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63736-3

NO. 63736-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KURT SCHAUER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HELEN HALPERT

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether defendant Kurt Schauer has failed to establish beyond a reasonable doubt that RCW 10.58.090 is unconstitutional.

2. Whether the trial court acted within its discretion in admitting evidence of Schauer's previous acts of child molestation under RCW 10.58.090.

3. Whether Schauer has failed to establish that he is entitled to a new trial based upon alleged prosecutorial misconduct in closing argument.

B. STATEMENT OF THE CASE

1. BACKGROUND

In 1992, Kristy Viner began dating Schauer. 6RP 67.¹ Approximately two years later, their dating relationship ended, though they remained close friends. 6RP 69-70. During all relevant times, Kristy lived in Oregon.² 6RP 61-65; 7RP 71. Schauer lived in Seattle. 7RP 16; 11RP 86.

¹ The report of proceedings consists of 14 volumes. The State adopts the same abbreviations used by appellant Schauer.

² Because a number of witnesses share the same last name, their first names are used throughout the brief.

In January of 1998, Kristy gave birth to a son, T.V. 6RP 61. T.V.'s biological father played virtually no role in his child's life. 6RP 65-66. Instead, Schauer filled that role. 6RP 70-71. When T.V. was three years old, Schauer told Kristy that he felt T.V. was his child and that he loved T.V. like a father loves his son. 6RP 72; 7RP 5.

After T.V. turned three, he began to spend weekends with Schauer. 7RP 10; 8RP 19-21. By the time that he was six years old, T.V. was spending every other weekend with Schauer. 7RP 16-17; 12RP 27-28. T.V. spent Father's Day, Thanksgiving, spring breaks, and several weeks in the summer with Schauer. 7RP 6, 17, 19. Schauer took T.V. on fishing and camping trips. 8RP 16-17.

Schauer was generous with his money. He bought Kristy a car. 7RP 9. He bought T.V. clothes and toys. 7RP 9. He took Kristy and T.V. to Disneyland and took T.V. to Montana for a paleontology dig. 7RP 21-25.

Schauer became a part of Kristy's extended family; he attended holiday functions and birthdays with the Viner family. 6RP 27; 7RP 6; 8RP 93-108; 10RP 113-15. T.V.'s cousins referred to Schauer as "Uncle Kurt." 10RP 113.

Schauer occasionally expressed concern that Kristy might take T.V. away from him. 8RP 106. He did not explain why. 8RP 107.

2. SCHAUER'S MOLESTATION OF T.V. AND A.A.

Unbeknownst to Kristy, Schauer began molesting T.V. when he was four years old. 8RP 24-25; Ex. 47 and 48. Virtually every time that T.V. stayed with Schauer, he would molest the young boy. Ex. 47 and 48. Schauer would rub T.V.'s penis and make T.V. touch Schauer's penis. 8RP 23-27; Ex 47 and 48. Schauer would make T.V. lie down on the bed in his bedroom and then place his hand up T.V.'s anus. 8RP 28-29. Schauer would also "bite" T.V.'s butt. 8RP 48. Schauer made T.V. take showers with him, and T.V. saw Schauer ejaculate several times. 8RP 29-30, 52-53; Ex. 47 and 48. T.V. thought the white substance was milk until he learned about sperm in the fifth grade. 8RP 30.

During the summer of 2007, Schauer invited T.V. and T.V.'s eight-year-old cousin, A.A., to come to Seattle for four days.³ 7RP 125, 129; 8RP 99, 120-21. On the first night, Schauer made

³ When A.A. had previously commented that Schauer was a cool dad and that he'd like to visit him in Seattle, T.V. responded that he did not want A.A. to come. 8RP 122.

A.A. and T.V. take a bath together. 7RP 128-29. Schauer entered the bathroom, grabbed a bar of soap and rubbed A.A.'s penis and testicles. 7RP 130-31; 8RP 31; Ex. 47 and 48. Schauer did the same thing to T.V. 7RP 133; Ex. 47 and 48. Schauer also placed his hand in between A.A.'s and T.V.'s buttocks. 7RP 114; Ex. 47 and 48.

That first night, A.A. called his parents. Though A.A. wanted to tell his parents what had happened, he did not, concerned that Schauer would hurt him. 7RP 136. Instead, he told his mother that Schauer made him take two baths a day and that he wanted to come home. 8RP 124-25; 10RP 124. His parents attributed the request to "jitters." 10RP 124.

The next day, Schauer made the boys take another bath and molested them again. 7RP 138-39. That night, A.A. again called his parents and said he wanted to come home. 10RP 125. Over the next three days, Schauer continued to make the boys take baths twice a day and molest them. 7RP 142-44.

After A.A. returned from this trip, his parents noticed changes in his behavior. He began wetting his bed every night. 8RP 127-29. He also seemed to become angry more easily. 8RP 127-28; 10RP 128.

3. THE DISCLOSURE OF THE ABUSE.

There were some hints that Schauer was molesting T.V. One time when T.V. was 8 or 9 years old, Schauer dropped T.V. off and told Kristy that T.V. had a problem going to the bathroom and had hemorrhoids. 7RP 59-60. Kristy noticed that the folds of his rectum were swollen. 7RP 61.

In February of 2007, A.A.'s family was driving to Seattle with T.V., whom they planned to drop off at Schauer's house for the weekend. 8RP 113-14. In the car, A.A.'s parents overheard T.V. tell his cousin, "My dad French-kisses me." 8RP 115; 10RP 119. When A.A.'s mother questioned T.V. about it, he explained that French-kissing was "when you stick in your tongue in your mouth." 8RP 115. Upon arriving in Seattle, A.A.'s mother asked Schauer if he French-kissed T.V., and Schauer made a joke about it. 8RP 116-17.

Nearly a year later, in January of 2008, while celebrating T.V.'s birthday at a restaurant, Kristy heard T.V. say, "Daddy kisses me with his tongue." 7RP 41. When Schauer denied it, T.V. insisted, "Yes, you do. Yes, you do." 7RP 41.

A few weeks later, Kristy and T.V. attended a scouts meeting where the group discussed personal safety, including inappropriate

touching. 7RP 42. After the meeting, T.V. told his mother, "I think what we talked about is happening to me." 7RP 43. When Kristy questioned him, T.V. responded, "Daddy tickles me, touches my privates." 7RP 44. Kristy suggested that he was mistaken, and T.V. insisted, "No. Daddy tells me to drop them [his pants], and he tickles me in my privates." 7RP 44.

Kristy talked to her sister Jennifer, A.A.'s mother, about what T.V. had said and brought him to Jennifer's house the next day. 7RP 48-49; 8RP 132-34, 166. After Jennifer questioned T.V. about bullies, T.V. described how Schauer molested him. 7RP 50; 8RP 135-38. At one point, T.V. asked what the "white stuff" was that came out of Schauer's penis and then added, "Is that semen?" 7RP 50-52; 8RP 138. Jennifer asked T.V. how many times he had seen it, and T.V. responded two to four times. 7RP 101.

The next morning, February 2, 2008, Jennifer and her husband spoke with their son A.A. 8RP 142. A.A. disclosed that Schauer had molested him when he stayed at Schauer's house in Seattle in 2007. 8RP 141-42, 176, 184; 10RP 135.

That morning, Jennifer contacted a cousin who was a police officer, and the police then responded and took a report from Kristy. 6RP 14-17, 25-32; 8RP 145.

4. THE POLICE INVESTIGATION

On February 22, 2008, pediatric nurse practitioner Kathy McCready conducted physical examinations of T.V. and A.A. 7RP 58; 10RP 8-21. McCready noted that T.V.'s anal area had an unusual appearance: the folds between the skin and internal mucosa were smoothed and extended. 10RP 36-46. It did not appear that he was born that way. 10RP 43. During the exam, T.V. told McCready that Schauer "touches my privates and makes me go in the shower with him. He likes boys, too, like he's gay." 10RP 54. He explained how Schauer slept with boys and "[h]e's been doing it since I have been alive." 10RP 55.

McCready also conducted a physical examination of A.A. and found no relevant physical findings indicating abuse. 10RP 63-77. During the course of the exam, A.A. described how Schauer had molested him. 10RP 73-75.

Immediately following the physical examinations, child interview specialist Tom Findlay separately interviewed T.V. and A.A. 9RP 87-97; Ex. 45, 46, 47 and 48. Both boys described how they had been molested. Ex. 45, 46, 47 and 48. T.V. stated that he finally told his aunt because he wanted it to stop. Ex. 47 and 48.

5. SCHAUER'S EARLIER MOLESTATION OF T.P.

Kristy and her family did not know that Schauer previously had molested another young boy. 7RP 7-8; 12RP 22-23.

In 1987, T.P. was 10 years old and living with his mother and two brothers in Cheyenne, Wyoming. 8RP 79-81. T.P. met Schauer through the Big Brothers program and got together with him once a week. 8RP 83-84; 9RP 13. Schauer befriended T.P.'s mother, and she allowed Schauer to babysit T.P. and his brothers. 8RP 84-85; 12RP 43. At the time, Schauer was in a military police position in the U.S. Air Force. 9RP 13-15.

In July of 1987, while Schauer was babysitting, T.P. took a shower and, wearing only underwear, lay down on his bed. 8RP 86; 9RP 10-11. Schauer entered the room and fondled T.P.'s genitals. 8RP 86. T.P. pretended to be asleep, but Schauer stated, "I know you're awake." 8RP 86-87. Schauer left the room but then returned, moved T.P.'s underwear down and fondled his bare penis. 8RP 87.

When T.P.'s mother returned, he told her what had happened. 8RP 88-89. She contacted the police. 8RP 90.

The police notified the Air Force, and when military personnel attempted to stop Schauer, he fled. 9RP 15-16. The

Cheyenne police later arrested Schauer, and during an interview with a detective, Schauer admitted that he had sexual contact with T.P. 9RP 16-44. A few days later, a detective re-contacted Schauer in jail, and he again admitted to having sexual contact with T.P. 9RP 49-55. Schauer later pled guilty to the crime of Immodest, Immoral or Indecent Acts with a Minor. 9RP 59.

6. THE CHARGES, SCHAUER'S TESTIMONY AND THE TRIAL.

On May 14, 2008, the State charged Schauer with six counts of first-degree child molestation. CP 1-3. T.V. was the victim for counts I, II and III, and A.A. was the victim for counts IV, V and VI. Id. The State later amended the charges to allege aggravating circumstances. On all six counts, the State alleged that Schauer abused his position of trust to facilitate the commission of the offense. CP 9-13. On the first three counts relating to T.V., the State alleged that the offense was part of an ongoing pattern of sexual abuse of the same victim. CP 9-11.

The matter went to trial in April of 2009. Schauer testified in his defense. 11RP 71. He denied that he molested T.V. or A.A. 11RP 131, 140-48. He admitted that he had a prior conviction for

molesting T.P., but described the incident as one where his hand "slipped" while he was dressing the boy. 12RP 45-46. He explained, "I'm not going to say it was inadvertent. I'm not going to say it was not." 12RP 45. Schauer denied that he had ever been sexually attracted to little boys. 12RP 89-90.

The jury found Schauer guilty of counts I through V and acquitted him of count VI. CP 73-83. The jury found the aggravating circumstances on Counts I through V. Id. On each conviction, the trial court imposed an indeterminate sentence consisting of maximum term of life and an exceptional minimum term of 346 months. CP 98. This appeal follows.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE THAT SCHAUER HAD PREVIOUSLY MOLESTED A BOY.

Schauer challenges the admission of evidence that he previously molested T.P. He argues that (1) RCW 10.58.090 is unconstitutional, and (2) if the statute is valid, the evidence was not admissible. These claims are without merit. This Court has previously rejected Schauer's ex post facto and separation of powers challenges to RCW 10.58.090. Schauer's claim that the

statute runs afoul of his state constitutional right to a jury trial is unsupported by any authority. Finally, the trial court clearly acted within its discretion in admitting the evidence under RCW 10.58.090 in light of the similarities between the facts of this case and Schauer's previous molestation of T.P.

a. Relevant Facts

Prior to trial, the State gave notice that it sought to offer under RCW 10.58.090, the testimony of two prior victims of molestation: T.P. and J.P. CP 117-19, 132-43. Defense counsel interviewed both men prior to trial. Pretrial Ex. 8 and 11.

According to the State's proffer, in 1987 Schauer was enlisted in the Air Force and resided at a base in Cheyenne, Wyoming. CP 117. Schauer became a "Big Brother" to 10-year-old T.P. and 6-year-old J.P. Id.; Pretrial Ex. 11. T.P. and J.P.'s mom was single and worked full time. CP 117. For several months, Schauer baby-sat the boys while their mother was at work. Id. During this time period, Schauer repeatedly molested and raped J.P. CP 134-35; Pretrial Ex. 8. Among other things, he insisted on taking baths with J.P. Pretrial Ex. 8.

As recounted above, on one day, Schauer also molested J.P.'s older brother, T.P. CP 117-18; Pretrial Ex. 11. T.P. immediately told his mother, who reported Schauer to the police. CP 118. When contacted by the police, Schauer admitted to having sexual contact with both T.P. and J.P. CP 118; Pretrial Ex. 12 and 13.

Schauer was charged with two counts of Immodest, Immoral or Indecent Acts with a Minor. Ex. 39. As part of a plea deal, Schauer pled guilty to the count where the victim was T.P., and the count relating to J.P. was dismissed. Id.; CP 135.

In response to the State's proffer, Schauer challenged the constitutionality of RCW 10.58.090, and alternatively argued that the evidence relating to T.P. and J.P. was not admissible under the statute. 2RP 7-8; 3RP 152-60. The trial court rejected the constitutional challenges to RCW 10.58.090. 2RP 8-10. After hearing testimony and reviewing exhibits relating to Schauer's molestation of T.P. and J.P., the court held that evidence relating to T.P. would be admitted. 5RP 49-51. However, the trial court excluded evidence relating to J.P., explaining that Schauer had not pled guilty to molesting J.P., the court believed the detective's interview of J.P. was confusing, and the court was concerned that

there would be a mini-trial on whether Schauer had molested J.P.
5RP 50-51.

Prior to the testimony of the witnesses relating to Schauer's molestation of T.P. and again at the conclusion of trial, the court gave a limiting instruction:

In a criminal case in which the defendant is accused of child molestation, evidence of the defendant's commission of another offense or offenses of sexual assault against a child or of child molestation is admissible and may be considered for its bearing on any matter to which it is relevant.

However, evidence of a prior offense on its own is not sufficient to prove the defendant guilty of the crimes charged in the information.

The defendant is not on trial for any act, conduct, or offense not charged in the information. Bear in mind as you consider this evidence, that at all times the State has the burden of proving that defendant committed each of the elements of each crime charged in the Information beyond a reasonable doubt.

CP 65; 8RP 78-79; 9RP 4.

b. Schauer Has Not Established That RCW 10.58.090 Is Unconstitutional.

During the 2008 session, the Washington Legislature enacted RCW 10.58.090. The statute provides that in sex offense cases, evidence of the defendant's commission of another sex

offense is admissible subject to the court's balancing of factors under ER 403. The statute provides in pertinent part:

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.

RCW 10.58.090(1).

This statute was based upon federal rules enacted in 1994. Federal Rules of Evidence 413, 414 and 415. At least nine other states have enacted similar statutes or rules.⁴

Schauer argues that RCW 10.58.090 violates the state and federal ex post facto clauses, separation of powers, and "state constitutional fair trial protections." Brief of Appellant at 18-36. As a general principle applicable to all of Schauer's constitutional claims, this Court must presume that RCW 10.58.090 is constitutional. State v. Lanciloti, 165 Wn.2d 661, 667, 201 P.3d 323 (2009). Schauer bears the burden of showing the statute is unconstitutional beyond a reasonable doubt. State v. Shafer,

⁴ See Arizona Evid. R. 404(c); Ark. Code § 16-42-103; Cal. Evid. Code § 1108; Fla. Stat. § 90.404(2)(b); 725 Ill. Comp. Stat. 5/115-7.3; Iowa Code § 701.11; La. Code Evid. art. 412.2; Mich. Comp. Laws § 768.27a; Okla. Stat. 12, § 2413.

156 Wn.2d 381, 387, 128 P.3d 87 (2006). He has failed to meet this burden.

- i. RCW 10.58.090 does not violate the ex post facto clauses.

Schauer argues that the admission of evidence under RCW 10.58.090 violated the federal and state ex post facto clauses. The United States and Washington Constitutions both contain ex post facto clauses. U.S. Const. art. 1, § 10; Const. art. 1, § 23. "The ex post facto clauses prohibit states from enacting any law that (1) punishes an act that was not punishable at the time the act was committed, (2) aggravates a crime or makes the crime greater than it was when committed, (3) increases the punishment for an act after the act was committed, and (4) changes the rules of evidence to receive less or different testimony than required at the time the act was committed in order to convict the offender." State v. Angehrn, 90 Wn. App. 339, 342-43, 952 P.2d 195 (1998) (citing Collins v. Youngblood, 497 U.S. 37, 42, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990)).

Schauer claims that the admission of evidence under RCW 10.58.090 in his trial violated this fourth category. However, few rules of evidence have been found to fall under this category.

The Washington Supreme Court has held that a new rule of evidence that allows for the admission of previously prohibited witness testimony does not violate the ex post facto clause.

In State v. Clevenger, 69 Wn.2d 136, 141, 417 P.2d 626 (1966), Clevenger was charged with committing incest and indecent liberties on his three-year-old daughter. His wife was permitted to testify due to an amendment to the spousal privilege statute, passed after the commission of the crime, which created an exception for crimes committed against one's child. The Washington Supreme Court rejected Clevenger's ex post facto challenge to the amended statute, explaining:

[A]lterations which do not increase the punishment, nor change the ingredients of the offence [sic] or the ultimate facts necessary to establish guilt, but - leaving untouched the nature of the crime and the amount or degree of proof essential to conviction - only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury, can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offence [sic] charged.

69 Wn.2d at 142 (quoting Hopt v. Utah, 110 U.S. 574, 590, 4 S. Ct. 202, 28 L. Ed. 262 (1884)).

Similarly, in State v. Slider, 38 Wn. App. 689, 688 P.2d 538 (1984), the Court of Appeals upheld the admission of child hearsay under the recently enacted child hearsay statute, RCW 9A.44.120. The court held that the application of the statute did not run afoul of the ex post facto clauses because the statute "did not increase the punishment nor alter the degree of proof essential for a conviction[.]" Id. at 695; see also State v. Ryan, 103 Wn.2d 165, 179, 691 P.2d 197 (1984) (rejecting ex post facto challenge to child hearsay statute).

In contrast, in the case cited by Schauer, Ludvigsen v. City of Seattle, 162 Wn.2d 660, 174 P.3d 43 (2007), the Washington Supreme Court concluded that amendments to the Washington Administrative Code (WAC) effectively reduced the quantum of evidence necessary to convict a defendant of driving while intoxicated. Under the relevant municipal ordinance, the City was required to prove the defendant failed a valid breath test. A 2004 amendment to the WAC relieved the City of a previous requirement that, in order to establish a valid breath test, it prove that the breath test machine's thermometer had been properly certified. Addressing an ex post facto challenge to this amendment, the court framed the issue as "whether the WAC amendments changed

ordinary rules of evidence or changed the evidence necessary to convict Ludvigsen of a DWI." Id. at 671-72. The court concluded that the amendments had changed the evidence necessary for a conviction:

[U]nder the per se prong, the validity of the breath test is a part of the prima facie case the government must prove. The City redefined the meaning of a valid test and thereby changed the meaning of the crime itself.... The subsequent change reduced the quantum of evidence to establish a prima facie case and to overcome the presumption of innocence.

Id. at 672-73 (footnotes omitted).

RCW 10.58.090 did not reduce the quantum of evidence necessary to establish a prima facie case. The elements of the crime remain the same, and the quantum of proof required to satisfy those elements remains the same. It is similar to the statutory amendments at issue in Clevenger and Slider; it allows for the testimony of witnesses who otherwise might not have been permitted to testify.⁵

⁵ Courts in other jurisdictions have rejected ex post facto challenges to statutes similar to RCW 10.58.090. See State v. Willis, 915 So.2d 365, 383 (La. Ct. App. 2005) (rejecting ex post facto challenge and holding that Louisiana statute "did not alter the amount of proof required in the Defendant's case as it merely pertains to the *type of evidence* which may be introduced."); People v. Pattison, 276 Mich. App. 613, 619, 741 N.W.2d 558 (Mich. Ct. App. 2007) (rejecting ex post facto challenge to Michigan law).

Consistent with the above authorities, this Court recently rejected an ex post facto challenge to RCW 10.58.090. In State v. Gresham, the Court explained:

RCW 10.58.090 does not alter the facts necessary to establish guilt, and it leaves unaltered the degree of proof required for a sex offense conviction. It only makes admissible evidence that might otherwise be inadmissible. For this reason, RCW 10.58.090 is like the statute at issue in Clevenger: the State still has to prove beyond a reasonable doubt all the elements of the charged crime—here, child molestation in the first degree—regardless of whether evidence was admitted under RCW 10.58.090. Because RCW 10.58.090 does not alter the quantum of evidence necessary to convict, it does not violate the constitutional prohibitions against ex post facto laws.

2009 WL 4931789 at *6 (2009); see also State v. Scherner, 2009 WL 4912703 (2009) at *4-7.

Schauer does not discuss or acknowledge Gresham, although he briefly attempts to distinguish Scherner. He ignores most of the court's ex post facto analysis and briefly discusses only one aspect of the court's decision - its discussion of the lustful disposition exception. Brief of Appellant at 22-23. In that portion of the opinion, this Court observed that RCW 10.58.090 could be viewed as "an extension of the principles underlying the lustful disposition exception to propensity evidence that Washington courts already recognize." 2009 WL 4912703 at *6. Schauer

claims that the "lustful disposition" exception has some relevance other than propensity, yet he does not identify the other purpose. In fact, the Washington Supreme Court has recognized that the lustful disposition exception allows propensity evidence and has held that evidence under this exception "is admitted for the purpose of showing the lustful inclination of the defendant toward the offended female, which in turn makes it more probable that the defendant committed the offense charged." State v. Ferguson, 100 Wn.2d 131, 134, 667 P.2d 68 (1983). Schauer has not shown that Gresham and Scherner were wrongly decided.

- ii. The state ex post facto clause does not provide greater protection than the federal clause.

Schauer argues that the ex post facto clause in article 1, section 23 of the Washington State Constitution provides greater protection than the ex post facto clause in the United States Constitution. Brief of Appellant at 25-31. However, the state constitutional provision is worded virtually identically to its federal counterpart, and Washington courts have never interpreted it differently. This Court should reject Schauer's claim that the

admission of evidence under RCW 10.58.090 violated the state constitution's ex post facto clause.

To determine whether a state constitutional provision provides greater protection than its federal counterpart, the court considers the six nonexclusive factors identified in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). The six factors are: (1) the state provision's textual language; (2) significant differences between the federal and state texts; (3) state constitutional and common law history; (4) existing state law; (5) structural differences between the federal and state constitutions; and (6) matters of particular state interest or local concern. Id. at 61-62.

An examination of the Gunwall factors does not support Schauer's claim that the ex post facto clause in article 1, section 23 provides greater protection than the federal clause. With respect to the first and second factors, the language of the two provisions is virtually identical. The federal ex post facto clause provides that "[n]o State shall... pass any Bill of Attainder, ex post facto Law or Law impairing the Obligation of Contracts." U.S. Const. art. 1, § 10. The Washington State Constitution similarly states that "[n]o bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed." Const. art. 1, § 23. The

Washington Supreme Court has held that where language of the state constitution is similar to that of the federal constitution, the state constitutional provision should receive the same definition and interpretation given to the federal provision. In re Detention of Turay, 139 Wn.2d 379, 412, 986 P.2d 790 (1999).

With respect to the third and fourth factors, state constitutional and common law history and existing state law, Washington courts have never interpreted the state ex post facto clause differently from its federal counterpart. Early in the state's history, the court looked for guidance to United States Supreme Court decisions concerning ex post facto claims. See Lybarger v. State, 2 Wash. 552, 557, 27 P. 449 (1891) ("As to the question whether or not the law now in force... is an *ex post facto* law we will quote and abide by the classified definition of Chief Justice Chase in Calder v. Bull.").

Over the last 100 years, the Washington courts have regularly cited the United States Supreme Court's interpretation of the federal ex post facto clause when considering claims brought under article 1, section 23. State v. Ward, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994); State v. Edwards, 104 Wn.2d 63, 70, 701 P.2d 508 (1985); Johnson v. Morris, 87 Wn.2d 922, 923-28,

557 P.2d 1299 (1976). Washington caselaw provides no support for Schauer's claim that the state constitutional provision is interpreted more broadly.

The fifth Gunwall factor, the differences in structure between state and federal constitutions, does not support a broader interpretation of the state constitutional provision. Both the federal and state ex post facto clauses were intended to be restrictions on a *state's* power to enact certain laws.

The sixth Gunwall factor requires consideration of whether the matter is of particular state or local concern. The goals of the ex post facto clauses of both constitutions appear to be equally important, locally and nationally.

In his Gunwall analysis, Schauer relies primarily upon an Oregon decision, State v. Fugate, 332 Or. 195, 26 P.3d 802 (2001). In Fugate, the Oregon Supreme Court held that the Oregon State Constitution's ex post facto clause was violated by retroactive application of "laws that alter the rules of evidence in a one-sided way that makes conviction of the defendant more likely." 332 Or. at 213. In so holding, the court acknowledged that its decision was inconsistent with the decisions of the United States Supreme Court concerning the ex post facto clause. Id. As authority for its

different interpretation, the Oregon court relied upon an 1822 decision by the Indiana Supreme Court, Strong v. State, 1 Blackf. 193 (Ind. 1822).

However, a review of Strong reveals that it provides no support for interpreting the Washington constitution's ex post facto clause differently from the federal counterpart. The issue in Strong was not a change in the rules of evidence but whether a change in punishment -- from stripes (whipping) to confinement in the State prison -- constituted an ex post facto violation. The Indiana Supreme Court noted that an ex post facto violation could occur when the law "retrench[ed] the rules of evidence, so as to make conviction more easy." Id. But as support for this proposition, the court cited federal caselaw.

When the Indiana Supreme Court later considered an ex post facto challenge to a new rule of evidence, it did not cite Strong, but looked to federal caselaw for guidance. Marley v. State, 747 N.E.2d 1123, 1130 (Ind. 2001). Consistent with Washington caselaw, the Indiana Supreme Court recognized that the ex post facto clause was not violated by a change to a rule of evidence that allowed for the testimony of witnesses who previously would not have been permitted to testify. Id.

Accordingly, Fugate and relevant Indiana caselaw do not support a broader interpretation of the Washington State Constitution's ex post facto clause. The Oregon court's decision was based upon dicta from an 1822 Indiana decision, and that portion of the Indiana decision was, in turn, based upon federal caselaw. Because Schauer has provided no persuasive evidence that the framers of the Washington State Constitution intended that the ex post facto clause have a different meaning than its federal counterpart, this Court should hold that the admission of the evidence under RCW 10.58.090 did not violate article 1, section 23.

- iii. The legislature's enactment of RCW 10.58.090 does not violate the separation of powers.

Schauer argues that the legislature's enactment of RCW 10.58.090 violates the separation of powers doctrine. This Court previously rejected this claim in Gresham and Scherner, and Schauer makes no attempt to distinguish those decisions. The Court should once again reject this argument.

The doctrine of separation of powers comes from the constitutional distribution of the government's authority into three branches. State v. Moreno, 147 Wn.2d 500, 505, 58 P.3d 265

(2002). The purpose of the doctrine is to prevent one branch of government from aggrandizing itself or encroaching upon the "fundamental functions" of another. Id. (citing Carrick v. Locke, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)). "Though the doctrine is designed to prevent one branch from usurping the power given to a different branch, the three branches are not hermetically sealed and some overlap must exist." City of Fircrest v. Jensen, 158 Wn.2d 384, 393-94, 143 P.3d 776 (2006). "The question to be asked is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another." Carrick, 125 Wn.2d at 135.

The courts have long recognized the legislature's authority to enact rules of evidence.⁶ The Washington Supreme Court has recognized that "rules of evidence may be promulgated by both the legislative and judicial branches." Fircrest, 158 Wn.2d at 394. The Court has acknowledged that its own authority to enact rules of evidence derives, in part, from a statute, RCW 2.04.190, and has

⁶ See State v. Sears, 4 Wn.2d 200, 215, 103 P.2d 337 (1940) (the legislature has the power to enact laws which create rules of evidence); Slider, 38 Wn. App. at 695-96 ("Our Supreme Court has also recognized (implicitly) the Legislature's authority to enact evidentiary rules when it analyzed the rape shield statute.").

held that "[t]he adoption of the rules of evidence is a legislatively delegated power of the judiciary." Id.

As a historical matter in Washington, the legislature and the courts have shared the responsibility for enacting rules of evidence. Prior to the enactment of the Rules of Evidence in 1979, the trial courts applied rules of evidence based upon statutes and common law. See generally 5 R. Meisenholder, Washington Practice (1965). A Judicial Council Task Force, which included representatives of both the legislature and the judiciary, drafted the current rules of evidence. 5 K. Tegland, Washington Practice, Evidence Law and Practice, at V-XI (2nd ed. 1982). To this day, numerous statutes supplement the Rules of Evidence on various issues.⁷ The legislature has enacted a number of statutes that relate particularly to evidence and testimony in sex offense cases.⁸

Since the enactment of the evidence rules, the courts have repeatedly rejected claims that the legislature's enactment of an evidentiary rule violated the separation of powers. In State v. Ryan,

⁷ See, e.g., RCW 5.45.020 (business records); RCW 5.46.010 (copies of business and public records); RCW 5.60.060 (evidentiary privileges); RCW 5.66.010 (admissibility of expressions of apology, sympathy, fault).

⁸ RCW 9A.44.020 (rape shield); RCW 9A.44.120 (child hearsay statute); RCW 9A.44.150 (child witness testimony concerning sexual or physical abuse).

supra, the Washington Supreme Court rejected the claim that the legislature's enactment of the child hearsay statute, RCW 9A.44.120, violated the separation of powers. In doing so, the court held that "apparent conflicts between a court rule and a statutory provision should be harmonized, and both given effect if possible." 103 Wn.2d at 178.

More recently, in Fircrest, the defendant challenged a statute that provided that breath test results were admissible if the State satisfied a certain threshold burden. The statute was passed in response to a Washington Supreme Court decision holding breath tests were inadmissible if they failed to comply with certain procedures in the WAC. 158 Wn.2d at 396-97. The court held that the statute did not violate the separation of powers:

The legislature has made clear its intention to make BAC test results fully admissible once the State has met its prima facie burden. No reason exists to not follow this intent. The act does not state such tests must be admitted if a prima facie burden is met; it states that such tests are *admissible*. The statute is permissive, not mandatory, and can be harmonized with the rules of evidence. There is nothing in the bill, either implicit or explicit, indicating a trial court could not use its discretion to exclude the test results under the rules of evidence. The legislature is not invading the prerogative of the courts nor is it threatening

judicial independence. SHB 3055 does not violate the separation of powers doctrine.

Id. at 399.

Here, the legislature, which retains authority to enact rules of evidence, did not invade the prerogative of the courts by enacting RCW 10.58.090. The statute carves out a narrow exception to ER 404(b), a rule that already contains numerous other exceptions. The statute provides that the trial court still has discretion to exclude the evidence after applying balancing factors under ER 403. The statute can be harmonized with the existing evidence rules, and the court can give effect to both. As this Court noted when rejecting the claim that the legislature's enactment of RCW 10.58.090 violated the separation of powers:

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.

Schnerer, 2009 WL 4912703 at *9; see also Gresham, 2009 WL 4931789 at *2-4. The Court should reject Schauer's separation of powers challenge to the statute.

- iv. RCW 10.58.090 does not violate Schauer's state constitutional right to a jury trial.

In a brief argument citing little authority, Schauer claims that RCW 10.58.090 is unconstitutional because it violates "state constitutional fair trial protections." Brief of Appellant at 35-36. The Court should reject this claim; the state constitutional right to a jury trial does not prohibit the admission of evidence under RCW 10.58.090.

Schauer claims that the state constitutional right to a jury trial, set forth in Const. art. 1, §§ 21 and 22, prohibits the admission of evidence under RCW 10.58.090. He cites to one *federal* decision, McKinney v. Rees, 993 F.2d 1378 (9th Cir. 1993) as supporting this claim. In McKinney, the Ninth Circuit did not render any opinion about the scope of the Washington State constitutional right to a jury trial. Instead, the court held that the trial court improperly admitted evidence about the defendant's previous possession of knives and that "the erroneous admission of propensity evidence rendered McKinney's trial fundamentally unfair in violation of the Due Process Clause." 993 F.2d at 1385. Schauer has not made a due process claim, and this Court has rejected a due process challenge to RCW 10.58.090. Schnerer,

2009 WL 4912703 at *11-13. In fact, the federal and state appellate courts, including the Ninth Circuit, have uniformly rejected due process challenges to rules and statutes similar to RCW 10.58.090.⁹

Perhaps because the weight of authority is so strongly against him on a due process challenge, Schauer has characterized his argument as implicating the state constitutional right to a jury trial. Yet no caselaw supports that notion that the right to a jury trial protects a defendant against the admission of certain evidence. This claim is without merit.

c. The Superior Court Properly Admitted Evidence That Schauer Had Previously Molested T.P.

Schauer argues that even if RCW 10.58.090 is valid, the court should not have admitted the evidence of his previous acts of molesting T.P. However, the court clearly acted within its discretion

⁹ See United States v. Mound, 149 F.3d 799, 801 (8th Cir. 1998); United States v. LeMay, 260 F.3d 1018, 1025-26 (9th Cir. 2001); United States v. Enjady, 134 F.3d 1427, 1432 (10th Cir. 1998); People v. Falsetta, 21 Cal.4th 903, 912, 986 P.2d 182, 89 Cal.Rptr.2d 847 (1999); McLean v. State, 934 So.2d 1248 (Fla. 2006); People v. Beaty, 377 Ill.App.3d 861, 884, 880 N.E.2d 237, 255 (Ill. Ct. App. 2007); State v. Reyes, 744 N.W.2d 95, 101-03 (Iowa 2008).

in admitting the evidence, given the similarities between the facts of this case and Schauer's previous molestation of T.P.

This Court reviews a trial court's decision whether to admit evidence under RCW 10.58.090 for an abuse of discretion.

Schnerer, 2009 WL 4912703 at *13. An abuse of discretion occurs only when no reasonable person would have ruled as the trial court did. State v. Atsbeha, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001).

Under ER 403, the trial court may exclude evidence proffered under RCW 10.58.090 if the probative value of the evidence is outweighed by the dangers of confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

RCW 10.58.090 requires the court to consider the following non-exclusive factors when deciding whether to exclude evidence of the defendant's other sex offenses under ER 403:

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.

RCW 10.58.090(6).

Here, the trial court considered each of these factors and concluded that the probative value of the evidence outweighed the prejudicial effect. 5RP 49-51. This conclusion was a reasoned decision and not an abuse of discretion.

As the trial court noted, the evidence revealed marked similarities between Schauer's prior act of molesting T.P. and his molestation of T.V. and A.A. All of the victims were young boys. In both instances, Schauer befriended a single mother and adopted the role of a father figure to the young child. After gaining the mother's trust, he was allowed to be alone with the child in a private setting. He then molested the child.

Schauer points to some slight differences in the nature of the abuse, noting that he only fondled T.P. Of course, this was because T.P. immediately reported the abuse. The slight differences do not change the basic similarities of Schauer's actions.¹⁰ This factor supported admission of the testimony.

With respect to the closeness in time and frequency of the prior acts, the trial court acknowledged that this factor caused the court "the greatest pause." 5RP 49. Fourteen years passed between the time that Schauer molested T.P. and when he started to molest T.V. This passage of time did not require exclusion of evidence.¹¹ In State v. DeVincentis, 150 Wn.2d 11, 74 P.3d

¹⁰ See United States v. Bentley, 561 F.3d 803, 815 (8th Cir. 2009) (rejecting claim that prior acts were too dissimilar when the testimony established that the defendant molested young girls who were actual or virtual members of his family or lived in his home); United States v. Horn, 523 F.3d 882, 888 (8th Cir. 2008) (finding no abuse of discretion despite differences in ages of victims where all of the offenses involved sexual assaults of defenseless victims); United States v. Hawpetoss, 478 F.3d 820, 825-27 (7th Cir. 2007) (finding no abuse of discretion when all of the acts involved children with whom the defendant had a familial or quasi-familial relationship).

¹¹ RCW 10.58.090, like the corresponding federal rules, contains no time limit beyond which prior sex offenses are inadmissible. The federal courts have repeatedly held that prior sex offenses committed decades earlier were admissible. See United States v. Kelly, 510 F.3d 433, 437 (4th Cir. 2007) (rejecting argument that prior sex offense was inadmissible because it occurred more than 20 years ago); United States v. Benally, 500 F.3d 1085 (10th Cir. 2007) (affirming admission of testimony of two victims sexually assaulted 40 years earlier and a third victim sexually assaulted 21 years earlier), cert. denied, 128 S. Ct. 1917 (2008); United States v. Gabe, 237 F.3d 954, 959-60 (8th Cir. 2001) (upholding district court's admission of evidence of sexual molestation committed 20 years earlier).

119 (2003), approximately 15 years passed between the defendant's earlier conviction for sexual abuse and the new charge of rape. Despite the lapse in time, the court held that the evidence of the prior misconduct was relevant to show that he had previously victimized another girl in a markedly similar way under similar circumstances. 150 Wn.2d at 13. Similarly, here, the evidence showed that Schauer had previously victimized a young boy in a strikingly similar way.

There were no intervening circumstances between Schauer's molestation of T.P. and his molestation of T.V. and A.A. that undermined the probative value of the evidence. Schauer claims that his successful completion of probation and sexual deviancy treatment was a significant intervening circumstance. Brief of Appellant at 11. However, he provided little information to the court about what sexual deviancy treatment he participated in, let alone did he suggest that he had been cured of his attraction to young boys. In his testimony at trial, he had considerable difficulty acknowledging his past behavior and could not bring himself to admit that he had ever been attracted to young boys. 12RP 45-64. There were no relevant intervening factors that weighed against admitting the evidence.

Schauer's molestation of T.P. resulted in a criminal conviction, and therefore this factor favored admission.

With respect to the necessity of and probative value of the evidence, the Court of Appeals has observed, "Generally, courts will find that probative value is substantial in cases where there is very little proof that sexual abuse has occurred, particularly where the only other evidence is the testimony of the child victim." State v. Sexsmith, 138 Wn. App. 497, 506, 157 P.3d 901 (2007). "Where a defendant is charged with child rape or child molestation, the existence of 'a design to fulfill sexual compulsions evidenced by a pattern of past behavior' is probative of the defendant's guilt." Id. at 504 (quoting DeVincentis, 150 Wn.2d at 17-18). Here, the State's case rested primarily on the testimony of T.V. and A.A. Given the central issue of credibility, the evidence that Schauer had previously molested another boy under very similar circumstances was highly probative.

Schauer argues that the danger of unfair prejudice outweighed the probative value of this evidence. However, his argument on this point is essentially an argument against the admissibility of propensity evidence and would apply to any evidence admitted under RCW 10.58.090. T.P.'s testimony was

undoubtedly prejudicial as all evidence admitted under RCW 10.58.090 will be. But RCW 10.58.090 and ER 403 are concerned only with *unfair* prejudice. This evidence was prejudicial to Schauer for the same reason it was probative - it tended to prove his sexual desire for young boys. Because this specific type of evidence is admissible under RCW 10.58.090, Schauer has not shown that the prejudice was *unfair*.

The trial court carefully considered ER 403 and the factors in RCW 10.58.090, and acted well within its discretion in admitting the evidence that Schauer molested T.P.

2. SCHAUER HAS FAILED TO ESTABLISH THAT HE IS ENTITLED TO A NEW TRIAL BASED UPON PROSECUTORIAL MISCONDUCT.

For the first time on appeal, Schauer claims that the prosecutor committed misconduct in closing argument by disparaging his constitutional right to confront witnesses. A review of the prosecutor's remarks in context reveals that this claim has no merit. The prosecutor did not disparage or criticize Schauer's exercise of his constitutional right to confront witnesses. Instead, the prosecutor's comments, which occurred during a discussion of the credibility of the victims, addressed the understandable

pressure that the young boys faced when testifying before a courtroom full of strangers and the defendant. This was proper argument.

a. Relevant Facts

During closing argument, the prosecutor anticipated that the defense counsel would point to inconsistencies in A.A.'s and T.V.'s testimony and their prior statements. With respect to A.A., the prosecutor argued:

And what [A.A.] told us in a room full of strangers, in front of the person who inflicted the abuse upon him, may have been subtly different than what he told Tom Findlay in that recorded interview. And I want to talk for a second about that subtle inconsistency or those subtle inconsistencies, because I suggest to you -- and I expect that defense counsel may spend a good deal of time on things like inconsistencies in [A.A.]'s account.

And what occurred to me is this. You know, is it any wonder in a group of strangers under the bright lights of the courtroom that [A.A.] didn't tell us some of the things that he told Tom Findlay? That he didn't tell us that, in fact, his penis felt like it was getting hard, and what were the words I think he used to Tom Findlay, "like a spider was biting me." He didn't talk about that.

And it stands to reason, does it not? This little guy, the last thing he wants to talk about are words like penis, words like butt, and least of all, he doesn't want

to talk about what happened to his body or what his body felt like when the defendant did that.

So I highlight that just for the notion that these are little boys, let's not forget that. And it's hard enough to talk about it the first time with Mom and Dad when just a little came out. Maybe a little easier with Tom Findlay, that nice gentleman with just the mirror in front of them. But harder still in front of a group of strangers that he doesn't know and in front of the very person who inflicted the abuse upon him.

13RP 18-19.

The prosecutor then discussed the charges relating to T.V. and noted that T.V. had been remarkably consistent in his description of the molestation:

Ladies and gentlemen, the consistency in [T.V.'s testimony] over time is also remarkable and perhaps more appropriate to talk about with respect to [T.V.] than with [A.A.]. [T.V.]'s ability to continually provide those details to us, details that a child can only provide if they had the great misfortune of experiencing acts of sexual abuse. He has provided those details time and time and time again, to Aunt Jenny and his mom, to Tom Findlay and perhaps a more comfortable setting for this child, and ultimately to all of us in this courtroom in front of the person who he believed and felt for the longest time was his dad.

I have said that on two occasions that it will not -- it was not only difficult for [A.A.] but difficult for [T.V.] to testify in front of the defendant. And let me be clear on this point. The defendant has a constitutional right to confront witnesses. Our constitution demands that. And that is why, folks, [T.V.] had to testify and [A.A.] had to testify. But it doesn't make it easy, even if that's what the law requires. So that's the only reason

why I make that point. It doesn't make it easy on those little guys.

And when you talk about consistency over time, these kids haven't said hey, I made it up, hey, I take it back, it didn't happen that way, it didn't happen at all. There's been no taking it back. There's been no recanting of the allegations by either little boy. In fact, there's been the exact opposite.

13RP 25-26.

As the prosecutor predicted, defense counsel devoted much of his closing argument to discussing "inconsistencies in the testimony of the boys." 13RP 44.

b. The Prosecutor's Argument Was Not Improper.

The law governing Schauer's claim is well-settled. When a defendant claims prosecutorial misconduct, he bears the burden of establishing that the prosecuting attorney's comments were both improper and prejudicial. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). To establish prejudice, the defendant must show a substantial likelihood that the instances of misconduct affected the jury's verdict. State v. Stenson, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997). "The prejudicial effect of a prosecutor's improper comments is not determined by looking at the comments in isolation but by placing the remarks 'in the context

of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

"Where the defense fails to object to an improper comment, the error is considered waived 'unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.'" McKenzie, 157 Wn.2d at 52 (quoting Brown, 132 Wn.2d at 561). Defense counsel's failure to object to the remarks at the time that they are made strongly suggests to a court that the argument in question did not appear critically prejudicial to the defendant in the context of the trial. 157 Wn.2d at 53 n.2.

Schauer quotes from a short portion of the prosecutor's closing argument where she referred to Schauer's constitutional right to confront witnesses, and claims that this argument constituted flagrant misconduct. The Court should reject this claim. The focus of the argument was not upon Schauer's exercise of his constitutional right, but on the victims' difficulties in testifying before a courtroom full of strangers and the defendant.

It is not improper for a prosecutor to discuss the obvious difficulties that a witness or victim faces when testifying in court. In State v. Gregory, 158 Wn.2d 759, 805, 147 P.3d 1201 (2006), the prosecutor asked the rape victim how she felt about testifying in court and being cross-examined. The victim responded that she hated it; "I wouldn't want my worst enemy to have to go through what I've gone --." Id. at 806. In closing, the prosecutor read this testimony and argued that the victim would not have subjected herself to the trial process unless her testimony was true. On appeal, the defendant claimed that the testimony and argument chilled the exercise of his constitutional right to confrontation. Id.

The Washington Supreme Court summarized the relevant law governing the defendant's claim of misconduct, explaining:

[N]ot all arguments touching upon a defendant's constitutional rights are impermissible comments on the exercise of those rights. This court has characterized the relevant issue as "whether the prosecutor manifestly intended the remarks to be a comment on that right." These cases suggest that so long as the focus of the questioning or argument "is not upon the exercise of the constitutional right itself," the inquiry or argument does not infringe upon a constitutional right.

Id. at 806-07 (internal citations omitted). The court then rejected the defendant's claim:

Gregory does not point to any case in which a general discussion of the emotional cost of victim testimony, offered to support the victim's credibility, amounted to an improper comment on the defendant's right to confrontation.

We conclude that the questioning and argument at issue here were not improper because they did not focus on Gregory's exercise of his constitutional rights to trial and to confront witnesses. Instead they focused on the credibility of the victim as compared to the credibility of the accused.

Id. at 808.

Here, the challenged comment occurred during the portion of the prosecutor's argument where she addressed the credibility of the victims and offered reasons for some inconsistencies between their previous out-of-court statements and their trial testimony. The prosecutor appropriately noted the difficulty that the child victims faced when testifying in front of a group of strangers and the man who molested them. The prosecutor's reference to the defendant's right of confrontation was not critical; instead, she assured the jury that "[o]ur constitution demands that." 13RP 25.

In contrast, in the case relied upon by Schauer, State v. Jones, 71 Wn. App. 798, 863 P.2d 85 (1993), the prosecutor was openly critical of the defendant's exercise of his right to confront witnesses. During cross-examination, the prosecutor asked the

defendant whether he was frustrated because the prosecutor had blocked his view of the victim during her testimony. Id. at 805. In argument, the prosecutor complained that "he wants to have direct eye contact with her. Why? And what was the result of that direct eye contact that first day? She broke down and cried and she told you." Id. at 806. The prosecutor then told the jury that the victim was so upset that she refused to return to court. Id. The Court of Appeals held that the questioning and argument were improper because they invited the jury to draw a negative inference from the defendant's exercise of a constitutional right. Id. at 811-12.

Unlike Jones, viewing the argument here as a whole, it is clear that the prosecutor was not disparaging Schauer's exercise of his right to confront witnesses. Instead, she was making the point that it was difficult for a child to come into the courtroom and relate the intimate details of sexual molestation with the alleged molester a short distance away. The prosecutor made these comments in the context of discussing the credibility of the witnesses; she never suggested that Schauer had behaved improperly in the courtroom. This argument was not improper.

c. Schauer Has Failed To Establish That He Suffered Prejudice Justifying A New Trial.

Even if the prosecutor's comment was improper, Schauer waived this claim of error by failing to object. As noted above, the failure to object waives a challenge to an allegedly improper argument unless the defendant shows that the comment was so flagrant and ill-intentioned that a curative instruction to the jury could not have neutralized any prejudice. McKenzie, 157 Wn.2d at 52.

Schauer cannot meet this standard. The comment cannot be characterized as flagrant and ill-intentioned; the prosecutor did not openly disparage Schauer's right of cross-examination, and no Washington case clearly indicates that the comments were improper. Moreover, an objection and curative instruction could easily have remedied any prejudice by reminding the jury that they should not draw any negative inferences from Schauer's exercise of his right to confrontation.¹²

¹² In discussing prejudice and elsewhere throughout his argument on the misconduct claim, Schauer repeatedly refers to testimony that T.V. had attempted suicide and implies that such testimony was not proper. Schauer did not object to the testimony at trial and has not assigned error to the admission of this evidence on appeal.

In a very brief argument, Schauer attempts to avoid the "flagrant and ill-intentioned" standard; citing to Jones, he argues that the claim of error cannot be waived and that the State must establish that any error was harmless beyond a reasonable doubt. Brief of Appellant at 44. However, since Jones, this Court has continued to apply the "flagrant and ill-intentioned" standard and has held that, even when the challenged remarks touched on a constitutional right, the defendant waives a challenge on appeal by failing to object at trial. State v. French, 101 Wn. App. 380, 387-88, 4 P.3d 857 (2000); State v. Klok, 99 Wn. App. 81, 86, 992 P.2d 1039 (2000).¹³ At best, the prosecutor's argument "touched on" Schauer's constitutional right to confront witnesses, and Schauer has not shown that an objection and curative instruction could not have remedied any prejudice.

Finally, Schauer argues that he received ineffective assistance of counsel because his attorney did not object to the prosecutor's comments and request a curative instruction. In order

¹³ The Washington Supreme Court recently declined to apply constitutional harmless error analysis to claims of prosecutorial misconduct. Warren, 165 Wn.2d at 26 n.3 (declining to reach "the issue of whether a constitutional error analysis might be appropriate if the prosecutorial misconduct directly violated a constitutional right.").

to satisfy this claim, Schauer must show that there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In the context of this case, Schauer must show that his attorney acted unreasonably by failing to object and that, had he done so, it is reasonably probable that the jury's verdict would have been different.

Here, the failure to object was not unreasonable because the prosecutor's argument was proper. In addition, the record does not support the notion that the jury's verdict would have been different had there been an objection and had the court stricken this brief argument. The jury heard compelling testimony from T.V. and A.A., and the inadvertent nature of their disclosures enhanced their credibility. The jury heard T.P. describe how Schauer engaged in very similar behavior years earlier. The defense never articulated any reasonable theory why the two boys would lie about being molested by Schauer, and Schauer performed so poorly as a witness that his attorney avoided virtually any discussion of his testimony in closing argument. It is not reasonable to assume that

this brief section of the prosecutor's argument affected the jury's verdict.

D. CONCLUSION

For the reasons set forth above, the State respectfully requests that this Court affirm Schauer's convictions.

DATED this 26th day of February, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

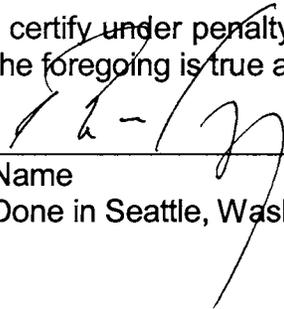


By: _____
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer Sweigert, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Appellant, in STATE V. KURT SCHAUER, Cause No. 63736-3-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

02/26/10

Date