

NO. 39750-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM KIPP,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 08-1-01272-5

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Kipp's claim that the trial court abused its discretion in admitting his taped statement must fail when the conversation was not "private" as the term is used in the Privacy Act because Kipp could not have reasonably expected that his conversation with the father of his victim would remain private and because Kipp's own words demonstrated that he understood that the conversation was not private?

2. Whether the trial court erred in failing to hold an evidentiary hearing when: (1) Kipp failed to specifically object to the trial court's failure to hold a full evidentiary hearing below, thereby waiving any such claim on appeal; and when (2) the trial court accepted Kipp's version of the facts in reaching its decision, thus there was no meaningful factual dispute necessitating an evidentiary hearing ?

3. Whether Kipp's claim that the trial court erred in admitting evidence regarding Kipp's molestation of J.M.C. under RCW 10.58.090 and ER 404(b) must fail when: (1) Kipp has failed to show that RCW 10.58.090 unconstitutionally violates the separation of powers doctrine; and (2) Kipp has failed to show that the trial court abused its discretion in admitting the evidence under the common scheme or plan exception to ER 404(b)?

4. Whether Kipp's claim that the trial court abused its discretion

in excluding the proposed testimony of Alan Tan must fail when: (1) Kipp failed to give timely notice of this witness and thus the trial acted well within its broad discretion in excluding the witness; and (2) Kipp suffered no prejudice from the exclusion of Mr. Tan's testimony because the proposed testimony was entirely cumulative?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

William Kipp was charged by amended information filed in Kitsap County Superior Court with two counts of rape of a child in the second degree and one count of child molestation in the second degree. CP 8. Following a jury trial, Kipp was found guilty of the charged offenses and the trial court then imposed a standard range sentence. CP 73. This appeal followed.

B. FACTS

i. Pretrial Motions regarding RCW 10.58.090 and ER 404(b)

The charges in the present case alleged that Kipp committed the crimes of rape of a child and child molestation against a minor victim named D.G.T. CP 8. Prior to trial the State gave notice that it intended to introduce evidence that Kipp had previously molested D.G.T.'s sister, J.M.C. under

similar circumstances. CP 26. Kipp objected, and both parties submitted briefs on the issue. CP 45, CP (TBD).¹

The trial court ultimately ruled that the testimony of J.M.C. was admissible under both the common scheme or plan exception to ER 404(b) and under RCW 10.58.090. RP 98-107. The trial court first discussed RCW 10.58.090 and rejected Kipp's argument that the statute was unconstitutional. Specifically, the trial court rejected Kipp's claim that the statute violated the separation of powers doctrine. RP 99-101. The court also rejected the claim that the statute conflicted with ER 404(b), stating,

It seems to me that the all the statute does is add another category to 404(b) with defined factors for the Court. I don't see that as a conflict, I see it as an expansion.

RP 101. The trial court also rejected Kipp's claim that the statute violated the due process clause, noting that the statute's explicit requirement that a trial court apply an ER 403 analysis satisfied any due process challenge. RP 101-02. The trial court then applied the factors outlined in the statute and found that the State's proposed evidence involved similarly aged victims with a similar relationship to Kipp, and the type of touching involved was also

¹ The State filed a brief entitled "State's Reply to Defense Response Re: Admissibility of Prior Sex Acts Under RCW 10.58.090." As Kipp did not designate this document as a clerk's papers, the State has filed a Supplemental Designation of Clerk's Papers including this document. The State's brief below argued that the evidence at issue was admissible as common scheme or plan evidence under ER 404(b) and was also admissible under RCW 10.58.090.

similar. RP 102-03. The court also noted that neither case involved weapons or other forms of abuse, and that both cases involved a similar manner of gaining access to the victims and in both cases the abuse took place either in Kipp's residence or at the home of the childrens' grandparents. RP 103. Next, when addressing the "necessity" of the evidence, the court noted that because of the private nature of such charges (as there were no witnesses), the present case presented a "he said/she said" situation, thus there evidence was necessary under the statute.

The court then addressed the final factor, whether the probative value substantially outweighs the danger of unfair prejudice, stating:

And we both know this is where the rubber hits the road. This is the analysis that matters, not what similarities we can draft.

It seems to me in this case that we have striking similarities in one point. We've got the two sisters, the two nieces, in the grandfather's house experiencing generally similar touching by the same man. The unfair prejudice hadn't been identified other than the fact that there is this thread that goes through people's minds, both jurors and defense counsels that where there's smoke there's fire, and that's the real prejudice. That's the real possibility of prejudice.

I trust juries, and if I instruct them not to use it for that purpose, I have to believe that they follow my instructions and don't use it for that purpose.

I am going to allow the State to bring in the evidence from [J.M.C.] under 10.58.090.

RP 105-06.

The trial court then addressed ER 404(b), stating,

Under 404(b) the evidence of the act would not be admissible to prove the character. And the State says it is a common scheme or plan. The defense argues that we've got 14 or 15 years separating the acts; and then how in the world can they be a common scheme or plan?

And I think what we're looking at here is not so much the period of time that passed, but – and I say this with all respect to Mr. Kipp, if this case goes in his favor – but it is the time of a child's life when she is approached by someone who's taking advantage of her. And in this case it seems to me that the most striking similarity, as I said before, is the age of the girls and their relationship to Mr. Kipp. That, I think, is enough to make these cases similar enough to pass muster under 404(b) as a common scheme or plan as a signature, if you will, of the alleged predator.

I agree with Mr. McFadden that “somewhat similar” is not enough to find a common scheme or plan, but in this case on reviewing the record, I think there is enough similarities to survive a 404(b) analysis, and I will find the State has both supports for its proffered evidence.

RP 106. The trial court then instructed counsel that it wanted limiting instructions regarding the 404(b) evidence. RP 106-07.

ii. Pretrial Motion to Suppress

Prior to trial, Kipp filed a motion to suppress a tape or CD that contained a conversation between Kipp and Joseph Tan, the father of the D.G.T. CP 38. Kipp's argument was that the tape recording of the conversation violated Washington's Privacy Act found in RCW 9.73.030. CP 38-44. Specifically, Kipp claimed that the recording was made without

his knowledge and that the conversation was a “private” conversation. CP 38-44. Kipp also argued that the conversation took place in an upstairs kitchen in a private home, and that Kipp and Mr. Tan were alone in the room at the time of the conversation, although they had passed another person (Mr. Tan’s son) on their way up the stairs to the kitchen. RP 48, 56-57, 61-62. Kipp also argued that subject of the conversation was “an intimate matter,” between two family members and that this was a “long and involved conversation.” RP 57, 61.

The State, in both its written brief and in the argument presented to the court, did not contest the basic factually summary presented by Kipp regarding how and where the tape was made. See CP 63-68², RP 58-60. The State did, however, contest the claim that this was a “private” conversation for purposes of the Privacy Act. RP 58, CP 66-67.

The State argued that Washington Courts have recognized that in almost all cases the defendant will argue that the conversation is private, and that, because of this, the courts have identified several factors that are to be considered in deciding whether a particular conversation is private. CP 66, RP 59. Those factors are the duration and subject matter of the conversation, the location of the conversation and the potential presence of a third party,

² The only factual circumstance that the State contested was Kipp’s claim that Mr. Tan was believed to be armed with a knife” during the conversation. CP 64.

and the role of the non-consenting party and the relationship to the consenting party. CP 66, RP 59. The State argued that the nature of the conversation, and the relationship of the parties, was clear from the content of the recording itself: that is, that the conversation involved one man accusing another man of molesting his daughters. CP 67, RP 59-60. Given this fact, a reasonable person would not expect the contents of the conversation to remain private. RP 59-60. In addition the location was such that a third party could have walked in. CP 67, RP 59-60.

The trial listened to the contents of the tape and then gave the following ruling:

The question before me is whether it is a private conversation. And both parties have given me the factors outlined in the case law I review when determining whether this was a private conversation or not.

The first factor is the nature and duration of the conversation. And on this factor I think it splits equally between the parties in terms of their position. It is a confrontation by a father to someone he believes has molested his daughters. Whether that belief is true or not, it is his belief. And that sort of confrontation is not the kind of thing that remains private. However, it was also long and isn't the these offhand remarks to stranger that we see. So I think that factor, balancing, we've got almost identical considerations to both sides.

The second factor is where it took place. And again, we've got a bit of a split. Mr. McFadden is correct, it took place in a private residence, but it did take place in a common area, the kitchen. It didn't take place in a bedroom or basement, anything. And I will accept Mr. McFadden's description of the events as would have been testified to by

Mr. Kipp.

I'll accept the offer of proof that it did take place in this kitchen and that Mr. Tan's son has left. But the issue is the potential for a third person to come in. And I think that potential is much higher in this situation in a kitchen than it would be in a different place.

The third factor that is outlined by the courts is the role of the nonconsenting party and his or her relationship to the consenting party. And again, we've got a couple of things going on; they are family members, and typically that would be private. But they weren't talking as family members; they weren't talking as brothers-in-law. They were talking as father of a daughter and the accused molester. And I think that's really the nature of the relationship. The State's argument that a reasonable person in the defendant's position should have expected or be reasonably expected to think that this would make its way to the authority is a good one. What tips me though on this analysis is something that was on the tape that isn't covered by one of the factors, but is certainly the expectation and intent of the parties through the language of the parties. At the very end of the tape, as they are kind of winding down the conversation, Mr. Kipp says to Mr. Tan – and I might not have it exactly correct because of the quality of the tape, but he says: Let's go somewhere and talk about this, just the two of us. That tells me that he is looking for a private conversation and what was going on ahead of time wasn't.

I am going to allow the jury to hear the tape.

RP 62-64.

iii. Evidence at Trial

At trial, D.G.T. testified that Kipp is her uncle. RP 137. When D.G.T. was 12 years old she was living at a residence with brothers, her father, and her grandparents. RP 137-38. D.G.T. explained that Kipp was

around periodically, as he was in the Navy at the time and would go “from place to place.” RP 137.

D.G.T. described several instances where Kipp molested her at the residence. RP 138-42. Specifically, D.G.T. described an instance where Kipp put his hand inside her underwear and touched her vagina for several minutes. RP 139-40.³

D.G.T. also described another occasion when Kipp came to the house while D.G.T. was taking a shower. RP 141. On this occasion D.G.T.’s brothers and grandfather were not at home and her grandmother was sleeping. RP 140-41. When D.G.T. got out of the shower she found Kipp was in the house. RP 141. D.G.T. then described that on that occasion Kipp inserted his finger into her vagina. RP 140-41. D.G.T. tried to push him away because she didn’t want it to happen, and Kipp then got mad. RP 142. Kipp kept trying to touch her, but D.G.T. kept pushing Kipp away. RP 142. Kipp eventually stopped when D.G.T.’s grandfather came home. RP 142.

D.G.T. also stated that there were occasions when she would stay with Kipp and his family, as D.G.T. was close with her cousin and used to spend the night with her. RP 142-43. When D.G.T. would spend the night at

³ D.G.T. stated that on this occasion Kipp rubbed her vagina without penetration. RP 140.

Kipp's house she would sleep alone in her cousin's room and her cousin would sleep in another room. RP 143. D.G.T. stated that while she was sleeping, Kipp would come into the room and insert his finger into her vagina. RP 143-44. D.G.T. stated that her response was to get up and go to the bathroom and wait for Kipp to leave. RP 144.

D.G.T. also said that Kipp digitally penetrated her "a lot," approximately two to three times a week, while Kipp was around and not out to sea. RP 142, 159. D.G.T. further stated that when these events were occurring Kipp would tell her to be quiet and told her not to tell her aunt. RP 144. D.G.T. explained that she didn't tell anyone about these events because she was embarrassed, but that she eventually told her sister about the abuse. RP 144-45.

At trial, the State also presented testimony from D.G.T.'s older sister, J.M.C., who was 28 years old at the time of trial. RP 173-74. J.M.C. testified that Kipp was her uncle as well, as her is married to her aunt. RP 174. J.M.C. explained that Kipp molested her on a number of occasions, beginning when J.M.C. was 15 years old. RP 174-77. J.M.C. described a number of instances that occurred both at her grandparents home and at Kipp's residence, and involved touching of her breast and vagina, as well as oral sex. RP 175-76. J.M.C. stated that these events occurred over approximately a twelve-month period of time. RP 176. J.M.C. stated that

she didn't report the abuse because she thought it was her fault and because Kipp was her aunt's husband. RP 177. Eventually, however, J.M.C told her husband about the abuse. RP 177. J.M.C explained that when she found out that her sister was spending the night at Kipp's house she was worried that maybe "it was happening to her." RP 177.

Joseph Tan, the father of D.G.T. and J.M.C., also testified at trial. RP 205. Mr. Tan is also Kipp's brother in law. RP 205. Mr. Tan explained that after he had learned of what had occurred between his daughters and Kipp, he confronted Tan about those events during a conversation that took place in the kitchen of Mr. Tan's parents' house. RP 206. Mr. Tan recorded the conversation he had with Kipp onto a cassette tape. RP 206-07. The recording of the conversation was played at trial. RP 207-13.

At the beginning of the taped conversation Mr. Tan tells Kipp that his daughters had told him that Kipp had molested them. RP 207. Mr. Tan also stated, "It's not okay to do it one time, you know, but it happened twice." RP 208. Kipp responded,

I know what you are saying. I know what you are saying, and it was – they were both asking me questions, curious about thing.

RP 208. Kipp later stated that he wanted to explain things and the following exchange then took place,

Mr. Kipp: It's hard to – it's hard to explain, because everything that happened back then, what was going on back then, and all I can say is just like –

Mr. Tan: You didn't think about it, what you were doing?

Mr. Kipp: No. I did it, and it stopped, and it hasn't started again, and that was the end of it.

Mr. Tan: Yeah, but it happened to [J.M.C.]. it happened to [D.G.T.]. What do you think about that? Have you got a sickness or something like that? Are you sick?

Mr. Kipp: No. Like I said, because both of them – like with [J.M.C.], she actually started with me first. She started with me.

Mr. Tan: Yeah, but you are an adult.

Mr. Kipp: I know, I know.

Mr. Tan: You are an adult.

Mr. Kipp: Joe-Joe, Joe-Joe, I was 19 at the time. I wasn't an adult. I was a kid with [J.M.C.]. I was still a kid, and she started with me.

Mr. Tan: Yeah, but you know, [J.M.C.] is only what, 10 years old, 15, when that thing happened?

Mr. Kipp: 15, yeah.

Mr. Tan: And –

Mr. Kipp: I was four years older than her.

Mr. Tan: [D.G.T.] is ten years old when that happened. That year you are old enough to realize that, right?

Mr. Kipp: But – [D.G.T.], yeah. But like I said, it was just there was a lot going on at the time. Both – she was – like I said, it stopped, and it hasn't since.

RP 208-10.

Mr. Tan later asked if Kipp understood that this was a crime, and Kipp replied, "Yeah." RP 210. Kipp also stated, "It's done. It was something

stupid. It happened a long time ago. It is done.” RP 212. The taped conversation ends with the following exchange:

Mr. Kipp: No, no. No, like I say, when we get a chance, just you and I, we will go somewhere and we’ll talk, try to –

Mr. Tan: Okay.

Mr. Kipp: --explain everything.

Mr. Tan: Okay.

RP 213.

III. ARGUMENT

- A. **KIPP’S CLAIM THAT THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING HIS TAPED STATEMENT MUST FAIL BECAUSE THE CONVERSATION WAS NOT “PRIVATE” AS THE TERM IS USED IN THE PRIVACY ACT BECAUSE KIPP COULD NOT HAVE REASONABLY EXPECTED THAT HIS CONVERSATION WITH THE FATHER OF HIS VICTIM WOULD REMAIN PRIVATE AND BECAUSE KIPP’S OWN WORDS DEMONSTRATED THAT HE UNDERSTOOD THAT THE CONVERSATION WAS NOT PRIVATE.**

Kipp argues that the trial court erred in admitting the taped conversation between Kipp and Mr. Tan. App.’s Br. at 14. This claim is without merit because Kipp has failed to show that the trial court abused its discretion as the taped conversation was not a “private” conversation for purposes of Washington’s Privacy Act.

A trial court's admission of evidence is reviewed for abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). An appellate court is not to disturb a trial court's rulings on the admissibility of evidence absent an abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). "Discretion is abused if it is exercised on untenable grounds or for untenable reasons." *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002) (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

Washington's Privacy Act prohibits recording of any:

Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

RCW 9.73.030(1)(b). The statute clearly prohibits only the recording of *private* conversations. *Lewis v. State, Dept. of Licensing*, 157 Wn.2d 446, 458, 139 P.3d 1078 (2006)(emphasis in original).

The Act does not define the term "private." The Washington Supreme Court, however, has turned to Webster's Third New International Dictionary (1969) for the ordinary and usual meaning of the term private:

"belonging to one's self ... secret ... intended only for the persons involved (a conversation) ... holding a confidential relationship to something ... a secret message: a private communication ... secretly: not open or in public."

State v. Faford, 128 Wn.2d 476, 484, 910 P.2d 447 (1996), *citing Kadoranian v. Bellingham Police Department*, 119 Wn.2d 178, 190, 829 P.2d 1061 (1992) (*quoting State v. Forrester*, 21 Wn. App. 855, 861, 587 P.2d 179 (1978), *review denied*, 92 Wn.2d 1006 (1979)); *State v. Christensen*, 153 Wn.2d 186, 192-93, 102 P.3d 789 (2004), *citing Webster's Third New International Dictionary* (1969), *quoted in State v. Townsend*, 147 Wn.2d 666, 673 57 P.3d 255 (2002).

Furthermore, the Washington Supreme Court has held that the issue of whether a conversation qualifies as “private” is a question of fact determined by the intent or reasonable expectations of the parties. *Faford*, 128 Wn.2d at 484; *Kadoranian*, 119 Wn.2d at 19; *Clark*, 129 Wn.2d at 225. The Washington Supreme Court has primarily focused on the subjective expectations of the parties to the conversation: was the information conveyed in the disputed conversations intended to remain confidential between the parties? *Faford*, 128 Wn.2d at 484; *Kadoranian*, 119 Wn.2d at 190. Thus, the Court has stated that a communication is private (1) when parties manifest a subjective intention that it be private and (2) where that expectation is reasonable. *Christensen*, 153 Wn.2d at 193; *Townsend*, 147 Wn.2d at 673. The Washington Supreme Court, however, has stated that the “inquiry does not stop there because any defendant will contend that his or her conversation was intended to be private,” and thus the court is must also “look to other

factors bearing upon the reasonable expectations and intent of the participants.” *State v. Clark*, 129 Wn.2d 211, 225, 916 P.2d 384 (1996).

Factors bearing on the reasonableness of the privacy expectation include the duration and subject matter of the communication, the location of the communication and the potential presence of third parties, and the role of the nonconsenting party and his or her relationship to the consenting party. *Christensen*, 153 Wn.2d at 193; *Clark*, 129 Wn.2d at 225-27.

In the present case the trial court explained that the subject matter and the relationship between Kipp and Mr. Tan turned around the fact that the conversation involved Mr. Tan accusing Kipp of molesting his daughters. RP 63-64. Although there are no reported Washington cases involving this sort of fact pattern, there are cases that are somewhat analogous.

For instance, the Washington Supreme Court and the Court of Appeals have repeatedly held that conversations with police officers are not private. *Lewis v. State, Dept. of Licensing*, 157 Wn.2d 446, 460, 139 P.3d 1078 (2006), *citing Clark*, 129 Wn.2d at 226, 916 P.2d 384 (no reasonable expectation of privacy in a conversation with an undercover police officer when it “takes place at a meeting where one who attended could reveal what transpired to others.”); *State v. Bonilla*, 23 Wn. App. 869, 873, 598 P.2d 783 (1979) (“It would strain reason for Bonilla to claim he expected his

conversations with the police dispatcher to remain purely between the two of them.”); *State v. Flora*, 68 Wn. App. 802, 808, 845 P.2d 1355 (1992) (“Because the exchange [between a police officer and an arrestee during an arrest] was not private, its recording [by the arrestee] could not violate RCW 9.73.030 which applies to private conversations only.”); *see also Alford v. Haner*, 333 F.3d 972, 978 (9th Cir.2003), *rev'd on other grounds, Devenpeck v. Alford*, 543 U.S. 146, 125 S. Ct. 588, 160 L. Ed. 2d 537 (2004) (noting that *State v. Flora* established that a traffic stop was not a private encounter for purposes of the privacy act).

The basic notion behind these rulings is that it unreasonable for a person who is discussing a case with a police officer to expect that the conversation would remain private. Rather, a reasonable person would understand that the officer would report the contents of the conversation to others.

In this present case, the trial court reached a similar conclusion regarding the conversation at issue, noting that the nature of the conversation was a confrontation between a “father of a daughter and the accused molester,” and noted that “that sort of confrontation is not the kind of thing that remains private.” RP 63-64. In addition, the court noted that a

reasonable person in the defendant's position should have expected that the conversation would be reported to the authorities. RP 64.⁴

In addition, the trial court also relied on Kipp's own comments at the end of the tape where he suggested that he and Mr. Tan go somewhere, "just you and I," and talk about the allegations. Specifically, the tape contains the following exchange:

Mr. Kipp: No, no. No, like I say, when we get a chance, just you and I, we will go somewhere and we'll talk, try to –

Mr. Tan: Okay.

Mr. Kipp: --explain everything.

Mr. Tan: Okay.

RP 213. The trial court reasoned that this exchange demonstrated that Kipp reasonably understood that the conversation was not "private" as that term is use in the Privacy Act. Rather, the court held that this passage demonstrated the "expectation and intent of the parties through the language of the parties," and that,

That tells me that he is looking for a private conversation and what was going on ahead of time wasn't.

⁴ While it is possible that Kipp subjectively hoped that the conversation would remain private, this wish alone does not make the conversation private in terms of the Privacy Act, because the wish is simply not reasonable given the fact that conversation revolved around Kipp's molestation of Mr. Tan's daughters. Under Washington law, a defendant must show, not that he hoped or wished that a conversation would remain private, but rather he must show that he reasonably expected the conversation would remain private. *Christensen*, 153 Wn.2d at 193; *Townsend*, 147 Wn.2d at 673. Kipp has failed to make such a showing, given the nature of the conversation.

RP 62-64. This analysis was proper, as the Washing Supreme Court has explained that a court is to “look to other factors bearing upon the reasonable expectations and intent of the participants.” *Clark*, 129 Wn.2d at 225.

Given all of these facts, the trial court did not abuse its discretion in denying Kipp’s motion to suppress because the evidence showed that the nature of the conversation was such that a reasonable person would have understood that the contents of the conversation would not remain private and because Kipp’s own words on the tape demonstrated that he understood that the conversation was not “private” as that term is used in the Privacy Act. Kipp’s claim, therefore, must fail.

B. THE TRIAL COURT DID NOT ERR IN FAILING TO HOLD AN EVIDENTIARY HEARING BECAUSE: (1) KIPP FAILED TO SPECIFICALLY OBJECT TO THE TRIAL COURT’S FAILURE TO HOLD A FULL EVIDENTIARY HEARING BELOW, THEREBY WAIVING ANY SUCH CLAIM ON APPEAL; AND BECAUSE (2) THE TRIAL COURT ACCEPTED KIPP’S VERSION OF THE FACTS IN REACHING ITS DECISION, THUS THERE WAS NO MEANINGFUL FACTUAL DISPUTE NECESSITATING AN EVIDENTIARY HEARING.

Kipp next claims that the trial court erred in failing to hold an evidentiary hearing. App.’s Br. at 10. This claim is without merit because

Kipp has failed to show that the trial court erred.

ER 104 provides that preliminary questions concerning the admissibility of evidence shall be determined by the court and that in making its determination, the trial court “is not bound by the rules of evidence.” ER 104. Furthermore, Kipp has cited no authority for his claim that a trial court must hold an evidentiary hearing prior to determining questions of the admissibility of evidence. Rather, the Washington Supreme Court has specifically held that evidentiary hearings are not required when a trial court is deciding issues of admissibility of evidence. *See, e.g., State v. Kilgore*, 147 Wn.2d 288, 295, 53 P.3d 974 (2002).

Furthermore, although Kipp mentioned below that he was prepared to offer testimony if needed, the record does not demonstrate that Kipp ever specifically requested an evidentiary hearing or that the trial court ever denied such a specific request. Thus, Kipp failed to properly preserve this issue for appeal, as arguments not raised in the trial court will not be considered on appeal unless they concern a manifest error affecting a constitutional right. *See, RAP 2.5(a); State v. Sengxay*, 80 Wn. App. 11, 15, 906 P.2d 368 (1995) (failure to timely object at trial waives appellate review of non-constitutional issues).

In addition, even if Kipp had requested an evidentiary hearing below or if the trial court erred in failing to hold an evidentiary hearing, any error in this regard would be harmless because the trial court in the present case accepted the facts as outlined by Kipp. Specifically, the trial court noted that “I will accept Mr. McFadden’s description of the events as would have been testified to by Mr. Kipp” and “I’ll accept the offer of proof that it did take place in this kitchen and that Mr. Tan’s son has left.” RP 62-64. Any need for an evidentiary hearing, therefore, was obviated by the fact that the trial court accepted Kipp’s version of the events.

The only claim made by Kipp that the trial court did not accept was Kipp’s claim that the conversation was “private.” This conclusory claim, however, was the ultimate question and the trial court was not required to accept Kipp’s claim in this regard. Rather, the trial court was required to look at the evidence and decide whether the facts demonstrated that the conversation was “private” as that term is used in the Privacy Act.⁵

In addition, the Washington Supreme Court has noted that a defendant’s claim that a conversation was private is not controlling. Rather,

⁵ Furthermore, Washington Courts have even explained that when the facts are not meaningfully in dispute, the issue of whether a conversation is private may even be decided as a question of law. *State v. Christensen*, 153 Wn.2d 186, 192, 102 P.3d 789 (2004); *State v. Modica*, 164 Wn.2d 83, 87, 186 P.3d 1062 (2008); *State v. Townsend*, 147 Wn.2d 666, 673, 57 P.3d 255 (2002) (citing *State v. Clark*, 129 Wn.2d 211, 225, 916 P.2d 384 (1996)). Thus, there is no support either in the Privacy Act or ER 104 requiring the trial court to hold an evidentiary hearing before determining the admissibility of evidence.

“any defendant will contend that his or her conversation was intended to be private,” and thus a court must “look to other factors bearing upon the reasonable expectations and intent of the participants.” *Clark*, 129 Wn.2d at 225.⁶

As the trial court accepted Kipp’s factual representations regarding the circumstances of the conversation, and because the court listened to the recording of the conversation itself, the trial court did all that it was required to do in deciding whether the evidence was admissible. Kipp’s claim, therefore, must fail.

C. KIPP’S CLAIM THAT THE TRIAL COURT ERRED IN ADMITTING EVIDENCE REGARDING KIPP’S MOLESTATION OF J.M.C. UNDER RCW 10.58.090 AND ER 404(B) MUST FAIL BECAUSE: (1) KIPP HAS FAILED TO SHOW THAT RCW 10.58.090 UNCONSTITUTIONALLY VIOLATES THE SEPARATION OF POWERS DOCTRINE; AND (2) KIPP HAS FAILED TO SHOW THAT THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING THE EVIDENCE UNDER THE COMMON SCHEME OR PLAN EXCEPTION TO ER 404(B).

Kipp next claims that the trial court erred in admitting the evidence

⁶ Finally, Kipp complains that the trial court did not hold an evidentiary hearing on whether Kipp believed that Mr. Tan was armed or that Kipp feared Mr. Tan. App.’s Br. at 13. It is true that the trial court did not address this contention by Kipp in its oral ruling, but this is not surprising since Kipp has failed to explain why these facts are relevant to a factual determination under the Privacy Act. While a claim that a statement is made under duress or the like might be relevant to whether a statement is reliable, such matters are not relevant to whether the conversation was private as that term is used in the Privacy Act.

regarding J.M.C. under RCW 10.58.090 and ER 404(b). Specifically, Kipp argues that RCW 10.58.090 unconstitutionally violates the separation of powers doctrine. App.'s Br. at 40. In addition, Kipp claims that the trial court erred in admitting the evidence under ER 404(b). App.'s Br. at 27, 48. These claim are without merit because Kipp has failed to meet his substantial burden of showing that the statute is unconstitutional and because Kipp has failed to show that the trial court abused its discretion in admitting the evidence under the common scheme or plan exception to ER 404(b).

1. Kipp has failed to show that RCW 10.58.090 unconstitutionally violates the separation of powers doctrine.

Constitutional challenges to legislation are questions of law that are reviewed de novo. *City of Fircrest v. Jensen*, 158 Wn.2d 384, 389, 143 P.3d 776 (2006). A statute is presumed constitutional, and the party challenging the legislation bears the burden of proving the legislation is unconstitutional beyond a reasonable doubt. *State ex rel. Peninsula Neighborhood Ass'n v. Dep't of Transp.*, 142 Wn.2d 328, 335, 12 P.3d 134 (2000).

The statute in question in the present case is RCW 10.58.090, which provides in part:

(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 ER 404 (b), if the evidence is not

inadmissible pursuant to ER 403.

(2) In a case in which the state intends to offer evidence under this rule, the attorney for the state shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

...

(4) For purposes of this section, “sex offense” means:

- (a) Any offense defined as a sex offense by RCW 9.94A.030;
- (b) Any violation under RCW 9A.44.096 (sexual misconduct with a minor in the second degree); and
- (c) Any violation under RCW 9.68A.090 (communication with a minor for immoral purposes).

(5) For purposes of this section, uncharged conduct is included in the definition of “sex offense.”

(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.

Kipp advances several arguments as to why RCW 10.58.090 is unconstitutional. First, Kipp appears to argue that the statute is an unconstitutional intrusion upon the Courts' rule-making authority by the legislature. App.'s Br. at 42. The Court of Appeals, however, has recently rejected this argument.

In *State v. Scherner*, 153 Wn. App. 621, 225 P.3d 248 (2009) the defendant argued that RCW 10.58.090 violated the separation of powers doctrine and invaded "the judicial branch's inherent power to promulgate rules of evidence, infringing on the court's independence and integrity." *Scherner*, 153 Wn. App. at 643. The Court of Appeals, however, disagreed. The *Scherner* court first noted that, "the three branches are not hermetically sealed and some overlap must exist." *Scherner*, 153 Wn. App. at 643, quoting *City of Fircrest v. Jensen*, 158 Wn.2d 384, 393, 143 P.3d 776 (2006). In addition, the Court noted that under Washington law the Supreme Court and the legislature share the authority to enact evidence rules, and the legislature's authority to enact rules of evidence has long been recognized by the Supreme Court. *Scherner*, 153 Wn. App. at 643-44, citing *Fircrest*, 158 Wn.2d at 394; *State v. Pavelich*, 153 Wash. 379, 279 P. 1102 (1929); *State v. Sears*, 4 Wn.2d 200, 103 P.2d 337 (1940); *State v. Fields*, 85 Wn.2d 126,

128-29, 530 P.2d 284 (1975).⁷

Furthermore, the *Scherner* court addressed any potential tension between RCW 10.58.090 and ER 404(b) by stating that, under Washington law, where an apparent conflict between a court rule and a statutory provision can be harmonized, both are given effect if possible, and that the “inability to harmonize a court rule with a statute occurs only when the statute directly and unavoidably conflicts with the court rule.” *Scherner*, 153 Wn. App. at 644, citing *State v. Ryan*, 103 Wn.2d 165, 178, 691 P.2d 197 (1984); *Emwright v. King County*, 96 Wn.2d 538, 543, 637 P.2d 656 (1981); *Washington State Council of County and City Employees v. Hahn*, 151 Wn.2d 163, 169, 86 P.3d 774 (2004). In addition, the court noted that although ER 404(b) bans propensity evidence if it is offered to prove action in conformity therewith, the rule itself sets out a nonexclusive list of exceptions. RCW 10.58.090, in turn, works to expand the nonexclusive list of “other purposes” for which evidence of prior acts may be admitted. *Scherner*, 153 Wn. App. at 644. And, as with ER 404(b), the admission of evidence under the statute is still subject to the court’s ER 403 balancing test. From these facts the court concluded that,

⁷ The *Scherner* court also noted that, “The adoption of the rules of evidence is a legislatively delegated power of the judiciary. Therefore, rules of evidence may be promulgated by both the legislative and judicial branches.” *Scherner*, 153 Wn. App. at 643-44, citing *Fircrest*, 158 Wn.2d at 394.

RCW 10.58.090 is consistent with the direction of case law allowing prior sexual misconduct evidence in sex offense cases. More significantly, the legislative amendment permits but does not ever re-quire a court to admit evidence of prior sexual misconduct. Rather, admission is subject to the court establishing that the evidence is relevant and that the probative value outweighs the risk of unfair prejudice under the modified ER 403 balancing test.

In sum, RCW 10.58.090 evidences the legislature's intent that evidence of sexual offenses may be admissible, subject to the modified ER 403 balancing test. But the legislation also leaves the ultimate decision on admissibility to the trial courts based on the facts of the cases before them. This is consistent with past legislative amendments to the rules of evidence and does not infringe on a core function of the judiciary.

There is no violation of the separation of powers between the legislative and judicial branches of government.

Schnerer, 153 Wn. App. at 648.

Similarly, in *State v Gresham*, 153 Wn. App. 659, 673, 223 P.3d 1194 (2009), the Court of Appeals rejected a defendant's argument that the RCW 10.58.090 invaded the judiciary's prerogative to promulgate rules of evidence. In *Gresham* the court noted that the statute was permissive, as it preserved the court's ability to exclude evidence under ER 403, and thus,

With this language the legislature recognized the court's ultimate authority to determine what evidence will be considered by the fact finder in any individual case. Since the statute permits, but does not mandate, the admission of evidence of past sex offenses, it does not circumscribe a core function of the courts.

Gresham, 153 Wn. App. at 670.

As Kipp's argument in the present case mirrors the arguments of the defendants in *Scherner* and *Gresham*, this Court should reject Kipp's arguments for the reasons outlined by the *Scherner* and *Gresham* courts.⁸

2. *Kipp has failed to show that the trial court abused its discretion in admitting the evidence under the common scheme or plan exception to ER 404(b).*

A trial court's ER 404(b) determination is reviewed for an abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Under ER 404(b), evidence of prior bad acts is inadmissible to prove character in order to show conformity with them. ER 404(b); *State v. Kilgore*, 147 Wn.2d 288, 291-92, 53 P.3d 974 (2002). But such evidence may be admissible for other purposes such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident. ER 404 (b); *State v. Lough*, 125 Wn.2d 847, 854-55, 889 P.2d 487 (1995); *Kilgore*, 147 Wn.2d at 292, 53 P.3d 974.

Evidence of prior bad acts may be admitted to prove a common scheme or plan. *Lough*, 125 Wn.2d at 852. In *Lough*, our Supreme Court

⁸ The *Scherner* court also rejected a due process challenge to RCW 10.58.090, noting first the statute was still subject to the court's ER 403 balancing test,

RCW 10.58.090 explicitly requires the trial court to conduct a modified ER 403 balancing test and prohibits admission of evidence of prior sex offenses where the risk of unfair prejudice is greater than the probative value of the evidence. Application of ER 403 in determining admissibility ensures that RCW 10.58.090 does not open the door to any and all propensity evidence in sex offense cases.

Scherner, 153 Wn. App. at 655.

noted that the common scheme or plan exception to ER 404(b) arises “where several crimes constitute constituent parts of a plan in which each crime is but a piece of the larger plan” or “when an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes.” *Lough*, 125 Wn.2d at 855. Furthermore, other acts are admissible to prove a crime if there is “such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations.” *Lough*, 125 Wn.2d at 860.

Similarly, when a defendant's previous conduct bears such similarity in significant respects to his conduct in connection with the crime charged as naturally to be explained as caused by a general plan, the similarity is not merely coincidental, but indicates that the conduct was directed by design. *Lough*, 125 Wn.2d at 860. To establish common design or plan for the purposes of ER 404(b), the evidence of prior conduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations. *Lough*, 125 Wn.2d at 860.

In the context of cases involving child molestation, Washington courts have upheld trial court orders that have admitted evidence of prior acts

under the common scheme or plan exception to ER 404(b). For instance, in *State v DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003), the defendant was charged with molesting a young girl who was the friend of another girl who was the defendant's neighbor. The defendant eventually hired the two girls to mow his lawn and clean his house, and during several of these visits he molested one of the girls. *DeVincentis*, 150 Wn.2d at 13-14. At trial, the State sought to admit evidence that several years earlier the defendant had molested a young girl (who was a friend of his daughter) and who had pent three or four evenings a week at DeVincentis' home. *DeVincentis*, 150 Wn.2d at 15. The trial court held that these prior bad acts were sufficiently similar to the charged crimes to show a common scheme or plan to molest young girls and were therefore admissible. *DeVincentis*, 150 Wn.2d at 15-16.

The Supreme Court affirmed, noting that the 404(b) evidence showed similarities to the charged offense. Specifically, the Supreme Court noted that the trial court had held that the evidence demonstrated a common scheme or plan:

The trial court explained that “the evidence involving [V.C.] is relevant to show that the defendant had devised a scheme to get to know young people through a safe channel, such as a friend of his daughter, or ... as a friend of the next-door neighbor girl...” RP at 221. This led to “greater familiarity occurring in his own home...” This plan allowed DeVincentis to bring the children into “an apparently safe but actually unsafe and isolated environment so that he could pursue his compulsion to have sexual contact with these ... prepubescent

or pubescent girls.” RP at 221. The girls were both between 10 and 13 years old.

DeVincentis, 150 Wn.2d at 22. In addition, the Supreme Court noted that the trial court had carefully balanced the probative value against the prejudicial effect, and held that the probative value of V.C.'s testimony outweighed the prejudicial effect. *DeVincentis*, 150 Wn.2d at 23.⁹

Finally, the Supreme Court noted that the trial court discussed a limiting instruction, despite the fact that it was a bench trial, reflecting the court's understanding of the limited purpose for which it would use V.C.'s testimony. *DeVincentis*, 150 Wn.2d at 23. The Supreme Court, therefore, affirmed the trial court's decision admitting the evidence and held that, “In sum, the trial court did not abuse its discretion when it admitted V.C.'s testimony under ER 404(b) because it meticulously applied the law and had

⁹ Specifically, the Supreme Court noted that:

“The trial court then balanced the probative value against the prejudicial effect. The trial court recognized that substantial probative value is needed to outweigh the prejudicial effect of ER 404(b) evidence. Oral argument on this issue before the trial court reflected that court's understanding of relevant factors “relevant factors used in balancing, such as the age of the victim, the need for the evidence, the secrecy surrounding sex abuse offenses, ‘the vulnerability of the victims, the absence of physical proof of the crime, degree of public opprobrium associated with the accusation, ... and the general lack of confidence in the ability of a jury to assess the credibility of child witnesses.’ RP at 130. After balancing these factors, the trial court found that the testimony of V.C. was the main evidence corroborating the testimony of K.S. No less inflammatory documentation or corroboration that the crime occurred was available. Although K.S. was old enough to clearly testify, on balance the probative value of V.C.'s testimony outweighed the prejudicial effect.”

DeVincentis, 150 Wn.2d at 23.

tenable grounds and reasons for its decision.” *DeVincentis*, 150 Wn.2d at 23-24.

Numerous other Washington courts have made similar holdings in child sex abuse cases. For instance, in *State v. Kennealy*, 151 Wn. App. 861, 887-89, 214 P.3d 200 (2009), this court upheld the trial court’s admission of evidence regarding the defendant’s prior acts admitted to show a common scheme or plan even though defendant argued that the prior incidents differed from the charged incidents. In *Kennealy* the defendant was charged with several sex offenses stemming from his sexual abuse of several children who were staying in the same apartment complex as the defendant. *Kennealy*, 151 Wn. App. at 868-69. At trial, the court had admitted evidence of Kennealy’s uncharged prior misconduct involving his daughter and three of his nieces, finding that the evidence showed that Kennealy had a common scheme or plan to molest children. *Kennealy*, 151 Wn. App. at 875. The trial court found the incidents were “remarkably similar and seemed consistent” with the evidence in the case before it; it admitted the statements for the limited purpose of proving a common scheme or plan to sexually molest young children, not to prove character. *Kennealy*, 151 Wn. App. at 875.

On appeal, the defendant in *Kennealy* argued that the prior incidents of sexual misconduct were different from the current charges because they each involved close relatives, the locations differed, and they did not involve

gifts or enticements, as had been the case in the charged offense. *Kennealy*, 151 Wn. App. at 888-89. This Court, however, held that although there were some differences in the prior acts (and the nature of the touching involved was substantially different in at least one of the cases) the incidents were still substantially similar and showed the defendant's "design or pattern to gain the trust of children between the ages of 5 and 12 to allow him access to the children in order to sexually molest them." *Kennealy*, 151 Wn. App. at 889.

Similarly, *State v. Baker*, 89 Wn. App. 726, 950 P.2d 486 (1997), the Court of Appeals also upheld a trial court's admission a defendant's prior sexual abuse of a victim. In *Baker*, the defendant was charged with having molested his girlfriend's daughter. Specifically, the allegation was that the defendant held a "slumber party" in his camper with his girlfriend's three daughters. The victim went to sleep in a bed with the defendant and awoke later when she felt the defendant rubbing her "privates" through her clothes. *Baker*, 89 Wn. App. at 729. At trial the State sought to admit testimony about the defendant's other alleged assaults on sleeping children to show a common scheme or plan to sexually assault sleeping children. In particular, the State sought to admit testimony from the defendant's daughter that when she was a child she visited the defendant as a child, the defendant would sleep in bed with her and she would awaken during the night with her underwear pulled down and his hand between her legs. *Baker*, 89 Wn. App.

at 730. The trial court admitted the evidence, finding that it showed that the touching of charged victim was part of a common scheme or plan and was not an accident, that the abuse of sleeping children was similar to the drugging of victims in Lough because the vulnerable state of the victims created a diminished ability to describe what occurred, and that its relevance outweighed any unfair prejudice. *Baker*, 89 Wn. App. at 730.

The Court of Appeals in *Baker* ultimately affirmed the trial court's admission of the ER 404(b) evidence, noting that the "strong similarities in the relationships, the ages, the scenario, and the touchings described by [the victims were] indicative of design rather than coincidence." *Baker*, 89 Wn. App. at 733-34. In addition, the Court noted that,

After conducting careful and correct pretrial procedures, the court gave similarly careful and thoughtful consideration to the posture of the parties' evidence and theories and reached well-reasoned conclusions. The trial court also minimized the prejudicial impact by giving the limiting instruction twice and by excluding other testimony that was less probative. The trial court did not abuse its discretion in determining that the evidence's probative value out-weighed its prejudicial effect.

Baker, 89 Wn. App. at 736-37.

In the present case, the testimony from both D.G.T. and J.M.C. was remarkably similar. Both described that Kipp was there uncle and that he had molested them both at his own residence and at the residence of the girls'

grandparents. Both also described that the defendant molested them by touching them without actually engaging in sexual intercourse. Although the events occurred years apart, the events occurred when the victims were of a similar age (12¹⁰ and 15 years old, respectively). Thus, the trial court noted,

And I think what we're looking at here is not so much the period of time that passed, but – and I say this with all respect to Mr. Kipp, if this case goes in his favor – but it is the time of a child's life when she is approached by someone who's taking advantage of her. And in this case it seems to me that the most striking similarity, as I said before, is the age of the girls and their relationship to Mr. Kipp. That, I think, is enough to make these cases similar enough to pass muster under 404(b) as a common scheme or plan as a signature, if you will, of the alleged predator.

I agree with Mr. McFadden that “somewhat similar” is not enough to find a common scheme or plan, but in this case on reviewing the record, I think there is enough similarities to survive a 404(b) analysis, and I will find the State has both supports for its proffered evidence.

RP 106.

Given these facts, the trial court did not abuse its discretion in admitting the evidence regarding J.M.C., as the “strong similarities in the relationships, the ages, the scenario, and the touchings described by the victims were indicative of design rather than coincidence.” *Baker*, 89 Wn. App. at 733-34. Furthermore, the record demonstrates that the trial court carefully balanced the probative value against the danger of unfair prejudice

¹⁰ See CP 8.

and gave the appropriate limiting instruction. See RP 105-07, CP (TBD).¹¹

For all of these reasons, Kipp has failed to show that the trial court abused its discretion.

D. KIPP'S CLAIM THAT THE TRIAL COURT ABUSED ITS DISCRETION IN EXCLUDING THE PROPOSED TESTIMONY OF ALAN TAN MUST FAIL BECAUSE: (1) KIPP FAILED TO GIVE TIMELY NOTICE OF THIS WITNESS AND THUS THE TRIAL ACTED WELL WITHIN ITS BROAD DISCRETION IN EXCLUDING THE WITNESS; AND (2) KIPP SUFFERED NO PREJUDICE FROM THE EXCLUSION OF MR. TAN'S TESTIMONY BECAUSE THE PROPOSED TESTIMONY WAS ENTIRELY CUMULATIVE.

Kipp next claims that the trial court in excluding the testimony of Alan Tan. App.'s Br. at 30. This claim is without merit because the trial court acted well within its discretion and because Kipp suffered no prejudice

¹¹ The State has filed a Supplemental Designation of Clerk's papers that includes the court's instruction to the jury. Instruction No. 6 states as follows:

"Evidence has been introduced of prior allegations of sexual assault or molestation that have not been charged in this case. This evidence has been admitted in the case for only a limited purpose. Evidence of these prior allegations cannot be considered to prove the character of the defendant in order to show that he acted in conformity therewith. The evidence may be considered by you only for the purpose of evaluating whether the defendant had a common scheme or plan for the crimes charged in this case. You may not consider it for any other purpose including to prove propensity to commit rape or molestation.

However, evidence of prior allegation of sexual assault or molestation on its own is not sufficient to prove the defendant guilty of the crime charged in this 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 offenses charged in the Information. The defendant is not on trial for any act, conduct, or offense not charged in the Information."

as the proposed testimony was entirely cumulative.

The admission and exclusion of evidence are within the sound discretion of the trial court and, thus, are reviewed for abuse of discretion. *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004). A decision to admit or exclude evidence, therefore, will be upheld absent a manifest abuse of discretion, which may be found only when no reasonable person would have decided the same way. *Thomas*, 150 Wn.2d at 869; *State v. Campbell*, 103 Wn.2d 1, 20, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094, 105 S. Ct. 2169, 85 L. Ed. 2d 526 (1985).

Furthermore, an evidentiary error that does not result in prejudice to the defendant is not grounds for reversal. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). The error is “not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *State v. Everybodytalksabout*, 145 Wn.2d 456, 469, 39 P.3d 294 (2002), *quoting Bourgeois*, 133 Wn.2d at 403

The Washington Supreme Court has previously upheld a trial court’s exclusion of proposed defense testimony and held that, although exclusion is an extraordinary remedy,

Discovery decisions based on CrR 4.7 are within the sound discretion of the trial court, and the factors to be considered in deciding whether to exclude evidence as a sanction are: (1) the effectiveness of less severe sanctions; (2) the impact of

witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the prosecution will be surprised or prejudiced by the witness's testimony; and (4) whether the violation was willful or in bad faith.

State v. Hutchinson, 135 Wn.2d 863,882-83, 959 P.2d 1061 (1998) (citations omitted). In addition, CrR 4.7(b)(1) specifically states that,

Except as is otherwise provided as to matters not subject to disclosure and protective orders, the defendant shall disclose to the prosecuting attorney the following material and information within the defendant's control no later than the omnibus hearing: the names and addresses of persons whom the defendant intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witness.

In the present case, the State filed (prior to trial) an Motion to Exclude Witnesses and Request for Offer of Proof outlining a number of concerns regarding witnesses that had been named as possible defense witnesses. CP (TBD).¹² Specifically, the State noted that Kipp had failed to provide a summary of the expected testimony from many of the witnesses as required by rule, that no contact information was provided for some of the witnesses, that the listed contact information for some of the witnesses was apparently outdated, and the some of the witnesses had been contacted but stated that they had never been contacted by the defense and had no idea what they

¹² The State's "Motion to Exclude Witnesses and Request for Offer of Proof and Certificate in Support Thereof." Is included in the State's Supplemental Designation of Clerk's Papers.

would be testifying about. CP (TBD)(State's Motion to Exclude Witnesses).

The Court then addressed the State's motion on the first day of trial, July 21. RP 16-35. At that time the defense provided a summary of the expected testimony for several of the witnesses and withdrew the names of a number of witnesses. RP 20-35.

The following day, July 22, the defense indicated that they had a new witness, Alan Tan. RP (July 22, 2009) 2. The trial court inquired why this witness was just now being disclosed, and the State objected to this late witness. RP (July 22, 2009) 2-4. Defense counsel explained that the witness had been at sea aboard the "Stennis," and counsel noted that he himself had not actually interviewed the witness yet. RP (July 22, 2009) 3-4. The trial court noted that the Stennis had been back for several weeks. RP (July 22, 2009) 3. The trial court then stated:

My strong inclination at this point is simply not to allow the witness because of the late notice.

I am not laying that at your feet, Mr. McFadden. It is clear to me that as soon as you found out about it, you got us the information.

I am laying it at Mr. Kipp's feet who – if he had known about this witness could have learned about him two weeks ago and done this in a thoughtful manner, it might have been a different story.

I will ask the jury panel if they know him. But I have really no intention of allowing him to testify unless I find out that there is something so extraordinary he has to say that no other witness can say it, and I make another determination on

the record about the balancing of the prejudice against the State.

So I'm saying to you Mr. McFadden, is if you find out this is the lynchpin of your client's case, I may reconsider, and I stress may. Because the lateness of the notice certainly does prejudice the State at this point. Nobody needs to be preparing for trial any more than necessary on the eve of trial, and this is something that could have been avoided with Mr. Tan.

RP (July 22, 2009) 5-6.

On July 28, defense counsel informed the court that the had finally contacted Mr. Tan and interviewed him and learned that Mr. Tan had lived in the same house with J.M.C. during the period of her alleged molestation and had also lived with Kipp, and thus had been able to witness the interaction between J.M.C. and Kipp "during that period of time." RP 123. Specifically, counsel summarized the proposed testimony and said it would include testimony that Mr. Tan never saw anything inappropriate between Kipp and the victims (and never saw Kipp alone with either girl), and that the Pine Tree residence was very crowded and had little to no privacy. RP 123-24.

The State objected, noting that it would be resting its case that day and it had not had any time to attempt to rebut this proposed testimony or to interview Tan, and that defense should have known about this potential evidence long before trial. RP 125.

Defense counsel then acknowledged that he had had some difficulty contacting Mr. Tan and that his proposed testimony was similar to testimony

that the defense would be producing from other witnesses. Specifically, defense counsel stated,

Mr. McFadden: . . . And Truthfully, the information is similar in nature to the other testimony anticipated from - -

The Court: Ms. Kip-Tan.

Mr. McFadden: -- Ms. Kipp-Tan, and also to a certain extent from Virginia Tan, so, -- but that's a two-edged sword. It cuts against us because it's similar information, but it cuts against the state because we are running down the same lines they presumably were already prepared for.

RP 126-27.

The trial court then ruled as follows:

Well, those are many of the things that are swirling around in my head if you will, and that is the lateness of the disclosure, the similarity or duplicativeness of the testimony, and the fact that we would have to halt the proceedings, give Ms. Pendras a chance to talk with Mr. Tan, who doesn't sound like he's completely responsive to inquiries, have her then talk to her witnesses, causing perhaps a half day or longer delay, and I am not inclined to do that fro somebody who is going to have testimony that is duplicative of two other witnesses.

On balance, it seems to me my initial ruling stands, that Mr. Tan was disclosed too late to provide an orderly trial process, and I am going to continue my ruling and disallow his testimony.

RP 127.

At trial, the defense called Maria Tan-Kipp and she testified that she lived with Kipp in 1995 when J.M.C. came to live with them and that at that

time the house was very crowded and there was no privacy. RP 244-46. She also said that Kipp was never left alone with J.M.C. RP 248. In addition she never saw Kipp act inappropriately toward J.M.C. RP 254.

Similarly, Ms. Tan-Kipp stated that although D.G.T. would come to visit them in 2003-2004, she never saw Kipp alone with D.G.T. and she did not see Kipp pay any inappropriate attention to D.G.T. RP 259, 261-62.

The defense also called Virginia Garcia Tan as a witness and she testified that she was also living at the residence with Kipp and J.M.C. in 1995-96 and that the house was crowded and that Kipp was never left alone with J.M.C. RP 290-93. She also stated that she never saw Kipp pay any inappropriate attention to J.M.C. RP 297. Ms. Tan also lived with D.G.T. in 2003-2005 and never saw Kipp alone with D.G.T. RP 297-99.

Given these facts, Kipp has failed to show that the trial court abused its discretion in refusing to allow Mr. Alan Tan to testify. As stated above, discovery sanctions are within the sound discretion of a trial court. *Hutchinson*, 135 Wn.2d at 882-83. Although exclusion is a severe sanction, it is clear that the impact of exclusion in the present case was minimal at best, since Mr. Tan's proposed testimony was cumulative of the testimony from Ms. Tan-Kipp and Ms. Tan who testified to exactly the same things that the Mr. Tan would have testified about. In addition, since Mr. Tan was not

disclosed until the trial started, the trial court correctly noted that the State would be prejudiced and/or the trial would be needlessly interrupted if Mr. Tan were allowed to testify.

Furthermore, even if the trial court's ruling had been incorrect, Kipp can still show no prejudice since two other witnesses were ultimately allowed to testify to exactly the same matters that Mr. Tan would have testified to.

Under Washington law, an evidentiary error that does not result in prejudice to the defendant is not grounds for reversal. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). The error is "not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Everybodytalksabout*, 145 Wn.2d 456, 469, 39 P.3d 294 (2002), *quoting Bourgeois*, 133 Wn.2d at 403.

Thus, in the present case, given the limited and cumulative nature of the evidence at issue, Kipp has failed to demonstrate prejudice because he has not shown that the evidence was such that, "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *Everybodytalksabout*, 145 Wn.2d at 469, *quoting Bourgeois*, 133 Wn.2d at 403).

The conclusion that any error was harmless is further supported by the fact that the victim testified as to the molestations, and Kipp's statements on the tape corroborated the victim's testimony. Kipp's claim that the trial court abused its discretion by refusing to allow Mr. Tan to testify, therefore, must fail.

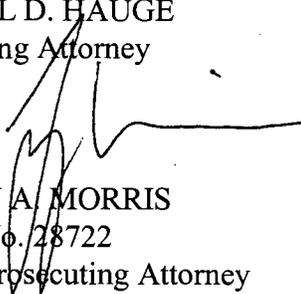
IV. CONCLUSION

For the foregoing reasons, Kipp's conviction and sentence should be affirmed.

DATED June 17, 2010.

Respectfully submitted,

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