried as a jury trial as opposed to a bench trial?
>
> MR. HAVILAND: Yes, sir, I do.
>
> THE COURT: You understand that in order for the State to obtain a conviction with a jury trial they have to convince all 12 people beyond a reasonable doubt that you're guilty of each of the charges? Do you understand that?
>
> MR. HAVILAND: Yes, sir.
>
> THE COURT: Do you understand that if you give that

right up, then it's just tried to me and they only have to convince one person?

MR. HAVILAND: Yes, Your Honor.

THE COURT: You understand that difference?

MR. HAVILAND: Yes.

THE COURT: All right. Have you been threatened or pressured in any way to sign this waiver?

MR. HAVILAND: No, sir.

THE COURT: All right. This is something that you're doing voluntarily?

MR. HAVILAND: Yes, sir.

THE COURT: Do you feel like you have had sufficient time to talk to Mr. Baum to weigh all of the pros and the cons in this?

MR. HAVILAND: Yes, sir.

THE COURT: You're sure this is what you want to do?

MR. HAVILAND: Yes

RP (5/3/13) 25-27. The trial judge made sure that Haviland understood that he had a right to have 12 people decide the case, that those 12 people would need to be convinced beyond a reasonable doubt, that there can be advantages to a jury trial, and Haviland was voluntarily making the decision to waive his jury trial right. RP 25-27.

The written waiver coupled with the trial judge's colloquy show that Haviland waived his jury trial right voluntarily, intelligently, and knowingly. This court should find the waiver sufficient and affirm Haviland's convictions.

4. This Court Should Not Reconsider *Pierce* And *Benitez*.

Haviland makes the same argument to this court that Benitez made to this court in his appeal. The only difference being that Haviland asks that this court reconsider *Benitez* in addition to reconsidering *Pierce.* This court should decline Haviland's invitation just as it declined Benitez's invitation to reconsider *Pierce. Benitez,* 175 Wn. App. at 127-29. The matter has been decided by this court and Haviland does not present any new arguments in support of his conclusion that *Benitez* and *Pierce* are wrongly decided under the controlling Supreme Court precedent. Haviland cites to all the same cases and arguments made by Benitez in his appeal and rejected by this court. *See Benitez*, 175 Wn. App. 127-29. This court should affirm Haviland's convictions.

IV. CONCLUSION

The bill amending the statute criminalizing Rape of Child in the Second Degree does not violate the single-subject rule or the title-in-subject rule required by Washington State constitution article

II, section 19. The trial court properly admitted the testimony of S.L.B. Finally, a defendant charged with a felony has the right to execute a knowing, intelligent, and voluntary waiver of his right to a jury trial. This court should affirm Haviland's convictions.

RESPECTFULLY submitted this 6th day of February, 2014.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by:_____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. DAVID HAVILAND, Appellant.	)))))))	NO. 45048-8-II DECLARATION OF EMAILING

Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On February 6, 2014, the appellant was served with a copy of the **Respondent's Brief** by emailing to the attorney for Appellant at the following email address:

Backlundmistry@gmail.com.

DATED this 6th day of February, 2014, at Chehalis, Washington.

Teri Bryant

Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

February 06, 2014 - 8:44 AM

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