

NO. 40681-1-II

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

STATE OF WASHINGTON, Respondent

v.

TYSON WESLEY GREGG, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.09-1-01951-7

BRIEF OF RESPONDENT

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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

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DIVISION II

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I. STATEMENT OF FACTS

The State accepts the statement of facts as set forth. Where additional information is needed, or further explanation is required, it will be set forth in the argument section of the brief.

II. RESPONSE TO ASSIGNMENTS OF ERROR

The assignments of error raised by the defendant deal with claims of violations of constitutional rights as a result of the use of RCW 10.58.090. Specifically the claim is a violation of separation of powers, ex post facto clause of both the federal and state constitutions, and in general, a claim that the statute is unconstitutional. The defendant was charged with four counts of Child Molestation in the First Degree and one count of Child Molestation in the Second Degree. The four counts of Molestation in the First Degree were during a period of time of December 1997 through December 2000 and the Child Molestation in the Second Degree was between December 2000 and December 2002. The testimony from the alleged victim, A.D., was that her older cousin, the defendant, made her masturbate him on numerous occasions while at their grandparent's house in Washougal, Washington. The complaining witness testified that these were occurring at multiple locations and multiple incidences at that property.

The evidence in the case also demonstrated that the defendant had a conviction for prior sexual abuse involving another victim. To that earlier matter, he pled guilty to one count of Incest in the First Degree on May 30, 2001.

The State maintained that in the criminal action, where the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense is admissible, notwithstanding ER 404(b). This is due to the provisions of RCW 10.58.090. The defendant claims that that statute violates many of the constitutional rights of the defendant. The State submits that the constitutional arguments have been heard before and the appeal courts have agreed with the State that the statute is admissible.

§ 10.58.090. Sex Offenses – Admissibility

(1) In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403.

.....

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

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

- (b) The closeness in time of the prior acts to the acts charged;
- (c) The frequency of the prior acts;
- (d) The presence or lack of intervening circumstances;
- (e) The necessity of the evidence beyond the testimonies already offered at trial;
- (f) Whether the prior act was a criminal conviction;
- (g) Whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; and
- (h) Other facts and circumstances.

Many of the issues raised by this defendant have been resolved in

State v. Scherner, 153 Wn. App. 621, 630, 225 P.3d 248 (2009):

Roger Scherner appeals his convictions of three counts of first degree child molestation. He fails in his burden to prove beyond a reasonable doubt that RCW 10.58.090, legislation that permits but does not require admission of evidence of prior "sexual offenses" 1 in sex offense prosecutions, is unconstitutional. That statute is not an ex post facto law and does not violate the separation of powers between the legislative and judicial branches. Moreover, it does not violate either the equal protection or the due process clauses of the state or federal constitutions. Alternatively, the evidence of his prior "sexual offenses" that the trial court admitted under the statute was also admissible as a common scheme or plan under ER 404(b). In sum, the trial court did not abuse its discretion in admitting the evidence of prior sexual offenses in this case. Because there are no other meritorious challenges to his convictions, we affirm.

RCW 10.58.090 permits but does not require admission of sexual offense evidence. Likewise, ER 404(b) permits admission of evidence for “other purposes” than to show propensity:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for *other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.*

Moreover, the accused's “lustful disposition” toward the victim, though not expressly listed in the rule is, nevertheless, another exception to the rule against certain types of propensity evidence. Evidence of an accused's sexual offenses against the victim in a prosecution for sexual misconduct has been consistently recognized as admissible. State v. Scherner, 153 Wn. App. at 641. This statute does not limit evidence of sexual offenses to acts against the victim. Rather, it permits admission of evidence of sexual misconduct by the accused against persons other than the victim. Viewing this statutory change as an extension of the principles underlying the lustful disposition exception to propensity evidence that Washington courts already recognize, it is difficult to see why admission of lustful disposition evidence is not unconstitutional but admission of sexual offense evidence under RCW 10.58.090 is unconstitutional. State v.

Ferguson, 100 Wn.2d 131, 133-34, 667 P.2d 68 (1983). There is no reduction in the quantum of evidence required to convict when comparing the two. RCW 10.58.090 modifies the subject matter addressed by ER 404(b) by expanding the nonexclusive list of permissible purposes for which evidence of prior “crimes, wrongs, or acts” may be relevant to include prior sex offenses by the defendant in sex offense cases. The exception that the legislature carved out closely tracks developments in Washington case law that have allowed the admission of prior sexual misconduct evidence in sex offense cases for a number of limited purposes. As previously noted, Washington courts have long admitted evidence of a defendant's “lustful disposition” toward the victim under the common law. In addition, our supreme court has recently upheld the admission of sexual misconduct evidence involving other victims under a less stringent version of the “common scheme or plan” exception to ER 404(b). State v. DeVincentis, 150 Wn.2d 11, 21, 74 P.3d 119 (2003) Evidence of prior sexual misconduct involving other victims has also been allowed as evidence of identity, a unique modus operandi, and to rebut the defendant's claim that the charged sexual offense was accidental. State v. Herzog, 73 Wn. App. 34, 43-44, 867 P.2d 648 (1994);

In any event, the statute expressly retains the function of the trial courts to balance probative value against prejudicial effect under the

modified ER 403 test. Moreover, trial courts retain the ultimate power to decide whether to admit or exclude any proffered evidence. These safeguards should protect against admission of any evidence that could unconstitutionally affect the sufficiency of evidence to convict.

RCW 10.58.090 does not subvert the presumption of innocence because it does not concern whether the admitted evidence is sufficient to overcome the presumption of innocence. The Scherner court stated, “[T]o the extent one may consider changes to such laws as ‘unfair’ or ‘unjust,’ they do not implicate the same kind of unfairness implicated by changes in rules setting forth a sufficiency of the evidence standard.” There is no constitutional violation.

This was reinforced in State v. Williams, 156 Wn. App. 482, 234 P.3d 1174 (2010). (170 Wn.2d 1011; 2010 Wash. LEXIS 1030 Petition for review of a decision of the Court of Appeals, Nos. 27924-3-III and 27925-1-III, June 15, 2010, 156 Wn. App. 482. Denied November 30, 2010).

ER 404(b) prohibits evidence of other crimes to show that the defendant acted in conformity with that character – had a propensity to commit this crime. But evidence of prior crimes may be admitted for other purposes, “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b). To admit evidence of prior convictions under ER 404(b), the court must (1) find by a preponderance of the evidence that the misconduct occurred; (2) identify, as a matter of law, the purpose of the evidence; (3) conclude

that the evidence is relevant to prove an element of the crime charged; and, finally, (4) balance the probative value of the evidence against its prejudicial effect.

The Washington Legislature enacted RCW 10.58.090 effective June 12, 2008. Mr. Williams's case went to trial in October 2008, so the act applied to him. The statute authorizes the trial court to admit evidence of prior sex offenses in a criminal action in which the defendant is accused of a sex offense, notwithstanding ER 404(b). RCW 10.58.090(1). The statute requires that the trial court consider whether the evidence should be excluded under ER 403 based on the following considerations: (a) the similarity of the prior acts to the current charges, (b) the closeness in time of the prior acts, (c) the frequency of the prior acts, (d) the presence or lack of intervening circumstances, (e) the need for the prior acts testimony, (f) whether the prior acts resulted in a criminal conviction, and (g) whether the probative value is substantially outweighed by unfair prejudice or confusion of the jury. RCW 10.58.090(6).

During pre-trial motions, the matter of the use of the statute was raised with the trial court. The defense had no objection to the use of the statute other than a claim that it was more prejudicial than probative and requested the court to balance it.

THE COURT: Okay. Are you in agreement that that evidence is admissible?

MR. MCCRAY (Defense Counsel): Well, Your Honor, I – I think it's gonna come down to the last prong of it, and I know the court as probably come up to speed on the 10.58

THE COURT: Yep.

MR. MCCRAY: - 090. Whether or not it is unduly prejudicial, more prejudicial than probative, and our position would be is that it is extremely much more prejudicial than it is probative of any of the facts that occurred regarding this particular victim in this case.

-(RP 49, L4-16)

The prosecutor discussed with the trial court the various aspects of RCW 10.58.090(6) and how those individual sections apply in our case. It was obvious that there was a lot of relevance that the prosecution was able to show.

MR. RICHARDSON (Deputy Prosecutor): Well, Your Honor, the State's position is that the Legislature has essentially found a situation where we don't any longer need to find a specific 4.04(b) exception for this type of evidence, we don't have to show a particular MO or other common scheme or plan type of evidence.

However, the facts in this case honestly do bear fairly strongly towards that common scheme or plan or MO type of evidence in that, as Your Honor's had an opportunity to read the State's memorandum, the defendant in the prior incident was requiring his younger sister to essentially provide him with oral sex. He was using his relative age and size to get her to do that, and making her feel like she could not tell.

These things occurred when they were alone. In addition, the similarities there are striking in that in both cases he was not essentially touching the young females, but he was having them touch him. And in the present case, that's by, essentially, digital manipulation or masturbation. In the earlier case, by oral sexual activity.

I think that the – the similarities are striking in this case, and bear greatly on the credibility of the witness testifying today. You've had an opportunity to read the briefing and you note that one of the primary concerns is that in these types of cases credibility of the witness is, well, frankly, almost everything. And to the extent that the prior offense could lead the jury to understand that this type of behavior is consistent with the prior behavior of the defendant, specifically with regard to that common scheme or plan is certainly relevant.

And with regard to the – the relative similarity between the ages of both victims at the time, and [A.D.] was between nine and twelve years old at the time of these offenses; K.E.P. was eight at the time the defendant had her perform oral sex on him.

So these – these incidents are, in fact, very similar.

Also the time frame of the incidents in terms of the years they occurred is very close in time, so it's showing a particular behavior of the defendant at that time.

I think when you look at the – the factors that are expected to be looked at, it's similar age victims, well, we have that; similar relationship between the defendant and the victims, we have that, a cousin and a sister type relationship; similar type of touching, we have that, manipulation of the defendant's penis, one by hand and one by mouth; similar use of weapon or accouterment. Well, in each case there was not a weapon, but just general size and strength.

And similar method of gaining access. Well, in play situations where you had unique access to the victims themselves.

These – these are factors that have been considered by the federal courts in the rules that are comparable to this 10.58 and would certainly apply in our case.

So I think it is clearly relevant.

-(RP 49, L20 – 52, L8)

The defense then was asked by the Trial Court to give an analysis of the situation and, again, the defense was not having problems with the use of the statute other than it wanted the court to balance prejudice against probative value. (RP 54). The trial court then found that there was a great deal of prejudice to the defense, but also there was a great deal of probative value and the Judge felt that the probative value outweighed the prejudicial value. (RP 57). The defense then suggested that Findings of Fact be prepared and that was agreed to by the parties. Findings of Fact and Conclusions of Law on RCW 10.58.090 Hearing was prepared (CP 51). A copy of the Findings of Fact and Conclusions of Law are attached hereto and by this reference incorporated herein. The State has taken no exception to the Findings of Fact and Conclusions of Law either at the trial court level or on appeal.

The defense after suggesting the Findings of Fact be entered also indicated to the court that the parties should fashion a stipulation as to how the information was to be provided to the jury. (RP 58, L3-5). In other words, the stipulation concerning the use of the statute with the jury was the idea of the defense.

The parties prepared the stipulation that everyone agreed to and this was read to the jury without objection being made by the defense.

THE COURT: Okay. As the – as part of the evidence in this case I need to read you some information.

“The parties have agreed that the following evidence will be presented to you. Tyson Wesley Gregg has a prior juvenile adjudication (conviction) for incest in the first degree from 2001. Then sixteen-year-old Tyson Wesley Gregg had his then eight-year-old half sister perform oral sex on him on multiple occasions. This is evidence that you will evaluate and weigh along with the other evidence.”

Thank you. Is this a good time to take a break?

-(RP 193, L5-19)

The defendant testified on his own behalf and during his testimony he spoke about that earlier incident of sexual impropriety with one of his relatives. He indicated too that he had gone through a SSOSA program and had gotten insights into his difficulties and problems. It appears that this was the nature of the defense that was being raised.

QUESTION (Defense Counsel): Let’s talk about that. You had a sexual offense with your half sister; is that correct?

ANSWER (Defendant): Yes, sir.

QUESTION: What happened?

ANSWER: (Sobbing). I manipulated my – my younger sister into sexually abusing. I would have her on three different occasions perform oral – oral sex on myself.

QUESTION: How old were you?

ANSWER: I was fourteen or fifteen at the time.

QUESTION: How old was your sister?

ANSWER: She was seven or eight.

QUESTION: Did you receive any treatment for this?

ANSWER: I went through I believe it was called a SSODA or a SSOSA program. I went through two – two years of weekly counsel with other sex offenders.

QUESTION: Okay. Did you gain any insight as to why this happened between you and your sister?

ANSWER: They believed a lot of it was because I was –

MR. RICHARDSON (Deputy Prosecutor):
Objection, that calls for opinion of an expert. It's insight as to the defendant's own belief would be the question.

MR. MCCRAY (Defense Counsel): It's – it's insight as to himself, Your Honor, I think he can testify –

THE COURT: Well, yeah, but let's make that clear, then.

BY MR. MCCRAY (Continuing):

QUESTION: Did you gain any insight into yourself as to why this may have occurred?

ANSWER: Yes, sir.

QUESTION: And what was that?

ANSWER: Because I was sexually molested as well.

QUESTION: When were you sexually molested, and by who?

ANSWER: I was around thirteen, and it was when I went up to Alaska with my dad. And it was my aunt's – not my aunt's, but my – my dad's wife at the time's nephew.

He would manipulate me into giving him oral sex.

QUESTION: Were there any other victims of you other than you sister, your half sister?

ANSWER: No, sir.

QUESTION: Is there any doubt in your mind that you did not touch [A], [A.D.], in any manner, any sexual manner whatsoever?

ANSWER: There's no doubt.

QUESTION: Would you have taken responsibility for it if you had?

ANSWER: Absolutely.

QUESTION: Why?

ANSWER: Because I know the pain that I've put my sister through and no one deserves that.

QUESTION: Do you have contact with your sister?

ANSWER: On a regular basis.

QUESTION: Do you remember having contact with – with [A.D.] after she stopped coming to your grandparents' farm?

ANSWER: Other than on holidays, no.

QUESTION: Did you get along with [A.D.]?

ANSWER: No, not really. She was a tattletale, so most of us didn't want to be around her.

-(RP 228, L10 – 230, L16)

Finally, the matter was also discussed with the jury as part of the jury instructions. In preparation of the jury instructions the defense indicated that they had no objections to the instructions and specifically had no objection to this particular instruction being provided to the jury. (RP 235, L21 – 236, L22). No exceptions are taken to the jury instructions by either party. (RP 243, L8-13). The Court's Instructions to the Jury (CP 31), a copy of which is attached hereto and by this reference incorporated herein, includes in the packet Instruction No. 5, which reads as follows:

In a criminal case in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense may be considered for its bearing on any matter to which it is relevant. However, evidence of a prior offense on its own is not sufficient to prove the defendant guilty of any crime charged in the Information. Bear in mind as you consider this evidence that at all times the State has the burden of proving that the defendant committed each of the elements of each offense charged in the Information. The defendant is not on trial for any act, conduct, or offense not charged in the Information.

The State submits that the statute is constitutional and further was being utilized by the defense for its own purposes.

III. RESPONSE TO ASSIGNMENT OF ERROR – TRIAL
STIPULATION

As previously indicated, a trial stipulation was utilized by the parties concerning this matter. The State submits that that stipulation is binding on both the prosecution and defense. It's obvious from the preceding discussion that the defense wanted to utilize information, and agreed to use the information. To do that, they fashioned a trial stipulation which was read to the jury and also part of the jury instruction. No objections were taken to either the trial stipulation or the jury instructions.

A trial court's decision that a stipulation was entered with the parties' understanding and agreement will not be disturbed where it is supported by the evidence. Baird v. Baird, 6 Wn. App. 587, 590, 494 P.2d 1387 (1972). Under RCW 2.44.010(1), a stipulation made in open court by an attorney is binding.

RCW § 2.44.010. Authority of attorney

An attorney and counselor has authority:

(1) To bind his client in any of the proceedings in an action or special proceeding by his agreement duly made, or entered upon the minutes of the court; but the court shall disregard all agreements and stipulations in relation to the conduct of, or any of the proceedings in, an action or special proceeding unless such agreement or stipulation be made

in open court, or in presence of the clerk, and entered in the minutes by him, or signed by the party against whom the same is alleged, or his attorney.

Rule 2A. Stipulations.

No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

As explained in State v. Wolf, 134 Wn. App. 196, 199, 139 P.3d

414 (2006):

While Wolf argues that he raises a sufficiency of evidence question that is not the dispositive issue. Rather, the dispositive issue is whether he waived the requirement that the State prove the element he now contests by stipulating to that element.

The premise of the waiver theory is that, upon entering into a stipulation on an element, a defendant waives his right to put the government to its proof of that element. "A stipulation is an express waiver . . . conceding for the purposes of the trial the truth of some alleged fact, with the effect that one party need offer no evidence to prove it and the other is not allowed to disprove it." It is well settled in cases that have considered the issue that a defendant, by entering into a stipulation, waives his right to assert the government's duty to present evidence to the jury on the stipulated element. We hold that Wolf waived the right to

put the State to its burden of proof on the element of having previously been convicted of a serious offense by his written stipulation.

IV. RESPONSE TO ASSIGNMENT OF ERROR – INVITED ERROR

The State submits that the attempt on appeal to attack the use of the statute by the defense is invited error by the defense. There were no objections made at the time of trial and in fact, even pre-trial the indications were that the defense was not going to contest the utilization of the statute itself, but merely wanted the balancing that was required. The balancing was done by the court and Findings of Fact were then prepared along with a trial stipulation.

A party invites error when a party sets up an error at trial and then claims such error on appeal. In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995). This doctrine applies even to errors of constitutional magnitude that can be raised for the first time on appeal. State v. Henderson, 114 Wn.2d 867, 869-70, 792 P.2d 514 (1990); State v. Heddrick, Jr., 166 Wn.2d 898, 909, 215 P.3d 201 (2009).

Moreover, we note that the same result is required by the doctrine of invited error. See generally State v. Boyer, 91 Wn.2d 342, 588 P.2d 1151 (1979). That doctrine prohibits a party from setting up an error at

trial and then complaining of it on appeal. State v. Boyer, supra. The present case does exactly that. In determining whether the invited error doctrine was applicable, courts have also considered whether a defendant affirmatively assented to the error, materially contributed to it, or benefited from it. See, e.g., State v. LeFaber, 128 Wn.2d 896, 904, 913 P.2d 369 (1996) (Alexander, J., dissenting) (considering distinction between defendant's failure to object to error and affirmatively assent to error); In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995) (considering whether defendant materially contributed to error); People v. Thompson, 50 Cal. 3d 134, 157, 785 P.2d 857, 266 Cal. Rptr. 309 (1990) (considering whether defendant benefited from closure).

The State submits that the defendant should not be allowed to make claim of unconstitutionality of the statute or to object to the use of the statute by the defense when it is obvious that the defense clearly had a great stake in the preparation of the various documents and raised no objections to the use of the statutory authority of 10.58.090. Further, the defense at the time of trial was attempting to benefit from the use of the statute. The defense should not be allowed at this time to make complaint about it. It is invited error and the State submits it is inappropriate.

V. CONCLUSION

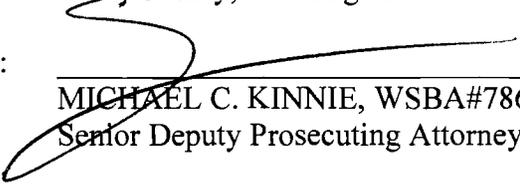
The trial court should be affirmed in all respects.

DATED this 24 day of February, 2011.

Respectfully submitted:

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16330 *for*

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FILED

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,
Plaintiff,
v.
TYSON WESLEY GREGG,
Defendant.

No. 09-1-01951-7

**COURT'S INSTRUCTIONS
TO THE JURY**



SUPERIOR COURT JUDGE

DATED this 23 day of March, 2010.

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INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 3

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State of Washington is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 4

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 3

In a criminal case in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense may be considered for its bearing on any matter to which it is relevant. However, evidence of a prior offense on its own is not sufficient to prove the defendant guilty of any crime charged in the Information. Bear in mind as you consider this evidence that at all times the State has the burden of proving that the defendant committed each of the elements of each offense charged in the Information. The defendant is not on trial for any act, conduct, or offense not charged in the Information.

INSTRUCTION NO. 6

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and verdict forms for recording your verdict. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

You will also be given special verdict forms for the crimes charged in counts 1 through 5. If you find the defendant not guilty of these crimes, do not use the special verdict forms. If you find the defendant guilty of these crimes, you will then use the special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. The presiding juror must sign the verdict forms and notify the bailiff. The bailiff will bring you into court to declare your verdict.

INSTRUCTION NO. 7

Married means one who is legally married to another, but does not include a person who is living separate and apart from his or her spouse and who has filed in court for legal separation or for dissolution of the marriage.

INSTRUCTION NO. 8

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

INSTRUCTION NO. 9

A person commits the crime of child molestation in the first degree when the person has sexual contact with a child who is less than twelve years old, who is not married to the person, and who is at least thirty-six months younger than the person.

INSTRUCTION NO. 10

A person commits the crime of child molestation in the second degree when the person has sexual contact with a child who is at least twelve years old but less than fourteen years old, who is not married to the person, and who is at least thirty-six months younger than the person.

INSTRUCTION NO. 11

Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party.

INSTRUCTION NO. 12

To convict the defendant of the crime of child molestation in the first degree as to Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or between December 5, 1997 and December 4, 2000, on an occasion separate from that in Count 2, Count 3, and Count 4, the defendant had sexual contact with Ashley Day;

(2) That Ashley Day was less than twelve years old at the time of the sexual contact and was not married to the defendant;

(3) That Ashley Day was at least thirty-six months younger than the defendant;
and

(4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 13

To convict the defendant of the crime of child molestation in the first degree as to Count 2, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or between December 5, 1997 and December 4, 2000, on an occasion separate from that in Count 1, Count 3, and Count 4, the defendant had sexual contact with Ashley Day;

(2) That Ashley Day was less than twelve years old at the time of the sexual contact and was not married to the defendant;

(3) That Ashley Day was at least thirty-six months younger than the defendant;
and

(4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 14

To convict the defendant of the crime of child molestation in the first degree as to Count 3, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or between December 5, 1997 and December 4, 2000, on an occasion separate from that in Count 1, Count 2, and Count 4, the defendant had sexual contact with Ashley Day;

(2) That Ashley Day was less than twelve years old at the time of the sexual contact and was not married to the defendant;

(3) That Ashley Day was at least thirty-six months younger than the defendant;
and

(4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 13

To convict the defendant of the crime of child molestation in the first degree as to Count 4, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or between December 5, 1997 and December 4, 2000, on an occasion separate from that in Count 1, Count 2, and Count 3, the defendant had sexual contact with Ashley Day;

(2) That Ashley Day was less than twelve years old at the time of the sexual contact and was not married to the defendant;

(3) That Ashley Day was at least thirty-six months younger than the defendant;
and

(4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 16

To convict the defendant of the crime of child molestation in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That between December 5, 2000 and December 4, 2002, the defendant had sexual contact with Ashley Day;

(2) That Ashley Day was at least twelve years old but less than fourteen years old at the time of the sexual contact and was not married to the defendant;

(3) That Ashley Day was at least thirty-six months younger than the defendant; and

(4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 17

The State alleges that the defendant committed acts of Child Molestation in the First Degree and Second Degree on multiple occasions. To convict the defendant on any count of Child Molestation in the First Degree or Second Degree, one particular act of Child Molestation in the First Degree or Second Degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Child Molestation in the First Degree and Second Degree.

INSTRUCTION NO. 18

If you find the defendant guilty of Child Molestation in the First Degree as charged in Count 1, then you must determine if the following aggravating circumstance exists:

Whether the crime was part of an ongoing pattern of sexual abuse of the same victim under the age of 18 years manifested by multiple incidents over a prolonged period of time.

INSTRUCTION NO. 19

If you find the defendant guilty of Child Molestation in the First Degree as charged in Count 2, then you must determine if the following aggravating circumstance exists:

Whether the crime was part of an ongoing pattern of sexual abuse of the same victim under the age of 18 years manifested by multiple incidents over a prolonged period of time.

INSTRUCTION NO. 20

If you find the defendant guilty of Child Molestation in the First Degree as charged in Count 3, then you must determine if the following aggravating circumstance exists:

Whether the crime was part of an ongoing pattern of sexual abuse of the same victim under the age of 18 years manifested by multiple incidents over a prolonged period of time.

INSTRUCTION NO. 2/

If you find the defendant guilty of Child Molestation in the First Degree as charged in Count 4, then you must determine if the following aggravating circumstance exists:

Whether the crime was part of an ongoing pattern of sexual abuse of the same victim under the age of 18 years manifested by multiple incidents over a prolonged period of time.

INSTRUCTION NO. 29

If you find the defendant guilty of Child Molestation in the Second Degree as charged in Count 5, then you must determine if the following aggravating circumstance exists:

Whether the crime was part of an ongoing pattern of sexual abuse of the same victim under the age of 18 years manifested by multiple incidents over a prolonged period of time.

INSTRUCTION NO. 23

The State has the burden of proving the existence of each aggravating circumstance beyond a reasonable doubt. In order for you to find the existence of an aggravating circumstance in this case, you must unanimously agree that the aggravating circumstance has been proved beyond a reasonable doubt.

INSTRUCTION NO. 24

An "ongoing pattern of sexual abuse" means multiple incidents of abuse over a prolonged period of time. The term "prolonged period of time" means more than a few weeks.

ADDITIONAL JURY INSTRUCTION

I will now give you an additional instruction about the law that governs this case. You will have this additional instruction with you in the jury room. The instruction is:

"Any statements by the prosecuting attorney that shifts the burden of proof to the defense is not to be considered. See your instruction on the burden of proof."

You are not to give this instruction special importance just because it was read separately. Consider it along with all the instructions you have received.

You will now return to the jury room to continue your deliberation.

D. M. W.

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FILED

APR 27 2010
3:38 PM
Sherry W. Parker, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

TYSON WESLEY GREGG,
Respondent

FINDINGS OF FACT AND CONCLUSIONS
OF LAW ON RCW 10.58.090 HEARING

No. 09-1-01951-7

THIS MATTER having come before the Honorable Judge Diane Woolard on March 22, 2010, for Jury Trial. The State of Washington represented by Deputy Prosecuting Attorney Dustin D. Richardson and the Defendant, present and represented by Defense Attorney Vernon H. McCray. The Judge having reviewed the facts of the defendant's prior juvenile conviction in Clark County Juvenile Court Cause Number 01-8-00447-1.

After reviewing the case and hearing the testimony of all parties the Court makes the following:

FINDINGS OF FACT

1. Tyson Wesley Gregg (DOB: 2/14/1985) was convicted by plea to Incest in the First Degree in Clark County Juvenile Court Cause Number 01-8-00447-1 on July 14, 2001.
2. The prosecuting attorney did disclose to the defendant a summary of the substance of any testimony that was expected to be offered at least fifteen days before the scheduled date of trial.
3. The court evaluated whether evidence of the defendant's commission of another sexual offense or offenses should be excluded pursuant to Evidence Rule 403 using the factors outlined in RCW 10.58.090.

FINDINGS OF FACT AND CONCLUSIONS OF
LAW ON BENCH TRIAL - 1

CLARK COUNTY PROSECUTING ATTORNEY
CHILD ABUSE INTERVENTION CENTER
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VANCOUVER, WASHINGTON 98666
(360) 397-6002 (OFFICE)
(360) 397-6003 (FAX)

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* SODA treatment may have commenced prior to the end date in count 5 of this case Jm DOR

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2 4. The charges in the current case were close in time of the prior Incest. In fact, the acts overlapped to some degree.

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4 5. The frequency of the prior acts in the current case is four counts while the prior adjudication is for one count. However, the fact that the prior happened at all and other similarities weighs in favor of admissibility given other similarities in the specific allegations.

6
7 6. There is a lack of intervening circumstances. There are no intervening circumstances between the acts resulting in the prior adjudication and the acts alleged in the present case. The defendant's sex offender treatment is not an intervening circumstance because it occurred after the present offenses.*

8
9 7. The necessity of the evidence beyond the testimonies otherwise offered at trial is high as the credibility of the complaining victim is paramount to the jurors' deliberations due to a lack of other eyewitnesses or corroboratory evidence.

10
11 8. The prior act was a criminal conviction, specifically a juvenile adjudication for Incest in the First Degree.

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13 9. The acts underlying the prior Incest in the First Degree adjudication are similar to those in the present case in that the defendant allegedly made the current victim manually masturbate him and made his prior victim perform oral sex upon him.

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15 10. The victim in the prior adjudication and the victim in the present case were of similar ages. The prior victim was 8 years old at the time of that offense whereas the victim in the present case was between the ages of 9 and 12 for the ongoing abuse in the present case.

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17 11. The victim in the prior adjudication and the victim in the present case were both easily accessed by virtue of the fact that they are both family members, a sister and cousin respectively.

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19 12. The admission of the fact of the prior Incest adjudication will not confuse the issues or mislead the jury. The parties can clearly distinguish between the acts through testimony and argument.

20
21 13. The admission of the fact of the prior Incest adjudication will not cause undue delay or waste of time.

22
23 14. The admission of the fact of the prior Incest adjudication is not a mere presentation of cumulative evidence in that the somewhat unique pattern of behavior and intentions of the defendant bear strongly on the alleged victim's credibility.

24
25 15. While the evidence of the prior Incest adjudication is prejudicial to the defendant, it is not unfairly prejudicial.

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27 FINDINGS OF FACT AND CONCLUSIONS OF
28 LAW ON BENCH TRIAL - 2

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2 Based upon the above foregoing the Court makes the following:
3

4 **CONCLUSIONS OF LAW**

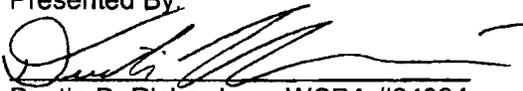
5 1. Based on the above finding of facts as well as the Statement of Defendant on Plea of
6 Guilty on the prior case, 01-8-00477-1, the probative value is not substantially outweighed by
7 the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by
8 considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

9 2. Defendant's prior adjudication for Incest in the First Degree, in Clark County Juvenile
10 Court Cause Number 01-8-00447-1, is admissible at trial in the present case.

11 DONE in Open Court this 27 day of April, 2010

12 
13 _____
14 THE HONORABLE DIANE M. WOOLARD
15 Judge of the Superior Court

16 Presented By:

17 
18 _____
19 Dustin D. Richardson, WSBA #34094
20 Deputy Prosecuting Attorney

21 
22 _____
23 Vernon H. McCray, WSBA #21263
24 Attorney for Defendant

25 _____
26 Tyson Wesley Gregg,
27 Defendant

