

SUPREME COURT NO. 88207-0
NO. 39883-4-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID GOWER,

Petitioner.

FILED
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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Bryan Chushcoff, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Your Petitioner for discretionary review is David Joel Gower, the Defendant and Appellant in this case.

B. COURT OF APPEALS DECISION

The Petitioner seeks review of the opinion in the Court of Appeals, Division II, cause number 39883-4-II, which was filed on November 20, 2012. A copy of the opinion is attached hereto in the Appendix. No motion for reconsideration has been filed in the Court of Appeals.

C. ISSUE PRESENTED FOR REVIEW

Whether the Court of Appeals erred in holding that the trial court's erroneous admission of propensity evidence under RCW 10.58.090 was harmless error where the trial court made findings on the erroneous evidence and based its conclusions and convictions on these findings.

D. STATEMENT OF THE CASE

1. Factual History:

In 2007, David Joel Gower lived in a house with his wife, Sivilina Gower, and Mrs. Gower's two teenage daughters, S.E.H. and S.H. RP 159. This case arose from two alleged incidents with his 17-year-old stepdaughter, S.E.H.

In the first incident, in late summer, 2007, when S.E.H. was two months short of her eighteenth birthday, S.E.H. was told that, as a

punishment for bad behavior, she would either be spanked, or would have to accompany her step-father on a short-haul trucking trip. RP 286, 301, 304.

Together, they drove from Tacoma to Astoria, Oregon and back in one day. According to S.E.H., as soon as the truck heater warmed up the cab, she was told to take her pants off and sit behind Gower in the cab. RP 309. Then, according to S.E.H., Gower proceeded to touch her breast and vagina as he drove. RP 306-7, 356. Obviously, there were no witnesses who could confirm or deny S.E.H.'s allegations, but Gower denied that anything sexual had occurred between them on the trip. RP 489. And, when the truck was stopped by a state trooper on the way back, S.E.H. did not ask for help or seem to need it. RP 492.

The second incident allegedly occurred in September of 2007, when S.E.H. caused the kitchen plumbing to back up by placing potato peelings down the drain, as she had apparently done several times before. RP 310. Gower admitted to being very angry and ordering S.E.H. "out of his sight" down to the basement. RP 475. S.E.H. testified that, once downstairs, Gower joined her, ordered her to undress, and spanked her with a plastic coat hanger. RP 310, 312, 333. S.E.H. also testified that this was a typical punishment in the household for "bad grades or doing something wrong." RP 300. S.E.H. said the spanking hurt, but she had no

marks or bruises from it. RP 333. S.E.H. did not see Gower become aroused during the punishment. RP 347.

S.E.H.'s sister, 15-year-old S.H., testified that she had never been sexually abused by Gower. RP 269, 276, 278. S.H. said that she had been spanked on occasion, with her pants down, but that she never considered this to be abuse, only one of the punishments for misbehavior. RP 274, 276. S.H. said the spanking did hurt, but did not leave marks. RP 278. S.H. had seen S.E.H. return to their room from the basement, "slightly pissed off and crying," and assumed this was following punishment. RP 272.

Detective Jason Brooks testified that he found an "S&M room" in the Gower house. RP 162. Detective Brooks admitted that S.E.H. had told him the S&M room was always locked and that she had never been in there—had never been punished in there. RP 231, 236.

Gower denied ever seeing S.E.H. naked, denied forcing her to undress, denied spanking her or hitting her with a coat-hanger or anything else. RP 476-77. He said the most he had ever done was "swat" S.E.H. on the butt. RP 477.

Gower testified that S.E.H. had accompanied him in the truck twice in the summer of 2007, that once it was by her choice and once was

punishment for reckless driving. RP 484-85. But he denied that he ever touched her or made her remove her clothing. RP 489.

2. RCW 10.58.090 Evidence:

Prior to trial, the State sought, over defense objection, to introduce the testimony of C.M., Gower's biological daughter, regarding two 1995 convictions for first degree child molestation. RP 500, CF 28

C.M. testified that Gower had sexually and physically abused her from 1992-1995. RP 46. According to C.M., her father had progressed from initially informing her about male anatomy, to showing her his own body and making her touch him as she sat on his lap with her breasts exposed. RP 49. She was in third grade. RP 50.

In the summer of 1995, when C.M. was ten, Gower would wake her in the middle of the night, make her take off her panties, bend over, and spread her buttocks as he looked and masturbated. RP 52. C.M. said this occurred two to three times a week. RP 60.

C.M. also remembered watching pornography with Gower as he masturbated, or sometimes touched her. RP 52-53. He also made her sit naked by the window. RP 53.

C.M. also testified to physical abuse by Gower, saying that he hit her often and she was afraid of him. RP 54. C.M. said that Gower had spanked her to the point of bruising. RP 62.

In 1995, C.M. disclosed to her teacher, and Gower was subsequently charged and pled guilty to two counts of child molestation in the first degree. RP 500. C.M. had not seen her father since then. RP 46.

The trial court ruled that C.M.'s testimony was inadmissible under ER 404(b),¹ but that this evidence only had to be related to a sex offense and admissible under ER 403 to be admissible under RCW 10.58.090. RP 132, 134, 285, CP 30-31.

The court also ruled that even C.M.'s testimony regarding the spanking was admissible under RCW 10.58.090 because the court found that there "may be" a sexual component to the spanking. RP 135-36, CP 31. The court ruled that, although the spanking was not a part of the convictions involving C.M., he found it more probably than not occurred. RP 138-39.

Gower admitted that he was convicted of a sex offense for his behavior with his daughter, C.M., in 1995. RP 499. He admitted he pled guilty to making C.M. get up at night, take off her clothes and bend over in front of him, and to attempting to get her to perform oral sex. RP 500.

Gower was under supervision for these convictions until 2004, taking monthly polygraph tests without incident. RP 495-96. The

¹ The court ruled that C.M.'s testimony was not similar enough to S.E.H.'s allegations to be considered a common scheme or plan under ER 404(b). RP 132.

supervision ended in the summer of 2004, and that is when he moved into Sivilina Gower's house. RP 498.

The trial court made extensive findings about C.M.'s testimony in the findings of fact and conclusions of law for the bench trial. CP 12-13.

3. Procedural History:

David Joel Gower was charged with one count of rape of a child in the second degree, two counts of indecent liberties, one count of incest in the first degree, and one count of assault in the second degree. CP 11.

Although not a victim of the crimes charged in this trial, C.M. was permitted to testify in the sentencing hearing, over defense objection. RP 589-92.

The court found Gower not guilty of the rape of a child and assault in the second degree charges, but guilty of two counts of indecent liberties and one count of incest in the first degree. CP 16-18. The court made extensive findings relating to C.M.'s testimony in the Bench Trial Findings of Fact and Conclusions of Law. CP 12-13.

He was sentenced to mandatory life sentences for counts II and IV. RP 593, Supp. CP (Judgment and Sentence at p. 6). He was also concurrently sentenced to sixty months on count III. Supp. CP (Judgment and Sentence at p. 6).

4. Court of Appeals Decision:

Gower appealed his convictions to Division II of the Court of Appeals in October of 2009. Gower argued, among other issues, that C.M.'s testimony had been erroneously admitted under RCW 10.58.090 because that statute was unconstitutional. Appellant's Brief, at 19-28. Gower further argued that this error required reversal in his case because the trial court had specifically ruled the evidence inadmissible under ER 404(b), but admissible under RCW 10.58.090, and it had been used impermissibly as propensity evidence. Appellant's Brief at 27. While Gower's appeal was pending, the Supreme Court accepted consideration of State v. Gresham, 153 Wn. App. 659, 223 P.3d 1194 (2009) and State v. Scherner, 153 Wn. App. 621, 225 P.3d 248 (2009). Gower's appeal was stayed pending decisions in Gresham and Scherner. In January of 2012, the Supreme Court held in State v. Gresham, 173 Wn.2d 405, 432, 269 P.3d 207 (2012) that RCW 10.58.090 is unconstitutional because it violates the separation of powers doctrine.

The stay on Gower's appeal was then lifted and the Court of Appeals filed a published decision in this case on November 20, 2012. In this decision, two members of the panel signed the majority authored by Judge Jill Johanson, holding that the evidence relating to Gower's conduct with C.M. had been improperly admitted under RCW 10.58.090, citing

State v. Gresham. Opinion at 4-5. However, the majority concluded that the error was harmless because the trial judge did not reference the inadmissible evidence in his conclusions of law. Opinion at 5. Judge Lisa Worswick dissented, noting that the trial judge had in fact made findings on the disputed evidence, had admitted the evidence for propensity, and had based his conclusions of law on those findings. Opinion (Dissent) at 19-20. Judge Worswick notes:

The findings of fact form the basis for the conclusions of law whether explicitly referenced or not. If the Court of Appeals retrospectively determines that the trial court must have ignored certain of its own findings of fact, the Court of Appeals steps out of its role as a review tribunal and becomes a fact finder itself, effectively amending the findings of fact to correct the trial court's error. I respectfully submit that this is not our role.

Opinion (Dissent) at 19-20.

Gower's petition for review of this decision timely follows.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The petitioner asserts that the issues raised by this Petition should be addressed by the Supreme Court because this case: (1) the decision of the court of appeals is in conflict with a decision of the Supreme Court; (2) the decision of the court of appeals is in conflict with another decision of the court of appeals, (3) raises a significant question under the Constitution of the United States and (4) involves an issue of substantial

public interest that should be determined by the Supreme Court, as set forth in RAP 13.4(b).

THIS COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT'S ERRONEOUS ADMISSION OF PROPENSITY EVIDENCE UNDER RCW 10.58.090 WAS HARMLESS ERROR WHERE THE TRIAL JUDGE MADE FINDINGS ON THE ERRONEOUS EVIDENCE AND RELIED ON THESE FINDINGS IN REACHING HIS CONCLUSIONS.

The trial court admitted C.M.'s testimony under RCW 10.58.090, RP 132-36, CP 30-31. The trial court held that C.M.'s testimony would be inadmissible under ER 404(b) and that the testimony did not fall within common scheme or plan exception, RP 132-35, CP 30-31. In its findings for the admission of the evidence, the trial court concluded that:

6. The evidence of the defendant's prior sexual misconduct with C.M. is necessary to the State's case at trial in the present case.

8. The probative value of the defendant's prior sexual misconduct with C.M. substantially outweighs any prejudice that may exist after the trier of fact hears the evidence.

9. The court finds that evidence of the defendant's prior sexual misconduct with C.M. is admissible in the present case under RCW 10.58.090.

10. The court does not find that the evidence is admissible under ER 404(b), but since it is admissible under 10.58.090, the State may utilize the evidence in its case in chief.

11. Such evidence includes testimony regarding the defendant spanking C.M., as the court finds that there may be a sexual motivation to the spanking of C.M. by the defendant."

CP 30-31.

In closing, the prosecution argued that the prior convictions were relevant to S.E.H.'s "credibility." RP 546, 551. He also compared C.M. to S.E.H. RP 545-46. Essentially, the focus of the prosecutor's argument was that because Gower had previously been convicted of molesting his biological daughter, he must be guilty of the same behavior with S.E.H. He argued that:

Your Honor, essentially, this case is a credibility determination for the Court. You have two different stories of what occurred. One story is credible, and that is [S.E.H.]. One story is not, and that is the defendant. The defendant acknowledged that he made rules and that he broke them. **The defendant acknowledged that he previously molested his daughter.** The defendant's explanation of what occurred in this case is simply not credible. [S.E.H.'s] is.

RP 551 (emphasis added).

The trial court entered findings of fact and conclusions of law at the conclusion of the bench trial. CP 10-18 (Attachment B). Included in the findings of fact is a complete recitation of the testimony of C.M. regarding her history with Gower, spankings she allegedly received, and alleged sexual abuse. CP 12-13. At the conclusions of the findings of fact section, the court states that: "From the foregoing Findings of Fact, the Court makes the following Conclusions of Law." CP 15. The trial judge then goes on to find that S.E.H. was credible and that the spanking she

received was sexually motivated. CP 16-18. Based on these findings and conclusions, Gower was convicted of two counts of Indecent Liberties and Incest in the Second Degree. CP 16-18.

In State v. Gresham, this Court held that RCW 10.58.090 violates the separation of powers doctrine and is unconstitutional. 173 Wn.2d at 432. It is therefore clear in this case that the trial court's admission of C.M.'s extensive testimony regarding alleged past sexual misconduct was erroneously admitted by the trial court under RCW 10.58.090. The only remaining issue is whether this error requires reversal.

Gresham held that errors in admitting evidence under RCW 10.58.090 will be evaluated under the nonconstitutional harmless error standard: "[W]hether, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." Gresham, at 433 (citations omitted). In Gresham, the Court held that Gresham's conviction must be reversed, while Scherner's convictions would be affirmed. 173 Wn.2d at 434-35. The key difference between the cases was that in Gresham, "there was no other basis for admission of evidence of Gresham's prior crimes," while the evidence of Scherner's "prior acts of child molestation was admissible for the purpose of demonstrating a common scheme or plan." Id. at 434-35. In this key way, this case is in the same position as Gresham—the trial court here expressly

found that C.M.'s testimony was inadmissible under ER 404(b) and there was no other basis for the admission of this evidence.

In Gresham, all that remained after excluding the erroneously admitted evidence was “[the child’s] testimony that Gresham had molested her and her parents’ corroboration that Gresham had the opportunity to do so, along with the investigating officer’s testimony. There were no eyewitnesses to the alleged incidents of molestation.” Id. at 433. The Court held, “[T]here is a reasonable probability that absent this highly prejudicial evidence of Gresham’s prior sex offense . . . the jury’s verdict would have been materially affected.” Id. at 433-34. Thus, the Court held, “[W]e cannot say that the erroneous admission of the evidence of Gresham’s prior conviction was harmless error.” Id. at 434.

The facts here are similar to those in Gresham’s case. The sole direct evidence against Gower was S.E.H.’s testimony. As the dissent in the Court of Appeals noted, this case “turned largely on a credibility contest between Gower and S.E.H.” Opinion (Dissent) at 16. S.E.H. testified about the alleged sexual contact between herself and Gower and Gower testified that there was no sexual contact and he did not spank her for sexual gratification. There were no eye-witnesses and there was no physical evidence. In fact, that this was a case based on credibility was the reason the State gave for the “necessity” of the admission of C.M.’s

testimony. RP2 123, 124-5. Moreover, the Court expressly admitted this evidence as propensity evidence, finding it would have been inadmissible under ER 404(b).

Courts have consistently noted the highly prejudicial nature of testimony like C.M.'s. "Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise." State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982). Judges are not immune to the dangers of such evidence, especially where the statute directing the admission of this evidence validates its use for the prohibited purpose of showing the defendant's propensity to commit a certain crime. The judge here made extensive findings of C.M.'s testimony and based its conclusions of law on the findings of fact. CP 12-13, 15. Thus, like in Gresham, the RCW 10.58.090 testimony admitted against Gower was not harmless and requires the reversal of his convictions.

Yet, the majority decision of the Court of Appeals here held that the erroneous admission of C.M.'s testimony in this case was nevertheless harmless. The majority concluded that because the trial court's conclusions of law do not reference the erroneous evidence, the trial court did not rely on it in reaching the convictions. Opinion, at 5. But, the trial

court does devote an entire section of the findings of fact in support of the verdict to C.M.'s testimony. CP 12-13. Responding to the dissent, the majority dismisses these findings, stating that "The trial court did make findings of fact concerning C.M.'s testimony but those findings were set out separately and were not connected in any way to the findings of fact and conclusions of law that support each guilty verdict." Opinion at 5, n.

11. As the Dissent notes:

When a judge is required to make findings of fact in a jury-waived case, he not only indicates his findings on the issuable facts, but he sets forth the very basis upon which his conclusions of law must rest. The findings of fact form the basis for the conclusions of law whether explicitly referenced or not. If the Court of Appeals retrospectively determines that the trial court must have ignored certain of its own findings of fact, the Court of Appeals steps out of its role as a review tribunal and becomes a fact finder itself, effectively amending the findings of fact to correct the trial court's error.

Opinion (Dissent) at 18. The trial court here expressly states that the conclusions of law to which the majority refers, are based on its findings of fact, which include those based on C.M.'s testimony. CP 15.

The majority decision relies on two cases to support its conclusion that because the error here occurred in the context of a bench trial, it was harmless unless the trial court expressly cites to the erroneous evidence in the conclusions of law: State v. Ryan, 48 Wn.2d 304, 308, 293 P.2d 399

(1956) and State v. Read, 147 Wn.2d 238, 245-46, 53 P.3d 26 (2002).

Citing Read, the majority held:

a trial court commits reversible error only when it considers inadmissible evidence and the defendant can show that the verdict is not supported by sufficient evidence, or that the trial court relied on the inadmissible evidence to make essential findings that it otherwise would not have made.

Opinion, at 5. The majority then goes on to say that because none of the trial court's conclusions of law reference C.M.'s testimony, there is no evidence that the trial court considered that evidence, making it harmless. Opinion, at 5-7. But, as the dissent points out, Ryan is factually distinguishable from this one because in that case the trial judge stated he would not be considering the disputed testimony. 48 Wn.2d at 308. The Supreme Court held, "We must accept the trial judge's statement that he disregarded the challenged testimony entirely." 48 Wn.2d at 308.

In Read, the Court noted that a presumption that the trial court did not rely on the inadmissible evidence can be rebutted by evidence that it did. That evidence exists in this case because the trial judge made findings on the disputed evidence, stated that it would rely on these findings in reaching its conclusions, and then reached conclusions of law based on these findings, including the credibility of S.E.H. Consequently, the presumption is rebutted and the court cannot conclude that the erroneous admission of C.M.'s testimony was harmless.

The court of appeals majority erred in finding that the trial court's erroneous admission of C.M.'s testimony under RCW 10.58 was harmless error. The erroneous admission of this evidence requires the reversal of Gower's convictions.

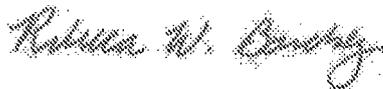
F. CONCLUSION

The Supreme Court should accept review for the reasons indicated in Part E, reverse the court of appeals, and reverse Gower's convictions.

DATED: December 12, 2012

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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ATTACHMENT A:

State v. Gower, Court of Appeals Opinion
Filed 11/20/2012

ATTACHMENT A

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DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

No. 39883-4-II

Respondent,

v.

DAVID JOEL GOWER,

PUBLISHED OPINION

Appellant.

JOHANSON, J. — David Joel Gower appeals his bench trial convictions for two counts of indecent liberties by forcible compulsion (counts II and IV) and one count of second degree incest (count III) for sexual contact with his stepdaughter, SEH. He argues (1) the trial court erroneously admitted evidence of his prior acts of child molestation under RCW 10.58.090,¹ (2) the evidence was insufficient to support his convictions, and (3) cumulative error requires reversal. We hold that it was error to admit evidence of Gower's prior sex offenses under RCW 10.58.090 because our Supreme Court has held that statute unconstitutional. But because we have the benefit of the trial court's specific findings of fact and conclusions of law in support of each guilty verdict, we further hold that substantial, independently-admissible evidence supports

¹ RCW 10.58.090, held unconstitutional in *State v. Gresham*, 173 Wn.2d 405, 432, 269 P.3d 207 (2012), provided for the admissibility of a defendant's prior sex offenses when charged with a current sex offense, notwithstanding ER 404(b).

Gower's convictions for counts II, III and IV, and we affirm those counts, holding harmless the trial court's admission of Gower's prior sex offenses under RCW 10.58.090.

FACTS

The State charged Gower with first degree child rape,² alleging that he digitally penetrated SEH on an occasion years earlier (count I). The State also charged Gower with indecent liberties by forcible compulsion³ and first degree incest,⁴ alleging sexual contact and sexual intercourse with SEH while she rode with Gower in his truck (counts II and III). And the State further charged Gower with indecent liberties by forcible compulsion and second degree assault with sexual motivation,⁵ alleging that he spanked SEH for sexual gratification (counts IV and V).

Pretrial, the State moved to admit the testimony of both CM, Gower's daughter; and JK, Gower's former stepdaughter. Both witnesses testified pretrial that Gower had inappropriately touched and physically abused them as children. The trial court ruled that both witnesses' testimonies were inadmissible under ER 404(b). It admitted CM's testimony under RCW 10.58.090 but denied admission of JK's testimony. The court held a bench trial in July 2009,

² RCW 9A.44.073.

³ RCW 9A.44.100(1)(a).

⁴ RCW 9A.64.020(1)(a).

⁵ RCW 9A.36.021 and RCW 9.94A.835.

and based on the evidence presented, it found the following facts:⁶ Between January 1 and November 10, 2001, when SEH was 11 years old, Gower digitally penetrated her in her bedroom.

Between August 1 and September 10, 2007, Gower learned that SEH had used a cell phone while driving. As punishment, Gower, a truck driver, ordered SEH to either ride with him in his truck on a trip from Tacoma, Washington, to Astoria, Oregon, or else receive a spanking. Gower had struck SEH in the past. SEH opted for the truck ride; and, while driving, Gower ordered SEH to remove her pants and underwear, touched her breasts and genitals, and digitally penetrated her.⁷

On September 19, SEH accidentally clogged the kitchen sink drain. Gower was upset and ordered SEH to the basement to be punished. Gower told SEH to remove her pants and underwear and spanked her with a coat hanger, asking, "[A]re we having fun yet?" Clerk's Papers (CP) at 15. After the spanking, SEH was crying and without pants or underwear.

Both Gower and SEH's mother were involved in Tacoma's sadomasochism community. Gower called witnesses to testify about his involvement in the sadomasochism community, and based on their testimony, the trial court found that the objective of spanking within the sadomasochism community is to satisfy sexual desire. The court further found that there is a

⁶ Gower does not assign error to the trial court's findings of fact following his bench trial, making them verities on appeal. *State v. Kaiser*, 161 Wn. App. 705, 724, 254 P.3d 850 (2011).

⁷ According to SEH, Gower began the sexual contact as soon as the truck's heater warmed the cab. She said once she was in the truck, she had three choices of physical punishment: (1) take one breast at a time out of her shirt, and allow Gower to touch and twist her nipple; and (2) remove her pants to allow Gower to rub her clitoris or (3) insert his finger into her vagina and twist its lips. Ultimately though, SEH explained that Gower determined that he would perform each of the punishments.

sexual component to such spanking because "normal things in life do not satisfy the sexual desires" of a sadomasochism practitioner. CP at 14. Gower did not object to the evidence underlying these findings and conclusions.

Based on these findings, the trial court concluded as a matter of law that Gower was not guilty of counts I, III (as charged), and V, but guilty of counts II, III (inferior degree), and IV. On count I, the trial court concluded that SEH's testimony regarding the digital penetration when she was 11 years old lacked sufficient detail to constitute proof beyond a reasonable doubt that the incident occurred, finding Gower not guilty of first degree child rape. On count III, the trial court concluded that although there was evidence that Gower had sexual intercourse with SEH in his truck, the evidence that it occurred in Washington was insufficient, finding Gower not guilty of first degree incest. And on count V, the trial court concluded that the State had not proved that Gower's spanking of SEH was unauthorized under RCW 9A.16.100,⁸ finding him not guilty of second degree assault with sexual motivation.

The trial court did conclude, however, that Gower was guilty of the inferior degree offense of second degree incest⁹ (count III) because there was sufficient evidence that sexual contact in Gower's truck occurred in Washington. The trial court also concluded that Gower was guilty of indecent liberties by forcible compulsion for the sexual contact in Gower's truck (count II) and indecent liberties by forcible compulsion for spanking SEH (count IV). Gower appeals these three convictions.

⁸ RCW 9A.16.100 provides that "the physical discipline of a child is not unlawful when it is reasonable and moderate and is inflicted by a parent, teacher, or guardian for purposes of restraining or correcting the child."

⁹ RCW 9A.64.020(2)(a).

ANALYSIS

I. RCW 10.58.090

The trial court ruled that CM's testimony was not admissible under ER 404(b) but that it was admissible under RCW 10.58.090. Gower argues that the trial court erred by admitting CM's testimony under RCW 10.58.090. Although we agree the admission of CM's testimony was error under RCW 10.58.090, we hold that it was harmless error.

RCW 10.58.090(1) provides, "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." Our Supreme Court in *State v. Gresham*, 173 Wn.2d 405, 432, 269 P.3d 207 (2012), held that RCW 10.58.090 violates the separation of powers by interfering with the judiciary's authority to determine court procedural law. As such, CM's testimony was improperly admitted under RCW 10.58.090.

Because the trial court also found that CM's testimony was not admissible under ER 404(b), we next determine whether admission of this evidence under RCW 10.58.090 was harmless. *Gresham*, 173 Wn.2d at 432-33. Admission of improper evidence is harmless if there is no reasonable probability that the error materially affected the trial's outcome.¹⁰ *Gresham*,

¹⁰ Gower argues that admitting CM's testimony and the evidence about his involvement in sadomasochism violated his Fourteenth Amendment right to due process because it constituted propensity evidence, citing *Garceau v. Woodford*, 275 F.3d 769, 775 (9th Cir. 2001), *overruled on other grounds*, 538 U.S. 202, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003). He thus argues that we must review this error under the constitutional harmless error standard: whether, beyond a reasonable doubt, the error did not affect the verdict. But the Washington Supreme Court in *Gresham* rejected this argument, holding that we analyze the admission of evidence under ER 404(b) under the lesser standard for nonconstitutional error. Moreover, because Gower did not

173 Wn.2d at 433. As our Supreme Court recognized in *Gresham*, evidence of prior sex offenses is highly prejudicial in sex offense cases. 173 Wn.2d at 433. But, "Where a case is heard by a judge without a jury, a new trial should not be granted for error in the admission of evidence, if there remains substantial admissible evidence to support the findings, unless it appears that the findings are based on the evidence which should have been excluded." *State v. Ryan*, 48 Wn.2d 304, 308 293 P.2d 399 (1956). Moreover, a trial court commits reversible error only when it considers inadmissible evidence and the defendant can show that the verdict is not supported by sufficient admissible evidence, or that the trial court relied on the inadmissible evidence to make essential findings that it otherwise would not have made. *State v. Read*, 147 Wn.2d 238, 245-46, 53 P.3d 26 (2002).

Our conclusion that admission of the improper evidence was harmless rests largely on the fact that, here, the trial court was the trier of fact. The trial court made specific findings of fact and five conclusions of law to support its guilty verdicts. None of these findings of fact reference or rely in any way on the inadmissible evidence.¹¹ In conclusions III and IV, regarding counts II and III, the trial court expressly relied solely on SEH's testimony. The trial court began

attempt to preclude admission of sadomasochism evidence, and even introduced his own sadomasochism evidence, he either failed to preserve any challenge for appeal or invited any error. See RAP 2.5(a); see also *State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 ("A party may not set up error at trial and then complain of it on appeal.").

¹¹ The dissent asserts that the trial court relied on inadmissible evidence. Dissent at 16. But the dissent does not point to any specific finding of fact supporting the convictions that was based on inadmissible evidence. There were none. The trial court did make findings of fact concerning CM's testimony but those findings were set out separately and were not connected in any way to the findings of fact and conclusions of law that support each guilty verdict. The dissent cannot show that the trial court relied on inadmissible evidence to support its guilty findings.

conclusion III, "That S.E.H.'s account of the road trip to Astoria did in fact describe sexual contact by forcible compulsion." CP at 16. It then began conclusion IV, "As stated in conclusion III, that S.E.H.'s testimony regarding the incident in the truck was credible." CP at 17. Finally, in conclusion V, which involves count IV, the trial court relied on the testimony of SEH and her sister, SH. It began, "That . . . S.E.H.'s description of what occurred on September 17th, 2007, was credible"; and, "[t]he testimony of S.H., S.E.H.'s sister is consistent with the account of S.E.H." CP at 17-18. In each of the trial court's conclusions of law, the trial court expressly articulated the evidence on which it relied to arrive at its conclusions. At no point did the trial court state that it relied on CM's testimony, and it instead relied solely on independently-admissible evidence as set forth in its findings of fact to support its guilty verdicts.

In a jury trial, we do not have a window into the jury's decision-making process, and therefore, we have no way to know if the jury relied on inadmissible evidence. But here, we have the great benefit of detailed findings of fact and conclusions of law that allow us to see precisely what evidence the trial court relied on to reach each of its verdicts. CM's testimony was harmless because substantial, independently-admissible evidence supports the trial court's findings, and Gower does not demonstrate that the trial court relied on inadmissible evidence to make essential findings it otherwise would not have made.¹² *See Read*, 147 Wn.2d at 245-46. Accordingly, the admission of improper evidence was harmless because there is no reasonable

¹² Here, despite the presence of the same prior sexual misconduct, the trial court acquitted Gower of counts I, III (greater offense, as charged), and V.

probability that the error materially affected the trial's outcome. See *Gresham*, 173 Wn.2d at 433.

II. SUFFICIENCY OF EVIDENCE

Gower next argues that the State failed to present sufficient evidence to support his convictions. Specifically, he argues that there was insufficient evidence of forcible compulsion to convict him of indecent liberties by forcible compulsion for sexually touching SEH in his truck (count II). He further argues there was insufficient evidence that the sexual contact occurred in Washington to convict him of second degree incest for the same touching (count III). And he finally argues that the State presented insufficient evidence of sexual contact to convict him of indecent liberties by forcible compulsion for spanking SEH in the basement (count IV). We hold that the State presented sufficient, independently-admissible evidence to support Gower's convictions on counts II, III and IV.

A. Standard of Review

Evidence is sufficient to support a conviction if it permits a reasonable fact finder to find each element of the charged crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). We review a trial court's decision following a bench trial for whether substantial evidence supports any challenged findings of fact and whether the findings of fact support the conclusions of law. *State v. Hovig*, 149 Wn. App. 1, 8, 202 P.3d 318, review denied, 166 Wn.2d 1020 (2009). We do not have to decide if we believe that the evidence establishes guilt beyond a reasonable doubt, but rather we must decide if any rational trier of fact could find guilt. *State v. Kilburn*, 151 Wn.2d 36, 57, 84 P.3d 1215 (2004). Gower does not assign error to any of the trial court's findings of fact, making them verities on appeal. *State v.*

Kaiser, 161 Wn. App. 705, 724, 254 P.3d 850 (2011). We review questions of law de novo. *Kaiser*, 161 Wn. App. at 724.

B. Indecent Liberties in Truck (count II)

Gower argues that the State failed to present sufficient evidence of forcible compulsion to convict him of indecent liberties by forcible compulsion for the sexual contact in his truck. Gower also appears to argue that the trial court's findings of fact do not support its conclusions of law. We disagree.

The essential elements of indecent liberties by forcible compulsion are that the defendant (1) knowingly causes another person (2) who is not his or her spouse (3) to have sexual contact with him or her or another (4) by forcible compulsion. RCW 9A.44.100(1)(a). "Forcible compulsion" means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped." RCW 9A.44.010(6).

At trial, SEH testified that she suffered regular spankings as punishment for various actions. When SEH was 11 years old, Gower began a long history of spanking SEH as punishment for assorted reasons, roughly once a month, causing her to feel scared, confused, and intimidated. Then in the summer of 2007, Gower sought to punish her again and offered her a choice: She could ride with him in his truck on a trip to Astoria, or again be beaten with an object of Gower's choosing. SEH opted for the truck ride. Once in the truck, Gower ordered SEH to comply with three additional punishments: (1) take her breasts out of her shirt one at a time, and allow Gower to touch and twist her nipples; and (2) remove her pants to allow Gower to rub her clitoris and (3) insert his finger into her vagina and twist its lips.

The trial court heard the evidence presented at trial and issued findings of fact. The trial court found, "Between August 1st, 2007, and September 10th, 2007, S.E.H. was told by the defendant that she had to accompany him on a trip to Astoria, OR, or be spanked. S.E.H. had previously been physically struck by the defendant." CP at 14. The trial court also found that "S.E.H. opted to accompany the defendant on the trip to Oregon rather than receive a spanking." CP at 14. The trial court finally found:

While driving to Oregon, the defendant ordered S.E.H. to remove her pants and underwear. The defendant rubbed S.E.H.'s clitoris. The defendant also grabbed the inside of S.E.H.'s labia and twisted it, penetrating her vagina with his finger. The defendant had S.E.H. place her breast in his hand, and touched her breasts. The defendant's sexual touching of S.E.H. started soon after they began driving the truck in Tacoma.

CP at 14-15.

The trial court relied on these findings of fact to reach its conclusions of law. Regarding the forcible compulsion element of indecent liberties in Gower's truck, the trial court concluded:

That S.E.H.'s account of the road trip to Astoria did in fact describe sexual contact by forcible compulsion. While the defendant had a reasonable basis to discipline S.E.H. for dangerous driving, her account that she was given the option of a spanking instead of going on the trip is credible evidence of forcible compulsion. S.E.H. had a reasonable fear of physical injury given the history of being struck by objects if she had not submitted to the sexual contact inside of the truck during the trip to Astoria. S.E.H. had to submit to reasonable discipline, not to sexual contact.

CP at 16. Gower argues that the findings of fact do not support this conclusion of law.¹³ We disagree.

¹³ Gower also argues in passing, without citation to authority, that spanking is not forcible compulsion. But RCW 9A.44.010(6) provides that "[f]orcible compulsion" includes a threat of "physical injury." And RCW 9A.04.110(4)(a) provides that "physical injury" means "physical

The trial court's findings of fact support the trial court's conclusions of law that Gower committed indecent liberties by forcible compulsion. Gower's threat to spank SEH if she did not ride with him in the truck constituted an express threat that placed SEH "in fear of . . . physical injury to herself." RCW 9A.44.010(6). Gower used this threat to coerce SEH into his truck, where she was isolated and helpless to resist his sexual advances. Based on Gower's past sexual touching of her, SEH had reason to expect similar sexual advances when alone with Gower in the truck. Moreover, Gower's long history of spanking SEH as punishment had an overtly sexual tone: Gower would order SEH to remove her clothing before a spanking; and, Gower was a member of the local sadomasochism community in which spanking has a sexual component. Based on these past experiences, SEH knew that if she disobeyed him by resisting, she would face punishment. Consequently, Gower's threat when forcing SEH into the truck included an implied threat that, once in the truck, he would meet any resistance to his sexual advances with physical punishment.

Thus, when Gower gave SEH the ultimatum to get into the truck for the Astoria trip, her choice was between a naked spanking with sexual overtones, or unwanted sexual contact if she went with him in the truck and did not resist. Based on her long history as a victim of routine physical abuse and the atmosphere of intimidation Gower created, SEH could not expect that resisting Gower would invite any other result than the usual punishment. Gower's express and implied threats were the means by which he forced sexual contact with SEH in his truck, which

pain or injury, illness, or an impairment of physical condition." A spanking inflicts physical pain, and thus a threat to spank can constitute "[f]orcible compulsion" under RCW 9A.44.010(6).

constituted indecent liberties by forcible compulsion. Accordingly, we affirm Gower's conviction on count II.

C. Second Degree Incest (Count III)

Gower next argues that the State failed to present sufficient evidence to convict him of second degree incest because substantial evidence does not support the finding that the sexual contact in Gower's truck occurred in Washington. We disagree.

The State bears the burden to prove that jurisdiction properly lies in state court. *State v. L.J.M.*, 129 Wn.2d 386, 392, 918 P.2d 898 (1996). Washington courts have jurisdiction over crimes that occur, in whole or in part, in Washington. RCW 9A.04.030.

The trial court found: "The defendant's sexual touching of S.E.H. started soon after they began driving the truck in Tacoma, and occurred throughout the trip to Astoria. The sexual contact occurred while the truck was in motion on the road in both Washington and Oregon." CP at 15.

As noted, Gower has not challenged the trial court's findings of fact. This would ordinarily make the above findings verities on appeal. *See Kaiser*, 161 Wn. App. at 724. But we may consider an appellant's arguments despite no formal assignment of error when the arguments are sufficiently briefed and the record is adequate for us to fairly decide the issue. *State v. Breitung*, 155 Wn. App. 606, 619, 230 P.3d 614 (2010), *aff'd*, 173 Wn.2d 393, 267 P.3d 1012 (2011). Because Gower sufficiently argues this issue in his briefing and the record is adequate, we exercise our discretion to consider this issue. We review the trial court's findings of fact on this point for substantial evidence. *Hovig*, 149 Wn. App. at 8.

We hold that substantial, independently-admissible evidence supports the trial court's finding that Gower's sexual contact "occurred while the truck was in motion on the road in both Washington and Oregon." CP at 15. SEH testified that the sexual contact in Gower's truck began in the morning after the truck left, as soon as the truck's heater warmed the cab. We take judicial notice that Tacoma is approximately 96 miles driving from the Oregon border¹⁴ by the shortest route to Astoria and that Gower's truck heater would have warmed the cab before reaching Oregon. SEH's testimony thus provided substantial evidence that Gower's sexual contact with her occurred in Washington.

As such, sufficient independently-admissible evidence supports the trial court's finding of fact that Gower's sexual contact occurred in Washington, and these findings support the trial court's conclusion that the sexual contact occurred in Washington.

D. Indecent Liberties by Forcible Compulsion for Spanking (count IV)

Gower finally argues that there was insufficient evidence of sexual contact to convict him of indecent liberties by forcible compulsion for the spanking he gave SEH in the basement. We disagree.

One element of indecent liberties by forcible compulsion is sexual contact. RCW 9A.44.100(1). "'Sexual contact' means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW

¹⁴ The state highway mileage chart indicates that it is 96 miles from Tacoma to Longview by the shortest route. Washington State Department of Transportation, Highway Mileage Chart, <http://tinyurl.com/cawmbzl> (last visited October 19, 2012). Longview is on the Oregon border and en route to Astoria by the shortest route.

9A.44.010(2). The buttocks are an intimate part for the purposes of this definition. *In re Welfare of Adams*, 24 Wn. App. 517, 519, 601 P.2d 995 (1979).

The trial court found: “[Gower told] S.E.H. to take her pants and underwear off so she could receive a spanking. [Gower] then spanked S.E.H.’s nude buttocks with a coat hanger, while telling her, ‘are we having fun yet?’” CP at 15. This finding is unchallenged on appeal and is therefore a verity. *See Kaiser*, 161 Wn. App. at 724. Based on this finding, the trial court concluded, “[Gower] obtained sexual contact by compelling S.E.H. to remove her clothing and expose her lower body by the use of force or threat of the use of force.” CP at 17.

The trial court also found that Gower was involved in the sadomasochism community, that “normal things in life do not satisfy” the desires of sadomasochism practitioners, and that there is a sexual component to spanking within that community. CP at 14. Gower argues that because there was no testimony that Gower had a sexual motivation for this spanking or that he had engaged in spanking for sexual gratification in the past, the evidence was insufficient to show sexual contact. In other words, Gower argues that there was no direct evidence that the spanking had a sexual component. But a fact finder may consider circumstantial evidence to infer sexual gratification beyond a reasonable doubt. *See State v. Wilson*, 56 Wn. App. 63, 68, 782 P.2d 224 (1989), *review denied*, 114 Wn.2d 1010 (1990).

Here, Gower made a 17-year-old girl remove her pants and underwear and asked her, “[A]re we having fun yet?” as he spanked her nude buttocks with a coat hanger. CP at 15. Moreover, Gower was a member of the sadomasochism community, where spankings have a sexual component. Gower voices no objection to the evidence underlying these findings. Thus, the manner in which Gower spanked the 17-year-old girl who was nude from the waist down,

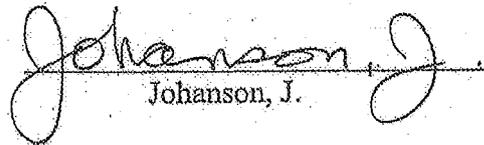
and the evidence that he was a member of a sexual fetish community in which spanking has a sexual component, provided sufficient independently-admissible circumstantial evidence from which a rational fact finder could conclude beyond a reasonable doubt that Gower spanked SEH for sexual gratification.

III. Cumulative Error

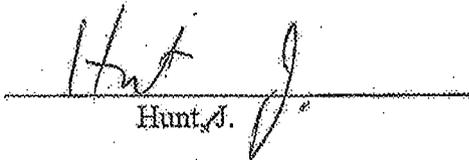
Finally, Gower asserts that cumulative error deprived him of a fair trial. We conclude that the cumulative error doctrine does not apply.

Under the cumulative error doctrine, we may reverse a defendant's conviction when the combined effect of trial errors effectively deny the defendant's right to a fair trial, even if each error alone would be harmless. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006), *cert. denied*, 551 U.S. 1137 (2007). Here, Gower only demonstrates that it was error to admit CM's testimony under RCW 10.58.090. Gower, however, does not show that this error combined with others to deny him a fair trial. Therefore, the cumulative error doctrine does not apply.

We affirm counts II, III and IV because independently-admissible evidence supports those convictions.


Johanson, J.

I concur:


Hunt, J.

WORSWICK, C.J., concurring in part and dissenting in part — I concur with the majority that sufficient evidence supports all of Gower's convictions. But I dissent from the majority as to harmless error. The trial court admitted evidence of Gower's prior sex offenses against CM under RCW 10.58.090, but excluded it under ER 404(b). The trial court therefore admitted the evidence to show Gower's propensity to commit sex crimes. Under such circumstances, I would reverse Gower's convictions and remand for a new trial. I accordingly dissent from the majority's decision to affirm Gower's convictions on the basis that CM's testimony was harmless.

The instant case turned largely on a credibility contest between Gower and SEH. SEH testified as to Gower's alleged crimes against her. And Gower testified that although he made SEH ride in his truck, there was no sexual contact and he never spanked her in the basement. There were no eyewitnesses to either crime, aside from SEH, and there was no conclusive physical evidence.

Under these facts, CM's testimony was not harmless. Based on CM's testimony, the trial court found that Gower had spanked CM and left bruises, had exposed himself to her and made her expose herself to him, had made her watch pornography, had masturbated in front of her, and had digitally penetrated her. And because the trial court ruled it inadmissible under ER 404(b), the trial court could not have admitted CM's testimony for any purpose *except* to show Gower's character as a sex offender who molested his daughter, and to show that he acted in conformity with that character by sexually assaulting his stepdaughter. The inference that Gower engaged in sexual misconduct with SEH because of a propensity to sexually assault his daughters was highly

prejudicial to Gower. This evidence was reasonably likely to have affected the verdict and I would hold that it was not harmless.

The majority, in holding to the contrary, relies on *State v. Ryan*, 48 Wn.2d 304, 308, 293 P.2d 399 (1956), and *State v. Read*, 147 Wn.2d 238, 245-46, 53 P.3d 26 (2002). But I respectfully submit that neither case adequately supports the majority's conclusion.

The majority relies on *Ryan* for the proposition that "[w]here a case is heard by a judge without a jury, a new trial should not be granted for error in the admission of evidence, if there remains substantial admissible evidence to support the findings, unless it appears that the findings are based on the evidence which should have been excluded." Majority at 6 (quoting 48 Wn.2d at 308). But the majority applies this holding much more broadly than the facts of *Ryan* warrant.

In *Ryan*, the trial judge did not *make findings* relying on inadmissible evidence. 48 Wn.2d at 308. And the trial judge ruled with respect to the challenged items of hearsay admitted at trial, "I am going to strike them from the testimony and not consider them." 48 Wn.2d at 308. Our Supreme Court held, "We must accept the trial judge's statement that he disregarded the challenged testimony entirely." 48 Wn.2d at 308. Thus, unlike here, the trial judge explicitly declined to consider the inadmissible evidence, making *Ryan* distinguishable.

Read is similarly inapposite. *Read* relied on *State v. Miles*, 77 Wn.2d 593, 601, 464 P.2d 723 (1970), for the proposition that "we presume the trial judge did not consider inadmissible evidence in rendering the verdict." 147 Wn.2d at 244. But *Read* noted that the *Miles* presumption is rebuttable "by showing that the verdict is not supported by sufficient admissible evidence, or the trial court relied on the inadmissible evidence to make essential findings that it

otherwise would not have made.” 147 Wn.2d at 245-46. *Read* concluded that sufficient admissible evidence supported *Read*’s conviction, and that *Read* had not shown that the trial judge relied on the inadmissible evidence to make essential findings. 147 Wn.2d at 246.

The *Read* dissent disagreed with this conclusion however, opining, “Where, as here, a trial judge openly refutes the presumption he did not consider inadmissible evidence, we cannot conclude otherwise.” 147 Wn.2d at 258 (Sanders, J., dissenting). I would hold that here, the trial judge’s inclusion of CM’s testimony in the findings of fact openly refuted the presumption that the trial judge did not consider this inadmissible evidence.

“When a judge is required to make findings of fact in a jury-waived case, he not only indicates his findings on the issuable facts, but he sets forth the very basis upon which his conclusions of law must rest.” Gunnar H. Nordbye, *Improvements in Statement of Findings of Fact and Conclusions of Law*, 1 F.R.D. 25, 25 (1940). The findings of fact form the basis for the conclusions of law whether explicitly referenced or not. If the Court of Appeals retrospectively determines that the trial court must have ignored certain of its own findings of fact, the Court of Appeals steps out of its role as a review tribunal and becomes a fact finder itself, effectively amending the findings of fact to correct the trial court’s error. I respectfully submit that this is not our role.¹⁵

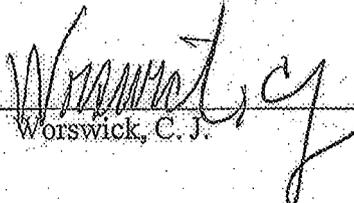
Because the trial court issued findings of fact based on CM’s testimony, and because RCW 10.58.090 directed the trial court to consider such facts to show Gower’s propensity to

¹⁵ The majority also suggests that Gower was not prejudiced because the trial court acquitted him on some counts. I disagree. The question is whether the error was reasonably likely to have affected the verdict. It does not follow that simply because the trial court acquitted Gower on some counts that the court would have reached the same verdict in the absence of the inadmissible evidence.

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commit sex offenses, I would hold that the admission of CM's testimony under RCW 10.58.090 was reversible error, requiring a new trial. I accordingly dissent from the majority's decision to affirm Gower's convictions.

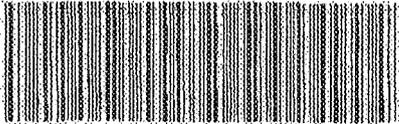
I concur in part and dissent in part.


Worswick, C. J.

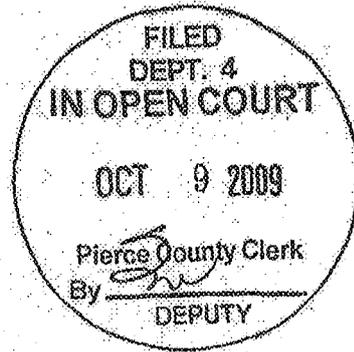
ATTACHMENT B:

Findings of Fact and Conclusions of Law Re: Bench Trial
CP 10-18

ATTACHMENT B



07-1-05074-6 32994159 FNFCL 10-12-09



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 07-1-05074-6

OCT 12 2009

vs.

DAVID JOEL GOWER,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
RE: BENCH TRIAL

Defendant.

THIS MATTER having come on before the Honorable Bryan Chushcoff, Judge of the above entitled court, for bench trial on the 13th day of July, 2009, the defendant having been present and represented by attorney Ed Lane, and the State being represented by Deputy Prosecuting Attorney Bryce Nelson, and the court having observed the demeanor and heard the testimony of the witnesses and having considered all the evidence and the arguments of counsel and being duly advised in all matters, the Court makes the following Findings of Fact and Conclusions of Law regarding the defendant's bench trial.

PROCEDURAL HISTORY

On September 28th, 2007, the defendant, DAVID JOEL GOWER, was charged by information in cause number 07-1-05074-6 with the following four counts:

- Count I: Rape of a Child in the Second Degree
- Count II: Rape in the Third Degree
- Count III: Incest in the First Degree

1
2 • Count IV: Assault in the Second Degree

3 On June 12th, 2009, the First Amended Information was filed, charging the defendant
4 with the following five counts:

5
6 • Count I: Rape of a Child in the Second Degree

7 • Count II: Indecent Liberties

8 • Count III: Incest in the First Degree

9 • Count IV: Indecent Liberties

10 • Count V: Assault in the Second Degree

11 On July 13th, 2009, the defendant freely made a knowing and intelligent waiver of his
12 right to a jury trial. This case proceeded via a bench trial.

13 Mid-trial, the State filed a second amended information. The second amended
14 information changed Count I to Rape of a Child in the First Degree, leaving Counts II-V as
15 charged in the First Amended Information. These five counts eventually proceeded to the court
16 for a verdict.
17

18 FINDINGS OF FACT

19
20 I

21 The State presented testimony from four witnesses at trial: C.M., the defendant's
22 biological daughter; Tacoma PD Det. Jason Brooks, the assigned detective on the current case;
23 S.H., the defendant's stepdaughter; and S.E.H., also the defendant's stepdaughter, and the victim
24 in this case.

25 C.M. testified in a pretrial hearing to determine whether her testimony was admissible
26 under RCW 10.58.090. The court ruled that the testimony was admissible under RCW
27
28

1
2 10.58.090. The defendant then stipulated that her testimony in the pretrial hearing was
3 *admissible at trial.*

4
5 II.

6 The defendant presented testimony from five witnesses at trial: Boris Hodak, a friend of
7 the defendant; William Herrington, a truck driver and co-worker of the defendant; Elizabeth
8 Gower, the defendant's sister in law; Kerry Barthelamy, a friend of the defendant; and the
9 defendant.

10 III.

11 C.M. is the defendant's biological daughter. C.M.'s date of birth is November 10th, 1984.
12 Her mother and the defendant were divorced after C.M. was born. During her childhood, she
13 would usually spend part of the year with the defendant, while spending most of the time with
14 her biological mother.

15
16 In approximately 1992, the defendant began to tell C.M. about sex. The defendant would
17 show C.M. his genitals. In September of 1992, C.M. moved in with the defendant and his wife.

18 During the 1992-93 school year, the defendant repeatedly spanked C.M., leaving bruises
19 on her body. An investigation by CPS ensued, but no criminal charges were ever filed.

20
21 During the summer of 1995, C.M. was living with the defendant. During that time
22 period, the defendant would routinely come into her bedroom and wake up C.M. in the middle of
23 the night. The defendant would expose himself to C.M., and take his clothes off. The defendant
24 would have C.M. take her clothes off, and make her bed over in front of him. C.M. would have
25 to expose her buttocks to the defendant, and while bent over her genital area was visible to him.

26 The defendant would make C.M. watch soft porn with him. While watching porn, the
27 defendant would masturbate in C.M.'s presence.

1
2 During one incident, the defendant make C.M. take her clothes off. The defendant
3 penetrated C.M.'s vagina with his finger. The defendant told C.M. that this was to show her
4 about sex. When C.M. told the defendant that this hurt, the defendant told her that it was
5 supposed to feel good.

6
7 The defendant also attempted to have C.M. perform oral sex on him. C.M. attempted to
8 put the defendant's penis in her mouth, but was unable to do so. C.M. could only get part of the
9 defendant's penis in her mouth and could not perform oral sex to completion on the defendant.

10 In late 1995, C.M. disclosed that the defendant had abused her physically and sexually.
11 The defendant was arrested and charged with crimes relating to C.M. In 1996, the defendant
12 entered a guilty plea to two counts of Child Molestation in the First Degree with C.M. as the
13 listed victim.

14
15 IV.

16 In September of 2007, S.E.H. disclosed at her school that the defendant had been
17 physically and sexually abusing her. S.E.H.'s mother, Sivilina Gower, was married to the
18 defendant. The defendant and Sivilina married in 2005. S.E.H. and her sister, S.H., lived with
19 the defendant and their mother at 1006 S. Cedar St. in Tacoma. The defendant and Sivilina
20 Gower had known each other since 1992.

21 When S.E.H. was living in an apartment in Kent with her mother, the defendant came
22 into S.E.H.'s bedroom at night, told her to open her legs, and inserted his finger into her vagina,
23 wiggling it around. This occurred prior to S.E.H.'s 12th birthday, at some time between January
24 1st, 2001, and November 10th, 2001. S.E.H. is uncertain of the exact date, but certain that it
25 occurred prior to her 12th birthday, as soon after she turned 12 her head was shaved due to an
26 outbreak of lice. S.E.H. remembers the incident occurred when she had long hair.

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V.

The defendant and Sivilina Gower practiced sadomasochism, otherwise known as S&M. The defendant was involved in local S&M groups, and regularly partook in S&M activities in the greater Seattle area. According to Kerry Barthelemy, the defendant was part of the main core of the Tacoma S&M group, and the group has suffered since the defendant has not been a participant. In S&M activity, there is a "dom" and a "sub," and the "dom" dominates the "sub."

According to Boris Hodak, he knew the defendant through his involvement with the Tacoma S&M group. Within the S&M community, the objective of spanking is to ^{satisfy} ~~punish~~ the ^{desire,} ~~desire~~. There is a sexual component to this spanking activity, as the reason for involvement in S&M is because normal things in life do not satisfy the sexual desires of an S&M practitioner. When the defendant was around Boris Hodak, the defendant would be the one to put his foot down and control a situation. BCL

VI.

Between August 1st, 2007, and September 10th, 2007, S.E.H. was told by the defendant that she had to accompany him on a trip to Astoria, OR, or be spanked. S.E.H. had previously been physically struck by the defendant. The defendant worked as a long-haul truck driver, and typically drove a large commercial semi-truck. S.E.H. had been driving a car while using a cell phone, and the defendant decided that she needed to go with him as punishment to see the road from the perspective of a large truck to learn how to drive more safely. S.E.H. opted to accompany the defendant on the trip to Oregon rather than receive a spanking. S.E.H. was sitting in the passenger seat and the defendant was driving.

While driving to Oregon, the defendant ordered S.E.H. to remove her pants and underwear. The defendant rubbed S.E.H.'s clitoris. The defendant also grabbed the inside of

1
2 S.E.H.'s labia and twisted it, penetrating her vagina with his finger. The defendant had S.E.H.
3 place her breast in his hand, and touched her breasts. The defendant's sexual touching of S.E.H.
4 started soon after they began driving the truck in Tacoma, and occurred throughout the trip to
5 Astoria. The sexual contact occurred while the truck was in motion on the road in both
6 Washington and Oregon.
7

8 Dean Harrington is a truck driver that works with the defendant. The truck the defendant
9 was driving to Astoria was a Kenworth W900. A driver in a W900 could reach over and touch a
10 person sitting in the passenger seat.
11

12 VII.

13 On September 19th, 2007, S.E.H. was at home. That evening she accidentally caused the
14 sink to clog by putting potato skins down the drain. The defendant had previously told S.E.H.
15 several times not to put items in the sink drain, and was very upset that she had done so.
16

17 The defendant ordered S.E.H. to go to the basement of the residence to receive her
18 punishment. The defendant wanted S.E.H. out of his sight, as he was very angry with her. The
19 defendant proceeded to tell S.E.H. to take her pants and underwear off so she could receive a
20 spanking. The defendant then spanked S.E.H.'s nude buttocks with a coat hanger, while telling
21 her "are we having fun yet?"
22

23 When the defendant completed spanking S.E.H., she ran upstairs. S.E.H. was upset, and
24 ran upstairs without putting on her pants and underwear. Her sister, S.H., saw S.E.H. come up
25 from the basement. S.E.H. was crying, upset, slightly "pissed off," and was not wearing any
26 pants or underwear.
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28 From the foregoing Findings of Fact, the Court makes the following Conclusions of Law.

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CONCLUSIONS OF LAW

I.

That the Court has jurisdiction of the parties and the subject matter, and that all relevant events of the crimes occurred in the State of Washington.

II.

That S.E.H.'s account of the defendant entering her bedroom in the apartment in Kent sometime during 2001 and inserting his fingers into her vagina had no prologue or epilogue. S.E.H. provided too little detail to credit her account as proof beyond a reasonable doubt that the event occurred. As a result, the defendant is not guilty of the crime of Rape of a Child in the First Degree as charged in Count I.

III.

That S.E.H.'s account of the road trip to Astoria did in fact describe sexual contact by forcible compulsion. While the defendant had a reasonable basis to discipline S.E.H. for dangerous driving, her account that she was given the option of a spanking instead of going on the trip is credible evidence of forcible compulsion. S.E.H. had a reasonable fear of physical injury given the history of being struck by objects if she had not submitted to the sexual contact inside of the truck during the trip to Astoria. S.E.H. had to submit to reasonable discipline, not to sexual contact.

As a result, the defendant is guilty beyond a reasonable doubt of Indecent Liberties as follows:

- (1) That between the 1st day of August, 2007, and the 10th day of September, 2007, the defendant knowingly caused S.E.H. to have sexual contact with the defendant;
- (2) That this sexual contact occurred by forcible compulsion;

- 1
- 2 (3) That the defendant was not married to S.E.H. at the time of the sexual contact; and
- 3 (4) That the acts occurred in the State of Washington.
- 4

5 IV.

6 As stated in conclusion III., that S.E.H.'s testimony regarding the incident in the truck
7 was credible, but it was unclear as to whether sexual contact or sexual intercourse occurred
8 within the State of Washington or in the State of Oregon. It was clear beyond a reasonable doubt
9 that sexual contact occurred within the State of Washington, and that sexual intercourse occurred
10 somewhere during the course of the trip to Astoria, but it was not clear beyond a reasonable
11 doubt that sexual intercourse occurred in the State of Washington.

12 As a result, the defendant is not guilty of the crime of Incest in the First Degree, and
13 guilty beyond a reasonable doubt of the lesser included crime of Incest in the Second Degree as
14 follows:

- 15
- 16 (1) That between the 1st day of August, 2007, and the 10th day of September, 2007, the
17 defendant engaged in sexual contact with S.E.H.;
- 18 (2) That the defendant was related to S.E.H. as a descendant;
- 19 (3) That at the time, the defendant knew the person with whom he was having sexual
20 contact was so related to him; and
- 21 (4) That the acts occurred in the State of Washington.
- 22

23 V.

24 That the S.E.H.'s description of what occurred on September 17th, 2007, was credible.
25 The defendant was sexually motivated in spanking S.E.H. under the circumstances she described.
26 The defendant obtained sexual contact by compelling S.E.H. to remove her clothing and expose
27 her lower body by the use of force or threat of the use of force. The testimony of S.H., S.E.H.'s
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2 sister is consistent with the account of S.E.H. S.H.'s testimony is credible beyond a reasonable
3 doubt.

4 The defendant is guilty of the crime of Indecent Liberties as follows:

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6 (1) That on or about the 19th day of September, 2007, the defendant knowingly caused
7 S.E.H. to have sexual contact with the defendant;

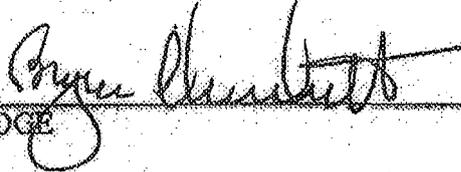
8 (2) That this sexual contact occurred by forcible compulsion;

9 (3) That the defendant was not married to S.E.H. at the time of the sexual contact; and

10 (4) That the acts occurred in the State of Washington.

11 The State did not prove that the spanking was not authorized parental discipline under
12 RCW 9A.16.100, and therefore the defendant is not guilty of the crime of Assault in the Second
13 Degree with Sexual Motivation as charged in Count V.

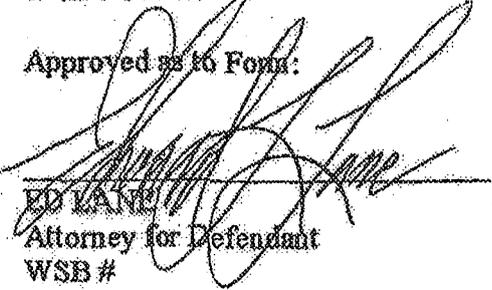
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15 DONE IN OPEN COURT this 9th day of October, 2009.

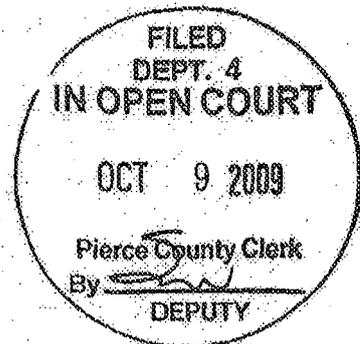
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JUDGE

19 Presented by:

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21 BRYCE NELSON 33142
Deputy Prosecuting Attorney
WSB # 33142

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23 Approved as to Form:

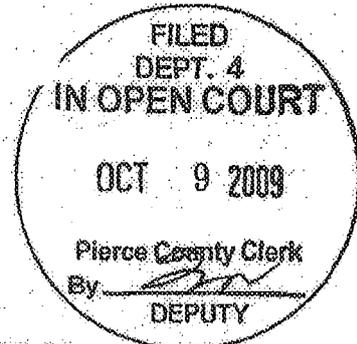
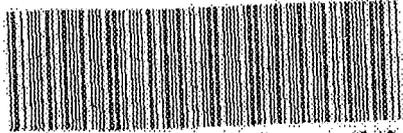
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25 ED LANE
Attorney for Defendant
26 WSB #



ATTACHMENT C:

**Findings of Fact and Conclusions of Law
Regarding Prior Sex Offenses
CP 25-32**

ATTACHMENT C



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 07-1-05074-6

OCT 12 2009

vs.

DAVID JOEL GOWER,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW REGARDING
THE STATE'S MOTION TO ADMIT
EVIDENCE OF PRIOR SEX OFFENSES

Defendant.

THIS MATTER having come before the Honorable Bryan Chushcoff on the 13th day of July, 2009, for pretrial hearing to determine the admissibility of other sex offense evidence under RCW 10.58.090 and ER 404(b) on the charges of Rape of a Child in the First Degree, Indecent Liberties (two counts), Incest in the First Degree, and Assault in the Second Degree, the defendant having been present and represented by Ed Lane, and the State being represented by Deputy Prosecuting Attorney Bryce Nelson, and the court having reviewed all submitted documents and briefing, and having considered the arguments of counsel and being duly advised in all matters, and the court having rendered an oral ruling thereon, the court herewith makes the following Findings and Conclusions.

I. FINDINGS OF FACT

1. In September of 2007, 17 year old S.E.H. disclosed that she had been physically and sexually abused by the defendant, her stepfather.

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2. After S.E.H. made the disclosure detailing allegations of physical and sexual abuse, an investigation was initiated by the Tacoma Police Department (TPD).
 3. TPD Detective Jason Brooks was assigned the case. On September 24th, 2007, Det. Brooks interviewed S.E.H.
 4. S.E.H. told Det. Brooks that she had suffered physical and sexual abuse at the hands of the defendant.
 5. S.E.H. disclosed to Det. Brooks that the defendant had hit her on her buttocks with a wire coat hanger in the basement of the residence at 1006 S. Cedar St. in Tacoma, where she lived with the defendant, her mother, and her sister.
 6. S.E.H. had accidentally backed up the kitchen sink by inserting potato skins into the drain after having previously been warned not to do so.
 7. The defendant told S.E.H. to go to the basement for her punishment.
 8. S.E.H. told Det. Brooks that once she was in the basement, the defendant forced her to remove her pants and underwear, and then hit her on the buttocks with the coat hanger.
 9. While the defendant was hitting S.E.H. on her bare buttocks, he asked her, "are we having fun yet?"
 10. S.E.H. was aware that the defendant practiced sadomasochism. The defendant had repeatedly beaten her in the past with various items, to include belts, paddles, wire hangers, and a device she described as a "flogger."
 11. S.E.H. also disclosed that the defendant had sexually abused her when she was approximately 12 years old by inserting his fingers into her vagina.
 12. S.E.H. also described a trip in the defendant's truck where he had sexually abused her while driving to Astoria, OR.

1
2 13. S.E.H. was told that she had a choice of punishment: receive a beating, or go with the
3 defendant on a trip in his truck. S.E.H. opted to take the trip with the defendant.

4
5 14. S.E.H. and the defendant were going from Tacoma to Astoria. As soon as they left the
6 Tacoma area, the defendant had S.E.H. take her pants and underwear off.

7 15. S.E.H. was instructed that she had to do 3 things as punishment.

8 16. First, when the defendant put his hand on her thigh, she had to move closer to him and
9 open her legs. The defendant would then rub S.E.H.'s clitoris.

10 17. Second, the defendant would grab the inside of her labia and twist them.

11 18. Third, the defendant would hold out her hand, and S.E.H. would have to place her breast
12 in his hand.

13 19. S.E.H. told Detectives that this went on from the time they got on the freeway in Tacoma
14 until they arrived in Astoria, OR.

15
16 20. On the way back to Tacoma, the defendant repeated the "punishment" again with S.E.H.,
17 forcing her to engaged in the same activities that occurred on the drive from Tacoma to
18 Astoria.

19 21. Eventually, the defendant was charged with a number of different crimes under this cause
20 number. On June 12, 2009, an Amended Information was filed alleging five counts:

- 21 ◦ Count I: Rape of a Child in the Second Degree
- 22 ◦ Count II: Indecent Liberties
- 23 ◦ Count III: Incest in the First Degree
- 24 ◦ Count IV: Indecent Liberties
- 25 ◦ Count V: Assault in the Second Degree with Sexual Motivation
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2 22. The State filed notice of its intent to seek admission of evidence of prior sex offenses on
3 June 5, 2009.

4
5 23. In 1996, the defendant entered a plea of guilty to two counts of Child Molestation in the
6 First Degree in cause number 96-1-02240-0.

7
8 24. The defendant had originally been charged with one count of Rape of a Child in the First
9 Degree and one count of Communication with a Minor for Immoral Purposes before an
10 Amended Information was filed as part of a plea agreement.

11 25. Originally, the charged victims in the 1996 case were the defendant's biological daughter,
12 C.M., and his stepdaughter, J.K.

13 26. C.M. was the charged victim on the two counts listed in the defendant's guilty plea. The
14 defendant did not enter a guilty plea to any charges relating to J.K.

15 27. Both C.M. and J.K. testified on July 13th, 2009.

16 28. The defendant began to abuse C.M. in approximately 1992.

17 29. C.M. split time with her biological mother and the defendant, generally spending
18 summers and some other time with the defendant.

19 30. During the 1992-93 school year, C.M. lived with the defendant.

20 31. The defendant would enter C.M.'s bedroom at night and wake her up. The defendant
21 would then make C.M. take her clothes off and would expose his genitals to her.

22 32. The defendant would force C.M. to bend over in front of her while completely nude and
23 expose her buttocks to him.

24 33. The defendant would force C.M. to watch him masturbate.

25 34. The defendant would force C.M. to watch porn with him.

26 35. During one incident, the defendant inserted his finger into C.M.'s vagina.
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- 2 36. The defendant told C.M. that this was to show her what to do.
- 3 37. When C.M. told the defendant that it hurt, he told her that it was supposed to feel good.
- 4 38. The defendant also forced C.M. to perform oral sex on him by inserting his penis into her
- 5 mouth.
- 6 39. C.M. attempted to perform oral sex on the defendant, but after putting part of the
- 7 defendant's penis in her mouth, was unable to insert all of his penis into her mouth.
- 8 40. The defendant also repeatedly physically abused C.M. by spanking and hitting her.
- 9 41. J.K. initially met the defendant by conversing with him over Citizen's Band (CB) radio
- 10 when she was approximately 13 years old.
- 11 42. The defendant eventually showed up at J.K.'s house and asked her if she would be his
- 12 girlfriend. J.K. declined, as the defendant was in his mid to late twenties, and she was 13
- 13 years old.
- 14 43. Eventually the defendant began to date J.K.'s mother, and they were married.
- 15 44. The defendant then moved in with J.K. and her mother.
- 16 45. The defendant once gave J.K. a "titty twister," twisting her nipple with his finger.
- 17 46. At one point while the defendant was living with J.K. when she was about 15 years old,
- 18 he purchased her alcohol, which he allowed her to consume.
- 19 47. The defendant then began watching pornography and masturbating in front of J.K.
- 20 48. J.K. was feeling ill, so she decided to go to bed to fall asleep.
- 21 49. J.K. awoke to find the defendant in her bedroom.
- 22 50. The defendant tried to take off J.K.'s bra. J.K. then passed out, and has no memory of the
- 23 rest of the incident.
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2 51. Both C.M. and J.K. were subject to cross examination by the defendant when they
3 testified.

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5 52. Both C.M. and J.K. were in fact cross examined by the defendant when they testified.

6 **II. CONCLUSIONS OF LAW**

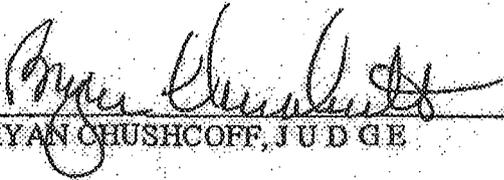
7 That the above-entitled court has jurisdiction of the subject matter and of the defendant,
8 David Joel Gower. That based on the Court's review of the evidence presented in this matter, the
9 Court makes the following *Conclusions of Law*.

- 10 1. The defendant's two prior convictions for Child Molestation in the First Degree are sex
11 offenses as defined by RCW 9.94A.030.
- 12 2. The defendant's present charges are all sex offenses as defined by RCW 9.94A.030.
- 13 3. Evidence of the defendant's prior sexual misconduct with C.M. is sufficiently similar to
14 the presently charged acts.
- 15 4. There is a gap in time between the defendant's prior sexual misconduct with C.M. and
16 the present events, but that gap is explained by the intervening circumstance of the
17 defendant's subsequent criminal charges, conviction, and sentence.
- 18 5. The defendant's prior sexual misconduct with C.M. occurred relatively frequently.
- 19 6. The evidence of the defendant's prior sexual misconduct with C.M. is necessary to the
20 State's case at trial in the present case.
- 21 7. The defendant's prior sexual misconduct with C.M. did result in a criminal conviction.
- 22 8. The probative value of the defendant's prior sexual misconduct with C.M. substantially
23 outweighs any prejudice that may exist after the trier of fact hears the evidence.
- 24 9. The court finds that evidence of the defendant's prior sexual misconduct with C.M. is
25 admissible in the present case under RCW 10.58.090.
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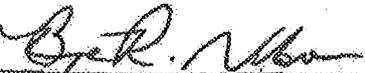
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- 2 10. The court does not find that the evidence is admissible under ER 404(b), but since it is
- 3 *admissible under 10.58.090, the State may utilize the evidence in its case in chief.*
- 4
- 5 11. Such evidence includes testimony regarding the defendant spanking C.M., as the court
- 6 finds that there may be a sexual motivation to the spanking of C.M. by the defendant.
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- 8 12. Evidence of the defendant's prior sexual misconduct with respect to J.K. is not
- 9 *admissible under RCW 10.58.090 or ER 404(b).*
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2 The court's oral ruling on this motion was given on July 13th, 2009, in open court in the
3 presence of the defendant.

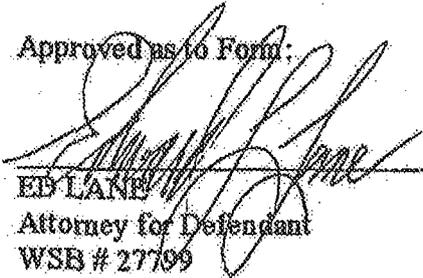
4 DONE IN OPEN COURT this 9th day of October, 2009.

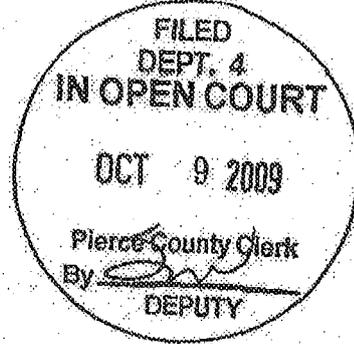
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8 
BRYAN CHUSHCOFF, J U D G E

9 Presented by:

10 
11 BRYCE NELSON 33142
12 Deputy Prosecuting Attorney
13 WSB # 33142

14 Approved as to Form:

15 
16 ED LANE
17 Attorney for Defendant
18 WSB # 27799

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NIELSEN, BROMAN & KOCH, PLLC

December 12, 2012 - 11:13 AM

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Court of Appeals Case Number: 39883-4

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SUPREME COURT NO. _____
No. 39883-4-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

DAVID GOWER, Petitioner.

CERTIFICATE OF MAILING PETITION FOR REVIEW

I certify that on December 13, 2012, I personally mailed a copy of
the petition for review in the above case, via first-class mail, to:

David Joel Gower
DOC #760395
Clallam Bay Correction Center
1830 Eagle Crest Way
Clallam Bay, WA 98326-9723

DATED: December 13, 2012.



Rebecca Wold Bouchey
WSBA #26081
Attorney for Appellant.

NIELSEN, BROMAN & KOCH, PLLC
1980 East Madison
Seattle, WA 98122

(206) 623-2373

NIELSEN, BROMAN & KOCH, PLLC

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