

NO. 40116-9-II

FILED
COURT OF APPEALS
DIVISION II

10 OCT -5 PM 1:21

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON

BY CM
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

MARK CHRISTENSEN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald Culpepper

No. 07-1-04299-9

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A.	<u>ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR</u>	1
1.	Whether the defendant has proven beyond a reasonable doubt that RCW 10.58.090 is facially unconstitutional?	1
2.	Whether the defendant has proven beyond a reasonable doubt that RCW 10.58.090 violates his right to a presumption of innocence?.....	1
3.	Whether uncharged conduct may be admitted for the purpose of RCW 10.58.090?	1
4.	Whether the State presented sufficient evidence for the court to find that the prior incident of sexual misconduct occurred?	1
5.	Whether the trial court abused its discretion in admitting evidence of the prior incident as “common scheme or plan” under ER 404(b)?	1
6.	Whether the trial court abused its discretion in balancing probative value with possible unfair prejudicial effect, per ER 403?	1
7.	Whether the Findings of Fact regarding the admissibility of the prior incident were a matter for the jury to find?	1
8.	Whether the trial court’s Findings of Fact violated the appearance of fairness doctrine?	1
9.	Whether sufficient evidence, including the defendant’s stipulation to the trial court considering the declaration for determination of probable cause, for the court to enter Findings of Fact 3, 4, and 5?	2
10.	Whether it was misconduct for the prosecuting attorney to propose Findings of Fact that were supported by evidence, stipulation, and an offer of proof?	2

B.	<u>STATEMENT OF THE CASE</u>	2
1.	Procedure.....	2
2.	Facts	3
C.	<u>ARGUMENT</u>	6
1.	THE DEFENDANT FAILS TO DEMONSTRATE THAT RCW 10.58.090 IS UNCONSTITUTIONAL.....	6
2.	THE SAME EVIDENCE WAS PROPERLY ADMITTED UNDER ER 404 (b).	9
3.	FINDINGS OF FACT 3, 4, AND 5 WERE PROPERLY ENTERED.....	11
4.	THE PROSECUTING ATTORNEY DID NOT COMMIT MISCONDUCT IN DRAFTING FINDINGS THAT WERE SUPPORTED BY THE RECORD.	14
D.	<u>CONCLUSION</u>	15

Table of Authorities

State Cases

<i>In re Detention. of Young</i> , 122 Wn.2d 1, 26, 857 P.2d 989 (1993).....	6
<i>State v. Benn</i> , 120 Wn.2d 631, 653, 845 P. 2d 289 (1993).....	7
<i>State v. Chamberlin</i> , 161 Wn.2d 30, 38, 162 P.3d 389 (2007).....	12
<i>State v. DeVincentis</i> , 150 Wn.2d 11, 74 P.3d 119 (2003)	8, 9, 10
<i>State v. Dugan</i> , 96 Wn. App. 346, 354, 979 P.2d 885 (1999)	12
<i>State v. Gamble</i> , 168 Wn.2d 161, 187, 225 P. 3d 973 (2010).....	11
<i>State v. Gresham</i> , 153 Wn. App. 659, 223 P. 3d 1194 (2009), <i>review granted</i> , 168 Wn.2d 1036 (2010).....	7
<i>State v. Jackson</i> , 102 Wn.2d 689, 694, 689 P. 2d 76 (1984).....	11
<i>State v. Jackson</i> , 102 Wn.2d 689, 695, 689 P.2d 76 (1984).....	8
<i>State v. Kennealy</i> , 151 Wn. App. 861, 214 P. 3d 200 (2009).....	10
<i>State v. Kilgore</i> , 147 Wn. 2d 288, 294-295, 53 P.3d 974 (2002).....	14
<i>State v. Lough</i> , 125 Wn.2d, 847, 852, 889 P.2d 487 (1995).....	7, 11
<i>State v. Manthie</i> , 39 Wn. App. 815, 820, 696 P.2d 33 (1985).....	14
<i>State v. Roberts</i> , 142 Wn.2d 471, 533, 14 P. 3d 713 (2000).....	14
<i>State v. Scherner</i> , 153 Wn. App. 621, 225 P.3d 248 (2009), <i>review granted</i> , 168 Wn.2d 1036 (2010).....	7
<i>State v. Sexsmith</i> , 138 Wn. App. 497, 157 P.3d 901 (2007).....	8
<i>State v. Sly</i> , 58 Wn. App. 740, 748-749, 794 P. 2d 1316 (1990)	14
<i>State v. Wolf</i> , 134 Wn. App. 196, 199, 139 P.3d 414 (2006).....	13

Statutes

RCW 10.58.090 1, 2, 3, 6, 7, 15
RCW 10.58.090(5) 7
RCW 10.58.090(6)(g)..... 9
RCW 10.59.090 7
RCW 9A.44.010(2)..... 8
RCW 9A.44.100 8

Rules and Regulations

ER 403 1, 9, 15
ER 404(b) 1, 3, 7, 8, 9, 10, 12, 15

Other Authorities

Washington Code of Judicial Conduct (CJC) Canon 3(D)..... 11

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

1. Whether the defendant has proven beyond a reasonable doubt that RCW 10.58.090 is facially unconstitutional?
2. Whether the defendant has proven beyond a reasonable doubt that RCW 10.58.090 violates his right to a presumption of innocence?
3. Whether uncharged conduct may be admitted for the purpose of RCW 10.58.090?
4. Whether the State presented sufficient evidence for the court to find that the prior incident of sexual misconduct occurred?
5. Whether the trial court abused its discretion in admitting evidence of the prior incident as “common scheme or plan” under ER 404(b)?
6. Whether the trial court abused its discretion in balancing probative value with possible unfair prejudicial effect, per ER 403?
7. Whether the Findings of Fact regarding the admissibility of the prior incident were a matter for the jury to find?
8. Whether the trial court’s Findings of Fact violated the appearance of fairness doctrine?

9. Whether sufficient evidence, including the defendant's stipulation to the trial court considering the declaration for determination of probable cause, for the court to enter Findings of Fact 3, 4, and 5?

10. Whether it was misconduct for the prosecuting attorney to propose Findings of Fact that were supported by evidence, stipulation, and an offer of proof?

B. STATEMENT OF THE CASE.

1. Procedure

On August 20, 2007, the Pierce County Prosecuting Attorney (State) charged the defendant, Mark Christensen, with one count of child molestation in the first degree, two counts of rape of a child in the first degree, and two counts of rape of a child in the third degree. CP 1-3. All counts involved M.S.¹, the daughter of the woman the defendant was living with. Before trial, the State filed a notice of intent to seek admission of prior sexual misconduct, per RCW 10.58.090. CP 12-13.

The case was tried twice. The first trial began April 8, 2009, before Hon. Bryan Chushcoff. 4/8/2009 RP 5.² Judge Chushcoff heard testimony

¹ The victim will be referred to by her initials, out of respect for her privacy.

² The record includes Report of Proceedings from both trials. Because most of the assigned errors are from the second trial, they will be referred to as RP, followed by the page number. Any other references to the Report of Proceedings will include the date of the proceeding.

and argument regarding the proposed evidence of prior misconduct. 4/13/2009 RP 94-124. Judge Chushcoff decided that the evidence was admissible under RCW 10.58.090 and ER 404(b). 4/15/2009 RP 142. Judge Chushcoff entered written Findings of Fact and Conclusions of Law regarding the evidence of prior misconduct. 11/16/2009 RP 9; CP 167-171. That trial ended in a hung jury. 4/23/2009 RP 712.

The second trial began November 16, 2009, before Hon. Ronald Culpepper. RP 1. The defendant reasserted his motions in limine and objections to evidence of the prior bad acts. RP 26-27. After hearing argument, Judge Culpepper reviewed, and then adopted Judge Chushcoff's analysis and rulings. RP 46-47.

After hearing all the evidence, the jury found the defendant guilty as charged in all five counts. CP 235-239. Judge Culpepper sentenced the defendant to 198 months for child molestation, 210 months for each count of rape of a child in the first degree, and 60 months for each count of rape of a child in the third degree. CP 246. The defendant filed a timely notice of appeal. CP 273.

2. Facts

Gail Christensen has two daughters from a previous marriage: M.S. and D. S.³ RP 357. Ms. Christensen met the defendant in 1995. RP 361. The defendant moved in with Ms. Christensen and her children 3-4

weeks after they met. RP 362. They lived in South Dakota at the time. RP 360.

In 1998, the defendant moved to Lakewood, Washington with Ms. Christensen and her children. RP 376, 377. Shortly after the move to Lakewood, the defendant began molesting M.S. RP 72. She was 10 years old. *Id.* The first incident occurred when the defendant and M.S. were on the living room couch, watching a movie. RP 74. Ms. Christensen and the others had gone to bed. *Id.* The defendant laid down behind M.S., his front to her back, heads in the same direction. RP 75. The defendant reached over her and began touching the outside of her jeans, over her vagina. RP 75, 76. The defendant began rubbing or “massaging” M.S.’s crotch. RP 76. He then turned the girl toward him and began to “grind” or “hump” on her RP 80. M.S. could feel the defendant’s erect penis touching her vagina through their clothes. RP 80. This continued for 30-45 minutes, until Ms. Christensen came back to the living room and asked what was going on. RP 78, 80.

A few days later, the same thing happened. RP 81. The defendant and M.S. were on the couch watching TV. *Id.* The defendant rubbed M.S.’s crotch through her clothes. *Id.*

The defendant’s behavior eventually escalated to skin-to-skin contact. RP 83. Several months after moving to Lakewood, the defendant

³ Witness D.S. will also be referred to by her initials out of respect for her privacy.

began to enter M.S.'s bedroom at night. RP 84. He laid in bed with her, began massaging her, and took her clothes off. RP 85. He then rubbed his penis on M.S.'s vagina until he ejaculated onto her stomach. RP 86-87. Afterward, M.S. went to the bathroom and cleaned herself off. RP 87. The defendant also took M.S.'s hand and placed it on his penis. He then moved her hand with his to show her how to masturbate him. *Id.*

When M.S. was 12, the defendant penetrated M.S.'s vagina with his fingers. RP 88. The defendant engaged in digital intercourse with M.S. "a couple nights a week" until she was 14 years old. *Id.*

Also when M.S. was 12, the defendant began engaging in penile-oral intercourse with M.S. RP 89. He had her perform oral sex and ejaculated in her mouth approximately twice a week. RP 89, 90.

When M.S. was about 14, the defendant began to engage in penile-vaginal intercourse with her. RP 88. This first occurred in the defendant's bedroom. RP 90. The defendant had M.S. get in his bed. RP 91. He had penile-vaginal intercourse with her. *Id.* The defendant ejaculated on her stomach. RP 92. As M.S. was cleaning herself after this incident, she found blood from her vagina on the toilet paper. *Id.* At this point, the defendant was having sex with M.S. frequently, nearly every night in her room. RP 93. The defendant had intercourse with her on a Christmas morning. RP 97. On one occasion, Ms. Christensen interrupted the defendant having intercourse with M.S. RP 99. Ms Christensen tried to enter the bedroom, but the door was locked. RP 99-100.

At one point, the defendant moved out because of conflict with M.S. RP 103. Ms. Christensen had M.S. write the defendant a letter of apology, because Ms. Christensen wished to reunite with the defendant. RP 105,106. When the defendant moved back, the sexual abuse resumed. RP 108.

M.S. eventually disclosed the sexual abuse, when she was an adult. RP 121. She told her sister, D.S., in December, 2006. RP 119, 284. The two of them then told their father. RP 286. At a family reunion in March 2007, they told mother, Ms. Christensen. RP 287, 289, 421. At that point, M.S. lived in Missouri. RP 120. She reported the sexual abuse to police in Independence. RP 128. Police there advised her to contact police in Lakewood, Washington to follow up on the investigation. CP 4.

C. ARGUMENT.

1. THE DEFENDANT FAILS TO DEMONSTRATE THAT RCW 10.58.090 IS UNCONSTITUTIONAL.

a. The statute is presumed constitutional.

A statute is presumed constitutional, and the party challenging it has the burden of proving beyond a reasonable doubt that it is unconstitutional. *In re Detention. of Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993).

- b. The statute has been held constitutional by the Court of Appeals.

In 2009, Division I of the Court of Appeals held that RCW 10.58.090 is constitutional. *See State v. Scherner*, 153 Wn. App. 621, 225 P.3d 248 (2009), *review granted*, 168 Wn.2d 1036 (2010); *State v. Gresham*, 153 Wn. App. 659, 223 P. 3d 1194 (2009), *review granted*, 168 Wn.2d 1036 (2010). The defendant does not show that the *Scherner* decision is wrongly decided.

RCW 10.58.090(5) specifically includes uncharged conduct in the definition of “sex offense.” The defendant acknowledges (App. Br. at 19) that the Court of Appeals has previously discussed and rejected the presumption of innocence and proof arguments against RCW 10.59.090. *See Scherner*, 153 Wn. App. at 634. As Division I points out, nothing in the statute relieves the State of the common law burden to prove, as under ER 404(b), by a preponderance, that the uncharged misconduct occurred. *Id.* Historically, under ER 404(b), uncharged misconduct has been admissible to prove “common scheme or plan.” The proponent has the burden to show, by a preponderance, that the misconduct occurred. *State v. Lough*, 125 Wn.2d, 847, 852, 889 P.2d 487 (1995) *see also State v. Benn*, 120 Wn.2d 631, 653, 845 P. 2d 289 (1993).

The defendant’s argument draws a distinction between prior “bad acts” under ER 404(b) and “offenses” under RCW 10.58.090. App. Br. at 19. ER 404(b) refers to “other crimes, wrongs, or acts.” There is no

question that this includes uncharged conduct. *See, e.g., State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003); *State v. Sexsmith*, 138 Wn. App. 497, 157 P.3d 901 (2007).

Although the defendant disputes that the prior act occurred (App. BR. at 19-20), the trial court found to the contrary. 4/13/2009 RP 128. The trial court went on to find that the act was the sex offense of indecent liberties⁴ under Washington law. *Id.* This finding necessarily rejects the defendant's assertion that the prior act was accidental, because the crime of indecent liberties requires a "knowing" act, "for the purpose of gratifying sexual desire." *See* RCW 9A.44.100, and .010(2).

The defendant does not argue that ER 404(b) is unconstitutional for similarly providing for the admission of misconduct where the defendant has been neither charged nor convicted. As pointed out above, appellate courts have upheld the preponderance standard regarding such evidence for many years. The Courts have not indicated that this standard violates the defendant's due process, presumption of innocence, or any other constitutional right. The Supreme Court has held that evidentiary issues under ER 404(b) are not of constitutional magnitude. *See State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

When considering the admissibility of such evidence under the statute or ER 404(b), the trial court is responsible for protecting the

⁴ *See* RCW 9A.44.100.

defendant's constitutional rights. The trial court has the responsibility to see that unfairly prejudicial evidence is not admitted. *See* ER 403; RCW 10.58.090(6)(g). The court also instructs the jury, as it did here, that the defendant is presumed innocent and that the presumption is overcome only if the state proves the offense beyond a reasonable doubt. *See* Instruction 2, CP 214. In addition, the court instructed the jury that its consideration of the prior uncharged act was limited to the issue of the credibility of witnesses, and could be considered for no other reason. *See* Instruction 4, CP 216.

2. THE SAME EVIDENCE WAS PROPERLY ADMITTED UNDER ER 404(b).

In *State v. DeVincentis*, 150 Wn.2d 11, 74 P. 3d 119 (2003), the Supreme Court held that the admission of evidence of a common scheme or plan requires substantial similarity between the prior bad acts and the charged crime. *Id.*, at 21. The Court found that such evidence is relevant when the existence of the crime is at issue. *Id.*

In *DeVincentis*, the defendant was charged with rape of a child and child molestation in the second degree. The defendant hired a neighborhood girl to do work around his house. As she worked, he walked around in his underwear. He eventually talked the girl into having sex with him. At the trial, the State moved to introduce evidence of the defendant's similar sexual misconduct in New York several years before. The facts were very similar. The defendant had used a similar approach to the young

girl, who was a friend of the defendant's daughter. The trial court found the prior act was admissible under ER 404(b) as part of a common scheme or plan. The Supreme Court agreed.

In *State v. Kennealy*, 151 Wn. App. 861, 214 P. 3d 200 (2009), the defendant was charged with child rape and molestation of neighborhood children. *Id.*, at 869. At the trial, evidence that the defendant had molested his own children years before was admitted under the common scheme or plan exception of ER 404(b). Although the prior misconduct was not as similar as in *DeVincentis* and the present case, this Court held that it was properly admitted. *Kennealy*, at 889.

The present case is very similar to *DeVincentis*. The defendant had sexually groped M.S.'s sister, D.S., under nearly identical circumstances as he first molested M.S. When the defendant lived with the victim's family in 1997, the defendant, D.S., and Gail Christensen were sitting on the couch watching a movie. RP 265. Gail went to bed. RP 266. The defendant laid on the couch with D.S. and put his arm around her. RP 267. He began to rub between her legs, over her clothes. RP 268. He unbuttoned her pants and unzipped them, and pulled her closer. *Id.* She could feel that he had an erection. RP 269.

Here, as in *DeVincentis*, the trial court found the acts similar and showed a common scheme or plan for committing sexual behavior with similar victims. CP 170. The trial court went on to properly balance

potential unfair prejudice with the probative value. RP--, CP 170. The trial court did not err.

3. FINDINGS OF FACT 3, 4, AND 5 WERE PROPERLY ENTERED.

- a. The trial court balanced the required factors and entered the findings.

To prove common scheme or plan, the State has the burden to (1) prove the prior acts by a preponderance of the evidence, (2) admit the prior acts for the purpose of proving a common plan or scheme, (3) show the prior acts are relevant to prove an element of the crime charged or to rebut a defense, and (4) show the evidence is more probative than prejudicial. *State v. Lough*, 125 Wn.2d 847, 852, 889 P. 2d 487 (1995).

Here, the trial court carefully considered the relevance and balanced the potentially unfair prejudice with the probative value on the record, as required for review. 4/13/2009 RP 129, 4/15/2009 RP 143. *See State v. Jackson*, 102 Wn.2d 689, 694, 689 P. 2d 76 (1984). The written findings reflected the court's reasoning, and was a further effort to preserve the reasoning for review.

- b. Findings 3, 4, and 5 did not violate the appearance of fairness doctrine.

A judge at any level must be fair to all parties and appear to be so. *See State v. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973 (2010); Washington Code of Judicial Conduct (CJC) Canon 3(D). A reviewing

court determines whether a judge appears to be impartial by how it would appear to a reasonably prudent and disinterested person. *State v. Dugan*, 96 Wn. App. 346, 354, 979 P.2d 885 (1999). An appellate court presumes that a judge acts without bias or prejudice. See *State v. Chamberlin*, 161 Wn.2d 30, 38, 162 P.3d 389 (2007). The party challenging impartiality bears the burden of presenting evidence of actual or potential bias. *Dugan*, at 354.

Here, in ruling on the disputed issue of the prior uncharged incident, the trial court stated his findings of fact and legal conclusions. These were later entered as a formal document. CP 167-171. The court only made these findings and conclusions after reading the briefs, hearing evidence, and considering the argument of the parties. Under ER 404(b), the court has to determine if the party offering the evidence has shown, by a preponderance, that the act occurred. The court must make the findings in order to permit informed appellate review. There is no evidence that the court was in any way biased or prejudiced regarding either party. The defendant does not meet his burden of proof.

- c. The defendant stipulated to facts sufficient to support Findings 3, 4, and 5.

At the pretrial hearing regarding the admissibility of the prior sexual misconduct, the defendant agreed that the court could read and consider the declaration of probable cause (CP 4-5) from the charging

documents. 4/13/2009 RP 119. When court later did this, it acknowledged that the defendant had agreed to permit it. 4/13/2009 RP 129, 4/15/2009 RP 141. The trial court proceeded to use facts from the declaration of probable cause to compare facts of the current case with the facts of the prior D.S. incident in its analysis of common scheme or plan. 4/13/2009 RP 130.

By conceding or stipulating that the court could consider the declaration of probable cause, the defendant waived his right to later object that the state did not present evidence. *See State v. Wolf*, 134 Wn. App. 196, 199, 139 P.3d 414 (2006). Where the defendant conceded the facts in Findings 3, 4, and 5, this Court should not consider his challenge to them for the first time on appeal.

The fact that Findings of Fact 3, 4, and 5 were not contested below is also demonstrated at the presentment and formal entry of the Findings and Conclusions. On November 16, 2009, just before the second trial began, the parties appeared before Judge Chushcoff for the presentment of the written Findings and Conclusions. 11/16/2009 RP 4ff. The defendant specifically objected to parts of paragraphs 7 and 8 of the Findings, but offered no objections to Findings 3, 4, and 5. 11/16/2009 RP 5-8. The focus of the defendant's objections was again on the legal admissibility of the evidence. *Id.*, at 5. If the defendant disputed the basis of Findings 3, 4, and 5, he should have objected below in order to give the court and the State an opportunity to supplement the record. *See State v. Sly*, 58 Wn.

App. 740, 748-749, 794 P.2d 1316 (1990). This Court should not consider them for the first time on appeal.

4. THE PROSECUTING ATTORNEY DID NOT COMMIT MISCONDUCT IN DRAFTING FINDINGS THAT WERE SUPPORTED BY THE RECORD.

A defendant alleging prosecutorial misconduct must show both improper conduct and prejudicial effect. *State v. Roberts*, 142 Wn.2d 471, 533, 14 P.3d 713 (2000). The defendant must also show that the prosecutor did not act in good faith. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985).

In the present case, at the beginning of his argument, the prosecutor made an offer of proof of M.S.'s testimony, relevant to the motion. 4/13/2009 RP 112. The same facts were alleged in the declaration of probable cause. CP 4. The court could have relied on an offer of proof alone as the factual basis. See *State v. Kilgore*, 147 Wn. 2d 288, 294-295, 53 P.3d 974 (2002). The defendant conceded the facts for the purpose of the argument. 4/13/2009 RP 119. The court compared the factual allegations, and made note that the defendant had permitted the court to consider the declaration of probable cause. 4/13/2009 RP129-130, 4/15/2009 RP 141. Therefore, the prosecutor had a good reason to include Findings 3, 4, and 5 in the formal Findings of Fact. The Findings reflect the court's decision; and were adopted as such by the court.

On November 16, 2009, the Findings and Conclusions were presented for entry. The defendant had the opportunity to object to and correct the Findings. He did not. 11/16/2009 RP 4ff.

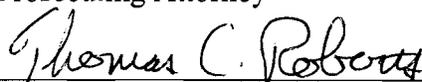
The record does not support an allegation of prosecutorial misconduct. This argument fails.

D. CONCLUSION.

The defendant fails to demonstrate beyond a reasonable doubt that RCW 10.58.090 is facially unconstitutional. The trial court gave a detailed explanation of its ruling on the record and entered written Findings and Conclusions. The court's decision was rendered only after a pretrial hearing which included testimony, agreed facts, and an offer of proof regarding the facts; and briefs and argument regarding the law. The trial court weighed all the factors required in RCW 10.58.090, ER 404(b), and ER 403. The court did not commit error. The State respectfully requests that the judgment be affirmed.

DATED: OCTOBER 4, 2010

MARK LINDQUIST
Pierce County
Prosecuting Attorney


THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

