

COURT OF APPEALS
DIVISION II

No. 41256-0-II

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STATE OF WASHINGTON

BY
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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

MICHAEL LOPEZ, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Amber Finlay, Judge

No. 09-1-00442-1

BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR

1. By admitting into evidence Lopez's prior conviction for a sex offense, was Lopez denied a fair trial, and did admission of evidence of the prior sex offense violate Lopez's right to be tried only for the offense charged?
2. Did the court correctly apply the test for admissibility of a prior sex offense as prescribed by RCW 10.58.090?
3. Does RCW 10.58.090 violate the separation of powers doctrine?
4. Is there sufficient proof in the record to support the court's order of sheriff's fees and appointed counsel and other costs?
5. Was Lopez denied due process and equal protection when following his conviction the court ordered that he pay costs associated with the conviction?

B. FACTS AND STATEMENT OF THE CASE

The State accepts Lopez's statement of facts but includes references to additional facts, as needed, in the relevant portions of argument in the State's response brief. RAP 10.3(b).

C. ARGUMENT

1. By admitting into evidence Lopez's prior conviction for a sex offense, was Lopez denied a fair trial, and did admission of

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evidence of the prior sex offense violate Lopez's right to be tried only for the offense charged?

A trial court's order admitting evidence is reviewed on appeal for an abuse of discretion. *State v. Hamlet*, 133 Wn.2d 314, 324, 944 P.2d 1026 (1997); *State v. Williams*, 156 Wn. App. 482, 234 P.3d 1174 (2010).

In the instant case, Lopez was being tried for two counts of child molestation in the second degree. He had previously been convicted for communicating with a minor for immoral purposes. The prosecution offered evidence of the prior conviction pursuant to RCW 10.58.090, which is set forth in relevant parts as follows:

(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....

(4) For purposes of this section, "sex offense" means...

(c) Any violation under RCW 9.68A.090 (communication with a minor for immoral purposes)....

(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;

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- (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.

RCW 10.58.090.

In the instant case, because the trial court correctly applied RCW 10.58.090, the trial court did not abuse its discretion by allowing into evidence Lopez's prior conviction of a sex offense. *State v. Williams*, 156 Wn. App. 482, 492, 234 P.3d 1174 (2010).

Lopez asserts that he was denied a fair trial by the admission of his prior conviction for a sex offense because, he asserts, admission of this evidence suggested that he had a propensity to commit the charged offenses and also put him on trial for the prior offense. The record on appeal, however, does not support this assertion.

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The record, as a whole, shows that Lopez was tried only for the currently charged offenses of child molestation in the second degree. The prior conviction of a sex offense, communicating with a minor for immoral purposes, was admitted into evidence as permitted by RCW 10.58.090. The prior conviction was sixteen years old and was similar to, though not identical to, the currently charged offenses. As such, its evidentiary value was limited but was useful to the jury in performing its fact-finding function. For the same reasons that the evidentiary value was limited, however, the prejudicial effect of the evidence was also limited. Accordingly, even if only slightly so, the evidence was more probative than prejudicial, and in any event it was not substantially more prejudicial than probative.

Because the evidence was not substantially more prejudicial than probative, Lopez was not denied a fair trial by admitting his prior conviction for a sex offense into evidence at trial. *State v. Scherner*, 153 Wn. App. 621, 225 P.3d 248 (2009), *review granted*, 168 Wash.2d 1036, 233 P.3d 888 (Jun. 1, 2010); *State v. Gresham*, 153 Wn. App. 659, 223 P.3d 1194 (2009), *review granted*, 168 Wn.2d 1036, 233 P.3d 888 (Jun. 1, 2010).

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2. Did the court correctly apply the test for admissibility of a prior sex offense as prescribed by RCW 10.58.090?

RCW 10.58.090 at subsection (1) does not require admission, but nonetheless presumes the admissibility, of evidence of prior sex offenses provided that the evidence is otherwise admissible under ER 403.¹ RCW 10.58.090(6) sets forth eight factors that the trial court is to consider when evaluating the admissibility of prior sex offenses, as follows:

- i) Similarity of the prior acts to the acts currently charged.

The trial court found that the victims in the current case and the prior conviction were each adolescent girls, similar in age, who were sexually contacted in exchange for privileges. RP 56-57; CP 66-67.

- ii) Closeness in time of the prior acts to the acts currently charged.

The trial court considered the fact that the prior conviction was in 1994 while the currently charged offenses occurred in 2010, and the court stated for the record that there was "a significant amount of years between the two acts." RP 57; CP 67.

RCW 10.58.090(6)(b) requires the trial court to consider the passage of time, but there is no time limitation. By comparison, a prior

¹ Subsection (3) of RCW 10.58.090 provides that "[t]his section shall not be construed to limit the admission or consideration of evidence under any other evidence rule."

sex offense may be admissible under ER 404(b) even though it is fifteen years old. *State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003). In federal cases, sex offenses as old as twenty years have been admissible. *United States v. Kelly*, 510 F.3d 433, 437 (4th Cir. 2007); *United States v. Gabe*, 237 F.3d 954, 959-60 (8th Cir. 2001). Even a sex offense as old as forty years may be admissible. *United States v. Benally*, 500 F.3d 1085, 1092 (10th Cir. 2007).

iii) Frequency of the prior acts.

The court found that "there is not a frequency between the prior acts." RP 58. See also, CP 67.

iv) Presence or lack of intervening circumstances.

The trial court found that "[t]here are no intervening circumstances that has been proposed, or presence between the two." RP 58. See also, CP 67.

v) Necessity of the evidence.

The plain language of RCW 10.58.090(6)(e) refers specifically to "testimonies," to the apparent exclusion of evidence other than testimonial

evidence, and requires the trial court to consider whether the prior sex offense evidence is necessary in light of the other "testimonies already offered at trial." The trial court in the instant case found that there was no other testimony to be offered at trial other than the testimony of the child victim. The court found that this circumstance weighed toward admissibility. RP 58; CP 67-68.

Because there was no evidence other than the child victim's testimony with which to prove that the sexual abuse of the victim had occurred, the necessity of the evidence of a prior sex offense was established in this case. *State v. Krause*, 82 Wn. App. 688, 696, 919 P.2d 123 (1996).

vi) Whether the prior was a criminal conviction.

Lopez stipulated that the prior sex offense was a conviction, and the court stated for the record that it had seen documentation of the conviction. RP 58-59, 132-136, 272-273; CP 68.

vii) Comparison of probative value against substantial prejudice.

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The trial court engaged in a careful analysis of the facts and found that admission of the prior sex offense would not cause undue prejudice to Lopez. RP 59-62; CP 68.

The jury was in a position to know the circumstances and to weigh the evidence appropriately in light of all the circumstances and to thus avoid undue prejudice. However, there was little or no evidence other than the child victim's testimony with which to prove that the sexual contact actually occurred; thus, the probative value of the evidence of the prior sex offense was substantial. See, e.g., *State v. Sexsmith*, 138 Wn. App. 497, 506, 157 P.3d 901 (2007).

The trial court limited any risk of prejudice by giving an appropriate limiting instruction to the jury. RP 360; CP 81 (Jury Instruction No. 8).²

viii) Other facts and circumstances.

² Jury Instruction No. 8 was provided to the jury, 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 is admissible and 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 the crime charged in the Information. Bear in mind as you consider this evidence at all times, the State has the burden of proving that the defendant committed each of the elements of the offense charged in the Information. I remind you that the defendant is not on trial for any act, conduct, or offense not charged in the Information.

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There were no significant or relevant other facts or circumstances to consider in regard to subsection (h) on the record of this case. CP 68.

In the instant case, the trial court considered each of the factors it was required by RCW 10.58.090 to consider. There is no particular weight that the court is required to give to any one or more of the factors for consideration. *State v. Scherner*, 153 Wn. App. 621, 658, 225 P.3d 248 (2009), *review granted*, 168 Wash.2d 1036, 233 P.3d 888 (Jun. 1, 2010). The court considered the passage of time, frequency, similarity and other factors, including the probative value as compared to the risk of substantial prejudice, the necessity of the evidence, and other factors required to be considered by RCW 10.58.090, conducted the appropriate balancing tests, and found the evidence of admissible. RP 130.

Thus, the trial court did not abuse its discretion in this case. *State v. Scherner*, 153 Wn. App. 621, 225 P.3d 248 (2009), *review granted*, 168 Wash.2d 1036, 233 P.3d 888 (Jun. 1, 2010); *State v. Gresham*, 153 Wn. App. 659, 223 P.3d 1194 (2009), *review granted*, 168 Wn.2d 1036, 233 P.3d 888 (Jun. 1, 2010); *State v. Williams*, 156 Wn. App. 482, 234 P.3d 1174 (2010).

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3. Does RCW 10.58.090 violate the separation of powers doctrine?

Prior precedent of this court has established that RCW 10.58.090 does not violate the separation of powers doctrine and is not unconstitutional. *State v. Scherner*, 153 Wn. App. 621, 225 P.3d 248 (2009), *review granted*, 168 Wash.2d 1036, 233 P.3d 888 (Jun. 1, 2010); *State v. Gresham*, 153 Wn. App. 659, 223 P.3d 1194 (2009), *review granted*, 168 Wn.2d 1036, 233 P.3d 888 (Jun. 1, 2010). However, both of these cases have been accepted for review by the Washington Supreme Court to decide this issue. Unless the Supreme Court overturns this precedent, the State urges the court to adhere to its precedent on this issue.

4. Is there sufficient proof in the record to support the court's order of sheriff's fees and appointed counsel and other costs?

At sentencing of this matter, the court stated the costs as follows:

"I have a copy of the fees here. I believe they indicate a total of \$1,194." RP 409. There was no objection or dispute in regard to the imposition of costs or the amount of costs imposed. Later, the court itemized the costs as follows: "[A] filing fee of \$200; sheriff's return of service fees, which looks like \$357.50; a jury fee assessed of \$250; and attorney fee of \$875."

RP 414. After the final tabulation, the court ordered \$3,169.00 in total
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costs. CP 13. There was no objection or dispute in regard to the costs imposed or the fact that the Lopez was required to pay these costs.

The court ordered that the costs be paid at the rate of "\$25 per month, commencing 60 days following release from total confinement, and additional costs as well." RP 416.

The record is skimpy on this point only because Lopez did not object to the imposition of costs, giving the inference that he agreed with the court's calculations. If the court finds that notwithstanding Lopez's failure to object in the trial court, the record is insufficient to support the trial court's order of costs, the State urges the court remand to the trial court for a determination of costs.

5. Was Lopez denied due process and equal protection when following his conviction the court ordered that he pay costs associated with the conviction?

Lopez did not object to the court's imposition of costs and fees at sentencing on this matter. Therefore, there is not a detailed record in regard to his ability to pay or the source of the costs. However:

The initial imposition of court costs at sentencing is predicated on the determination that the defendant either has or will have the ability to pay. RCW 10.01.160(3). Because this determination is clearly somewhat "speculative," the time to examine a defendant's ability to pay is when the government seeks to collect the obligation.

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State v. Smits, 152 Wn. App. 514, 523-524, 216 P.3d 1097, 1101 (2009), citing *State v. Baldwin*, 63 Wn. App. 303, 310-11, 818 P.2d 1116 (1991).

The sentencing court was not required to enter formal, specific findings in regard to Lopez's ability to pay. *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). Analysis and inquiry into Lopez's ability to pay should occur when the payments become due (60 days after his release from total confinement). *State v. Blank*, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997); *State v. Smits*, 152 Wn. App. 514, 523-524, 216 P.3d 1097, 1101 (2009). Still more, Lopez's failure to object when the costs were imposed is a waiver of the right to have formal findings entered in regard to his financial circumstances. *State v. Phillips*, 65 Wn. App. 239, 828 P.2d 42 (1992).

D. CONCLUSION

Lopez received a fair trial in this case. The evidence at trial was clear to the jury, as were the instructions to the jury, showing that Lopez was not on trial for any offense other than the ones described in the Information. Evidence of a prior sex offense, that occurred sixteen years prior to the current offenses, was properly admitted under RCW

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10.58.090. The age of the offense weighed against any prejudicial effect, and admission was necessary because the only other evidence in the case was the testimony of the child victim. The trial court properly weighed each of the factors set forth in RCW 10.58.090. Some of those factors had little impact, while others were more substantial. Thus, Lopez's conviction should be sustained.

Existing precedent of the court establishes the constitutionality of RCW 10.58.090. However, this precedent is currently under consideration by the Washington Supreme Court. This court should adhere to its existing precedent unless or until that precedent is overturned.

The sentencing court was not required to make formal, specific findings in regard to Lopez's ability to pay costs ordered by the court following conviction. The correct time to make an inquiry regarding the ability to pay is when the costs become due and payments are required.

Lopez did not object to the court's statement of the itemization of the costs. By not objecting, he created the inference that there was no dispute or disagreement in regard to the costs and that he, in fact, agreed with the imposition of costs. If the record on appeal is skimpy in regard to the data from which the calculation of costs was obtained, it is because Lopez did not object at the trial level. If the court finds that Lopez has not

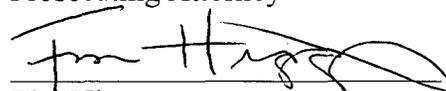
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waived this issue and also finds that the record is insufficient for a review of the costs, the State requests that the court sustain the conviction and remand this matter to the trial court for a determination of costs.

DATED: September 29, 2011.

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Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Tim Higgs", written over a horizontal line.

Tim Higgs
Deputy Prosecuting Attorney
WSBA #25919

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

STATE OF WASHINGTON
BY C
DEPUTY

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
)
 MICHAEL LOPEZ,)
)
 Appellant,)
 _____)

No. 41256-0-II
DECLARATION OF
FILING/MAILING
PROOF OF SERVICE

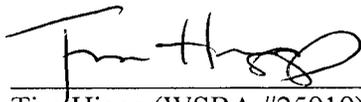
I, Tim Higgs, declare and state as follows:

On MONDAY, AUGUST 29, 2011, I deposited in the U.S. Mail,
postage properly prepaid, the documents related to the above cause number
and to which this declaration is attached, BRIEF OF RESPONDENT, to:

Gregory C. Link
Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101

I, Tim Higgs, declare under penalty of perjury of the laws of the
State of Washington that the foregoing information is true and correct.

Dated this 29th day of August, 2011, at Shelton, Washington.



Tim Higgs (WSBA #25919)