

67868-0

67868-0

NO. 67868-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MARCEL SAMPSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BETH ANDRUS

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Admission of evidence under former RCW 10.58.090 is harmless when the introduction of the evidence under that statute did not materially affect the outcome of the trial. Here, while evidence of the defendant's prior offense was admitted under RCW 10.58.090, it was also admitted under ER 404(b), and the deputy prosecutor argued to the jury that it should consider the evidence for purposes consistent with that court rule. Because this evidence was properly introduced pursuant to ER 404(b), a matter that is not challenged on appeal, and there is no reason to believe that the jury improperly used it as proof of criminal propensity, was the trial court's erroneous reliance on the now-invalid statute harmless?

2. Neither the admission of evidence pursuant to RCW 9A.44.120 nor the issue of whether a witness vouched for another's credibility is an issue of constitutional magnitude, and objections to such matters must be made to the trial court to preserve the issues for appellate review. In this case, no such objections were made. Did the defendant thereby waive his right to raise such challenges to this Court?

3. The presence of an unauthorized person during jury deliberations is presumed prejudicial only when there is proof that

the person substantially intruded into the deliberations. Here, beyond an unexplained mention of a thirteenth juror during post-verdict polling – something that was not commented upon by any of the parties, and which transpired well after the judge had already excused the alternate jurors before commencement of deliberations – there is no evidence to suggest that there was a thirteenth juror actually present during the jury’s consideration of the evidence, or that this person participated in the jury’s decision. Has the defendant failed to demonstrate the type of substantial intrusion that would warrant reversal?

4. Under well-established case law, the trial court does not violate a defendant’s rights to due process and equal protection when it determines that his prior history of felony convictions make him subject to sentencing as a persistent offender due to his current conviction. Here, the trial court concluded that the defendant was a persistent offender. Were the defendant’s constitutional rights not implicated by the trial court’s determination?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Marcel Sampson, was charged by amended information with four counts of rape of a child in the first degree, one count of child molestation in the first degree, two counts of communication with a minor for immoral purposes (CMIP), one count of possession of depictions of a minor engaged in sexually explicit conduct in the first degree (possession of depictions of a minor), one count of tampering with a witness, and one count of felony violation of a court order – domestic violence (FVNCO). CP 108-13. Two of the four counts of child rape alleged that Sampson engaged in sexual intercourse with L.H., who was between the ages of five and six when the acts occurred. CP 108-09. The other two counts charged Sampson with engaging in intercourse with N.P. when the victim was between the ages of four and five. CP 110.

The charge of child molestation concerned Sampson's sexual contact with L.R. at a time when she was between the ages of seven and eight. CP 110. In each of the child rape counts involving L.H. and in the child molestation charge concerning L.R., the State also alleged the existence of an aggravating factor: that

Sampson used his position of trust and confidence to facilitate the commission of the crime. CP 108-10.

The counts of CMIP related to Sampson's unlawful communication with both the L.R. named in the molestation count and another L.R., then between the ages of nine and ten. CP 110-11. The charges of witness tampering and FVNCO concerned Sampson's efforts to interfere with the investigative and judicial processes underway against him regarding the child sex offenses. CP 112-13.

The charge of possession of depictions of a minor was severed from the other counts prior to trial. 10RP 20.¹

By jury verdict rendered on August 9, 2011, Sampson was found guilty of one of the two counts of first-degree child rape involving victim L.H., and was convicted of first-degree child molestation, both counts of CMIP, witness tampering, and FVNCO. CP 136-43. By special verdict, the jury further found that, with regard to the child rape and molestation convictions, Sampson used his position of trust and confidence to enable him to commit those offenses. CP 137-39.

¹ The verbatim report of proceedings consists of 29 volumes. Please refer to Appendix A of this brief for a list of the volumes and the corresponding RP designations used herein.

The jury was unable to reach a unanimous verdict with regard to one of the two child rape counts involving L.H. or to either of the two counts concerning alleged victim N.P. CP 144-51.

Because the charges of first-degree child rape and first-degree child molestation are designated as "most serious offenses" under RCW 9.94A.030(32), and because the trial court determined that Sampson had been convicted on at least two prior occasions of other "most serious offenses," he was sentenced to life imprisonment without possibility of parole as a persistent offender. CP 171-82.

2. SUBSTANTIVE FACTS

In June 2009, Janine Thornton received a phone call from Seattle Police Department detective Donna Stangeland. 16RP 29. Stangeland explained to Thornton that she was investigating complaints of a sexual nature made by Thornton's nieces regarding Sampson. 16RP 30. Thornton had been involved in a romantic relationship with Sampson for a few months in the spring of 2008. 16RP 27, 29. During that time, Sampson lived in Thornton's home in south Seattle with her and her children, L.R. and L.H. At that time, Thornton's daughter, L.R., was between seven and eight

years old, and her son, L.H. was four or five years of age. 16RP 20, 23.

After her phone conversation with the detective, Thornton decided that she needed to speak with her children about their interaction with Sampson. 16RP 32. Thornton asked them if Sampson had ever touched them. 16RP 33. L.R. told her mother that, in fact, Sampson had touched her "down below," referring to her genital area. 16RP 34. L.R. also said that Sampson had tried to put his "thing" in her younger brother's "behind." 16RP 34. L.H. confirmed this, and added that Sampson had asked him to put his mouth around Sampson's penis. 16RP 34. L.R. also told her mother that Sampson had rubbed his penis in front of her and that "white stuff" had come out. 16RP 34-35.

Thornton initially feared reporting these events to the police, out of concern that her children would be taken away from her because she had let Sampson into her home. 16RP 35-36. However, she ultimately decided to inform Stangeland of what she had discovered. 16RP 37.

L.R. and L.H. were interviewed separately by Carolyn Webster, a child interview specialist with the King County Prosecuting Attorney's Office, in October 2009. L.R. told Webster

that Sampson had touched her "privacy," and L.H. told her that Sampson had put his "thingy" in L.H.'s "butt" and that Sampson had sucked on L.H.'s "wee wee." 18RP 131; 19RP 52. Webster video-recorded her interviews with L.R. and L.H., and the recordings were played for the jury at trial. 18RP 133; 19RP 55; State's Exs. 22, 23.

L.R. testified at trial that while he was living in her home, Sampson would repeatedly try to touch her "down there," sneaking into her room at night to do so. 16RP 119-20. She also stated that she saw Sampson try "to put his thing" into L.H.'s "butt," and that her mother may have been at work at the time. 16RP 125. She further told the jury that Sampson had once shown her and her cousin, also named L.R., a "nasty movie" featuring a naked man and woman "having it." 16RP 125-27.

L.H. testified that "something bad" happened to him when Sampson was living in the family's home. 16RP 151. Asked to explain, L.H. stated that Sampson had put his "private" in him, and that it had happened more than one time. 16RP 152-53. L.H. said that Sampson told him to keep quiet about what Sampson was doing to him. 16RP 153. When asked by the deputy prosecutor if Sampson had ever done anything with his mouth to L.H.'s "front private," L.H. answered in the negative. 16RP 154.

Thornton testified that as she was breaking up with Sampson, she knew that he was becoming involved with another woman, Fuhyda Rogers. 16RP 55. Rogers testified that her relationship with Sampson lasted from July 2008 to November 2008. 16RP 192. During that period of time, she became pregnant with Sampson's child. 16RP 194-95. Sampson moved in with Fuhyda and her two children, 10-year-old P.W. and three-year-old N.P., near the end of July 2008. 16RP 187.

Rogers' relationship with Sampson became "rocky" by November 2008, and they separated, though Sampson would occasionally spend the night. 16RP 192, 196. In February 2009, Rogers moved with her children into a new apartment, and Sampson visited one day to help her unpack. 16RP 197. On that occasion, Rogers asked him to leave because P.W. wanted to take a shower. 16RP 197. Sampson asked to use the bathroom first; after he left the bathroom, he told P.W. that it was all right for her to go in and shower. 16RP 197. He then struck up a conversation with Rogers. 16RP 197. After P.W. finished her shower, Sampson briefly went into the bathroom and then left the apartment. 16RP 197.

Sampson returned about a week later and spent the night. 16RP 198. While he slept, Rogers looked at his cell phone and found in it a video-recording, made on the phone's camera, of him setting the camera up in her bathroom. 16RP 198. The recording showed him exiting the bathroom, followed by her daughter entering and undressing. 16RP 198-99.

Anguished, Rogers began to phone the police from a different phone near where Sampson was sleeping. 17RP 23-24. Sampson awakened, grabbed his cell phone from Rogers, and fled her apartment. 17RP 24.

The following day, Rogers reported her discovery to Sampson's mother. 17RP 31. She then began receiving numerous calls from Sampson, which she would not answer, and would find notes left on her door. 17RP 31. She learned in May 2009 that Sampson had been arrested, and he began calling her frequently from the King County Jail. 17RP 33. In July 2009, Rogers obtained a court order protecting her from further contact from Sampson. 17RP 40-41. Nevertheless, Sampson continued to call her. 17RP 40-41.

Rogers testified that, around this time, Det. Stangeland contacted her and asked if she had been aware that others had

complained about Sampson's interaction with their children. 17RP 42-43. Rogers became concerned for her own children after the conversation with the detective, because she knew that Sampson had given baths to her son, N.P., on several occasions. 17RP 46.

Rogers asked N.P. what he remembered about Sampson. 17RP 107. When N.P. began to talk about being bathed by Sampson, his demeanor changed, and he became much more fidgety and nervous. 17RP 108. N.P. told his mother that Sampson would stick his fingers into N.P.'s butt, though he couldn't be sure Sampson used his fingers rather than some other body part, because he couldn't see. 17RP 109.

Rogers ended the conversation with her son and called Stangeland. 17RP 109. Stangeland subsequently arranged for a videotaped interview of N.P., conducted by Carolyn Webster. 19RP 71. During that interview, which was played for the jury, N.P. told Webster that Sampson had been "digging" in N.P.'s butt. 19RP 75-76; State's Ex. 24.

N.P. testified that Sampson had used profanity with him, scared him, locked him in his room, and hurt him in the bathtub. 17RP 92-93. When asked where Sampson had hurt him in the tub, N.P. stated, "In my private part." 17RP 95. He added that

Sampson had sucked on N.P.'s "wee wee" and had put something in his butt. 17RP 101.

Fuhyda Rogers testified that she would occasionally answer Sampson's calls from the King County Jail, in part because she was emotionally torn by the fact that she was pregnant with his baby. 17RP 35, 112. Sampson would phone her up to 30 times per day. 17RP 112. When she would challenge Sampson about what he had done to her son, Sampson would tell her that he needed forgiveness and had done some "crazy things." 17RP 113. The State played a number of these calls, which had been recorded by the King County Department of Adult and Juvenile Detention per jail protocol, to the jury. 17RP 133-44. At least 35 of the calls to Rogers were made after she had obtained the no-contact order, in early July 2009. 20RP 116. In one of the final calls, Rogers despairingly told Sampson that she was ready for someone to finally stand up in church and admit that he was a child molester. 17RP 144. Sampson responded, "You're talking to one." 17RP 144. In another conversation, he told Rogers that he needed sexual deviancy treatment. 21RP 73-74.

Janine Thornton told the jury that Sampson's mother came to her house on one occasion and offered her money if she would

not testify against Sampson. 16RP 31. The State played recordings of a number of phone calls made by Sampson to his mother while he was incarcerated, including a conversation in which he asked her to visit Thornton and offer her money. 19RP 98-100. The State also played recordings of several calls in which Sampson asked a friend named "Red" to track down Thornton and pressure her to refrain from being a witness against him. 20RP 123-24.

L.R., the cousin of Janine Thornton's daughter L.R., described visiting Thornton's home one time when she was nine or ten years of age, and watching t.v. with her cousin in Thornton's bedroom when Sampson entered. 20RP 34, 37-38. Sampson turned on a pornographic movie to watch with the two girls. 20RP 40. He then opened a box and took out some marijuana. 20RP 40-41, 43. He told the girls not to tell anyone, and would turn off the t.v. whenever Thornton neared the room. 20RP 41, 45. L.R. stated that she and her younger cousin left the room at the first opportunity after they recovered from shock. 20RP 40-41.

Det. Stangeland interviewed Sampson in June 2009. 20RP 78. During that interview, Sampson acknowledged that he had previously had sex with Briann Porter, the niece of Celeste Taylor,

a former girlfriend of his. 20RP 78. When Sampson lived with Taylor, in 2005, Porter was 14 years old. 15RP 161-62. Sampson began to call Porter at her own home. 15RP 169-70. Initially, he would say that he was looking for his friend, who was in a relationship with Porter's mother; eventually, he started to bring up sexually-related subjects, asking her if she was a virgin and if she would have sex with him for money. 15RP 171. Porter had never had such conversations before, and did not know how to respond. 15RP 172.

On one night in February 2005, Porter fell asleep in Taylor's living room after babysitting Taylor's children. 15RP 179. She awakened to Sampson moving her legs and climbing on top of her. 15RP 180-81. Sampson then put his penis inside Porter's vagina; Porter described it to the jury as the most painful thing she had ever felt. 15RP 181-82. She was too terrified and pain-stricken to say anything. 15RP 181-82.

Christina Rock testified that she had dated Sampson in late 2008 and early 2009. 18RP 28-29. Rock introduced him to the members of her immediate family, including her 14-year-old sister, Mariah. 18RP 32. In early 2009, Sampson told Rock that he wanted to have a "threesome" with her and Mariah. 18RP 34.

Rock was disturbed by his request and later confronted him about it; Sampson responded by saying that he did not remember making such a statement. 18RP 36.

Sampson did not testify in his case-in-chief or call any witnesses. 22RP 3-6. He stipulated to the existence of two previous convictions for violating no-contact orders. 21RP 39.

C. ARGUMENT

1. ADMISSION OF EVIDENCE UNDER RCW 10.58.090 WAS HARMLESS ERROR

Sampson contends that his convictions must be reversed because the trial court admitted evidence of two of his prior bad acts — his sexually-motivated assault of Briann Porter, the minor daughter of a former girlfriend, and his expressions of sexual interest in the minor sister of another girlfriend, Christina Rock — under RCW 10.58.090. That statute, of course, was subsequently deemed unconstitutional by the state supreme court in State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2012). Sampson argues that the admission of this evidence unfairly prejudiced him, because it improperly allowed the jury to convict him on the basis of criminal propensity, i.e., that it was simply his nature to commit sexual

crimes against children, and that no proof specific to the charged offenses was needed.²

Sampson's argument is based on an erroneous understanding of the history of the trial. The trial court did not rely solely on RCW 10.58.090 when deciding to permit the State to introduce evidence of Sampson's prior misconduct involving Porter. Rather, the court also admitted the evidence under ER 404(b), a decision that Sampson has not challenged on appeal. Also, the court did not rely on RCW 10.58.090 whatsoever with regard to the incident involving Rock's sister; its decision was predicated entirely on ER 404(b), and that ruling is also not the subject of this appeal.

Reversal is not required here. The jury was specifically instructed that the evidence of Sampson's prior bad acts was not sufficient by itself to prove his guilt for the charged crimes, but that the evidence could be considered for valid reasons that were distinct from mere propensity. Sampson did not object to those instructions at trial, and the prosecutor did not attempt to persuade

² In his brief to this Court, Sampson does not specify which of his convictions should be set aside due this alleged error. It is unclear whether he believes that his convictions for witness tampering and felony violation of a no-contact order, as well as his two misdemeanor convictions for communicating with a minor for immoral purposes, must be reversed along with his convictions for first-degree child rape and child molestation. The State believes that its response sufficiently addresses Sampson's allegation of error such that no reversals are required. Nevertheless, the absence of any specific argument on Sampson's part, particularly with regard to his convictions for non-sexual offenses, is suspect.

the jury to use the evidence for improper purposes in contravention of the court's instructions. In addition, Sampson's attempt to assert actual prejudice must be weighed against the fact that the jury did not convict him of several of the most serious charges.

Prior to jury selection, the State asked the trial court for permission to admit evidence during its case-in-chief of Sampson's sexual assault, in 2005, of Briann Porter. 9RP 67. Porter was the niece of Sampson's girlfriend at that time, Celeste Taylor, and was 14 years old when Sampson attacked her. 10RP 8. The attack occurred while Porter was spending the night at her aunt's house, and was the culmination of a period of "grooming," during which Sampson had repeatedly engaged the young girl in conversations of a highly sexual nature. 9RP 72. Sampson ultimately pleaded guilty to charges of second-degree assault, with intent to commit child rape, and communicating with a minor for immoral purposes as a result of his actions. 9RP 67. The State contended that this evidence was admissible under RCW 10.58.090, as well as under ER 404(b) as probative of Sampson's motive and intent as to the current offenses and as indicative of a common scheme or plan to target single mothers in order to gain access to their children. 9RP 72, 10RP 19.

The State also moved, pre-trial, for permission to admit under ER 404(b) evidence that Sampson had, in 2009, suggested to his then-girlfriend, Christina Rock, that he was interested in having sex with Rock's sister, who was 13 or 14 years of age at the time. 9RP 118-19. The State argued that this evidence was also indicative of Sampson's motive and intent and of his overarching plan of romancing women in order to access children. 9RP 121.

At the conclusion of the pretrial hearings, the trial court ruled that evidence of the events related to Briann Porter was admissible under RCW 10.58.090 *and* under ER 404(b) as proof of intent and motive. 10RP 12-19. The trial court held that it did not find this evidence to be admissible under the common scheme exception to ER 404 "because of the difference in timeframe." 12RP 19-20. As to the incidents involving Rock's younger sister, the court allowed the evidence under ER 404(b) alone. 9RP 123.

At the conclusion of the evidentiary stage of trial, the court gave two instructions to the jury regarding Sampson's prior acts.

Instruction 7 provided:

Evidence has been admitted in this case regarding the defendant's commission of previous sex offenses. The defendant is not on trial for any act,

conduct, or offense not charged in this case.

Evidence of prior sex offenses on its own is not sufficient to prove the defendant guilty of the crimes charged in this case. The State has the burden of proving beyond a reasonable doubt that the defendant committed each of the elements of the crimes charged.

CP 156.

Instruction 8 read as follows:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of testimony relating to statements the defendant made to Briann Porter regarding sexual encounters with her cousin Ivy, a cell phone containing a video of Philana Williams, a cartoon of a teenage gymnast on a computer purported to belong to the defendant, and the defendant's request for sex with the sister of Cynthia Rock. This evidence may be considered by you only for the purpose of evaluating the defendant's motive, intent, preparation, or plan in committing the crimes charged by the State in this case. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 156.

Admission of evidence of Sampson's assault and grooming of Briann Porter under former RCW 10.58.090 is subject to nonconstitutional harmless error analysis. Gresham, 173 Wn.2d at 433. Reversal is required only if this Court determines that, "had the error not occurred, the outcome of the trial would have been materially affected." Id., citing State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986).

Sampson cannot make such a showing here. First, the instructions given to the jury instructed its members that they could not convict Sampson merely because he had previously committed sex offenses. CP 156. The State continued to bear the burden of proving beyond a reasonable doubt that Sampson committed every element of the charged offenses. CP 156.

In addition, although Instruction 8, the limiting instruction concerning the evidence admitted under ER 404(b), did not include reference to Sampson's attack on Porter, the prosecutor in no way argued that the jury should convict Sampson simply on the basis of propensity. Rather, the prosecutor contended that Sampson's prior criminal conduct evidenced his motive and intent in the charged events, i.e., that he intended to sexually assault the named victims, and that he demonstrated this intent in part by romancing their

unmarried mothers in order to get closer to the children. 22RP 50-52. Sampson's motivation for targeting very young victims, the prosecutor argued, was due in part to his experience with Porter; an older child, she had been better-equipped, verbally and emotionally, to report what had happened to her. 22RP 51-52.³

These arguments are more aligned with the trial court's ruling under ER 404(b) than to the seemingly broader purposes that former RCW 10.58.090 allowed.

Finally, the fact that Sampson was not convicted of three of the four counts of first-degree child rape should not be discounted when assessing the extent to which he was purportedly harmed by introduction of the evidence regarding Briann in the State's case-in-chief. It is difficult to believe that this evidence could have been as damaging and inflammatory as Sampson suggests on appeal, and yet have improperly swayed the jury into convicting him of only one count of rape of a child, while failing to convince the jurors of his

³ It should also be noted that this Court may affirm the lower court's decision on any ground supported by the record. See State v. Michielli, 132 Wn.2d 229, 242, 937 P.2d 587 (1997). Here, there was ample basis for the trial court to conclude that evidence of Porter's victimization and the context in which it took place was admissible not only as proof of motive and intent, but also as indicative of a common scheme of which the prior and charged acts can reasonably be seen as "individual manifestations of a general plan." State v. Devincentis, 150 Wn.2d 11, 21, 74 P.3d 119 (2003). In each instance, Sampson initiated a romance with a single mother, ingratiating his way into at least temporary residence in her home, and then used his presence there as a mechanism to gain access to her children or other minor relatives for sexual purposes.

guilt for three similar crimes, for which the State's total evidence was essentially similar in strength and scope.

2. SAMPSON FAILED TO PRESERVE FOR APPELLATE REVIEW HIS CONTENTION REGARDING CHILD HEARSAY.

Sampson contends that the trial court erred in allowing witnesses to testify, pursuant to RCW 9A.44.120, regarding statements made to them by the children he victimized.

Specifically, he asserts that Janine Thornton and Carolyn Webster should not have been allowed to repeat accounts given to them by L.R. in which she described seeing Sampson sexually assault her brother, L.H., and seeing Sampson masturbate. Sampson contends that such evidence does not fall within the provisions of RCW 9A.44.120 and should have been excluded, and that its admission amounts to reversible error.

It is true that, as Sampson notes, RCW 9A.44.120 limits admissible child hearsay evidence to statements made by a child under the age of ten describing any act of sexual contact or physical abuse "performed with or on the child by another," and that the statute does not authorize admission of statements in which the child reports seeing another child being so mistreated. However, this is an issue that must be preserved for appellate review by way

of specific objection to the trial court. See State v. Clark, 91 Wn. App. 69, 75-76, 954 P.2d 956 (1998); RAP 2.5(a). Where, as here, the child declarant testifies at trial, there is no constitutional violation in admitting the child's hearsay statements. State v. Leavitt, 111 Wn.2d 66, 71, 758 P.2d 1982 (1988).

Sampson attempts to dodge the central issue of waiver in his brief to this Court, maintaining that he objected to the admission of L.R.'s out-of-court statements. See Brief of Appellant, at 23. Sampson did object, but not on the ground that he raises on appeal; instead, he challenged her competency to testify. 12RP 90. "A party must *specifically* object to evidence presented at trial and allow the trial court to rule on the issue to preserve the matter for appellate review." State v. Rasmussen, 70 Wn. App. 853, 859, 855 P.2d 1206 (1993) (emphasis added). Sampson did not do so here, thus waiving this issue.

Moreover, L.R. appeared before the jury, and testified herself to seeing Sampson anally raping her younger brother. 16RP 120-22. Accordingly, the admission of her out-of-court description, through the testimony of other witnesses, was harmless even if it was beyond the scope of RCW 9A.44.120. See State v. Hancock, 46 Wn. App. 672, 679, 731 P.2d 1133 (1987)

(holding that admission of victim's out-of-court statement was harmless error where the content of the statement was properly before the jury through victim's own testimony). And although L.R. testified that she was unable to recall seeing Sampson masturbate in front of her, as she had told her mother and Webster, Sampson makes scant effort to explain how admission of her out-of-court description of that event was so unfairly prejudicial that he would not have been convicted of any charges had the jury not learned of it.

3. SAMPSON FAILED TO PRESERVE FOR APPELLATE REVIEW HIS CLAIM OF IMPROPER VOUCHING.

Sampson next asserts that his convictions must be reversed because Janine Thornton testified that she had raised her children, L.R. and L.H., to understand the importance of telling the truth; Fuhyda Rogers testified that she had similarly taught her children, P.W. and N.P.; Det. Stangeland told the jury that she interviewed individuals with the goal of learning the truth; and that child interview specialist Webster explained that she used general questions with children, including those interviewed here, to determine whether they understood the difference between truth and falsehood and the importance of that difference. Brief of

Appellant, at 26-28. Sampson contends that this testimony amounted to improper vouching by one witness for the credibility of another witness. Brief of Appellant, at 25-26.

It must be noted that none of the witnesses actually opined on the trustworthiness of another or was asked whether she believed that a child was telling the truth. 16RP 9-13 (testimony of Janine Thornton); 16RP 167-73 (Fuhyda Rogers); 18RP 106-15 (Carolyn Webster); 20RP 57 (Det. Stangeland). Also, the jury did not convict Sampson on the charges involving N.P. CP 147-49. And it is common knowledge that detectives and forensic interviewers seek the truth when they question people.

Regardless, Sampson failed to object contemporaneously to any of the testimony he now challenges on appeal. Accordingly, he has waived this issue. See RAP 2.5(a); State v. Warren, 134 Wn. App. 44, 55, 138 P.3d 1081 (2006) (holding that where a witness does not expressly state her belief of a victim's account, testimony regarding a child's competency to tell the truth is not an issue of constitutional magnitude that can be contested for the first time on appeal).

4. THERE IS INSUFFICIENT EVIDENCE TO CONCLUDE THAT AN ALTERNATE JUROR

**IMPROPERLY PARTICIPATED IN
DELIBERATIONS.**

At the conclusion of closing arguments, the trial court thanked and temporarily released the three members of the 15-person jury who had been selected as alternate jurors. 22RP 105. The court explained to the remaining 12 jurors that her bailiff would give some last-minute instructions to them while the three alternates were collecting their belongings from the jury room, and cautioned the jurors to postpone their discussion of the case until after the alternates departed. 12RP 106. At no point during the eight days between the beginning and end of deliberations is there any indication in the record that any of the alternate jurors were recalled or that they were present during the jury's consideration of the evidence.

The jurors were polled after their verdicts were announced. 27RP 14-17. As the report of proceedings seems to indicate, the court clerk asked 13 jurors if the verdicts were both the group's decision and his or her individual conclusion. 27RP 14-17.

Based on this transcription of the polling, Sampson argues that this must mean that an unauthorized person – an alternate juror – participated in the deliberations. Brief of Appellant, at 31.

Sampson asserts that this amounts to a structural error necessitating the reversal of all of his convictions. Brief of Appellant, at 31.

The presence of an unauthorized individual in the jury room is presumptively prejudicial only where there has been “a substantial intrusion” by that person during deliberations. State v. Cuzick, 85 Wn.2d 146, 147, 530 P.2d 288 (1975); see also State v. Elmore, 139 Wn.2d 250, 298-99, 985 P.2d 289 (1999).

The State is at a loss to explain why the transcription states that 13 jurors were polled, when there is no indication anywhere else in the record of the presence of an extra person,⁴ or *any* comment from *any* participant in the trial, including the court and defense counsel following the polling, regarding such an extremely unusual situation. In the absence of proof other than the transcribed polling,⁵ and in light of the fact that the 12-member jury was specifically instructed to abstain from considering the evidence until the alternate jurors were excused, Sampson fails to

⁴ Compare Cuzick, 85 Wn.2d at 147 (concerning case in which, at the State's request, the trial court allowed an alternate juror to be present during deliberations, albeit with an instruction to refrain from participating).

⁵ This Court has the authority, pursuant to RAP 9.10, to direct the trial court to take additional evidence on this issue if, inter alia, additional proof of facts is needed to fairly resolve the case.

conclusively demonstrate that there was an unauthorized individual who *substantially intruded* into the jury's deliberations.

5. SAMPSON WAS PROPERLY SENTENCED AS A PERSISTENT OFFENDER.

Finally, Sampson challenges his sentence of life imprisonment without parole, arguing that he was deprived of his rights under the Sixth and Fourteenth Amendments to due process and equal protection because the trial court, rather than a jury, determined that he was a persistent offender. Brief of Appellant, at 32,39-40. Sampson fails to mention, much less attempt to distinguish, established case law that runs directly counter to his claims. His sentence should be affirmed.

The state supreme court has repeatedly rejected the argument that a defendant's right to due process is violated unless a jury determines the existence of his prior convictions. See State v. Thiefault, 160 Wn.2d 409, 418, 158 P.3d 580 (2007) (citations omitted). This Court is bound by the decisions of the state's highest court. State v. Gore, 101 Wn.2d 481, 486-87, 681 P.2d 227 (1984).

In State v. Langstead, 155 Wn. App. 448, 228 P.3d 799, rev. denied, 170 Wn.2d 1009 (2010), this Court rebuffed the claim,

made here by Sampson in identical fashion, that the legislature's failure to classify the "persistent offender finding" as an element of the current charged offense, thus allowing for jury determination, violates equal protection guarantees. This Court concluded that the legislature's choice was subject to rational basis review, and that "recidivists whose conduct is inherently culpable enough to incur felony sanction are, as a group, rationally distinguishable from persons whose conduct is felonious only if preceded by a prior conviction for the same offense." Langstead, 155 Wn. App. at 456-57. Divisions Two and Three of the state court of appeals have reached the same conclusion. See State v. Witherspoon, __ Wn. App. __, 286 P.3d 996, 1013 (2012); State v. Williams, 156 Wn. App. 482, 496-99, 234 P.3d 1174, rev. denied, 170 Wn.2d 1011 (2010).

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Sampson's convictions for first-degree child rape, first-degree child molestation, communicating with a minor for immoral purposes, tampering with a witness, and felony violation of a court order. The State further asks this Court to uphold Sampson's sentence as a persistent offender.

DATED this 7th day of December, 2012.

RESPECTFULLY submitted,

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Appendix A

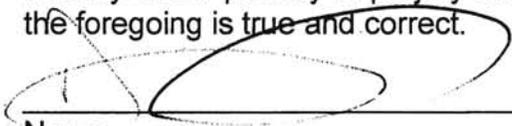
The Verbatim Report of Proceedings consists of 29 volumes, identified in this brief as follows:

<u>RP #</u>	<u>HEARING DATE(S)</u>
1RP	2/26/10
2RP	4/2/10
3RP	9/10/10
4RP	10/15/10
5RP	11/12/10
6RP	1/7/11
7RP	6/28/11
8RP	7/5/11
9RP	7/6/11
10RP	7/7/11
11RP	7/11/11
12RP	7/12/11
13RP	7/13/11
14RP	7/14/11
15RP	7/19/11
16RP	7/20/11
17RP	7/21/11
18RP	7/25/11
19RP	7/26/11
20RP	7/27/11
21RP	7/28/11
22RP	8/1/11
23RP	8/2/11
24RP	8/3/11
25RP	8/4/11
26RP	8/8/11
27RP	8/9/11
28RP	8/10/11
29RP	10/28/11

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. MARCEL SAMPSON, Cause No. 67868-0-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name

Done in Seattle, Washington

12/12/12

Date