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No. 63749-5-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON, Respondent,

v.

LARRY GRUBB, Appellant.

AMENDED BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the parties' limited in chambers questioning of four potential jurors requires reversal pursuant to State v. Momah, when Grubb actively participated in the limited questioning and the trial court sufficiently considered and weighed the public's and Grubb's right to a fair and public trial.
2. Whether the trial court acted within its discretion when it denied Grubb's request for a bill of particulars specifying the dates Grubb raped E.R. to facilitate an alibi defense when Grubb is not entitled to such specificity in a multicounty rape case where time is not an element of the offense and, regardless of time, Grubb had had repeated access and opportunity to E.R. during the charged time frame.
3. Whether trial court acted within its discretion to find that evidence of Grubb's previous sexual misconduct with E.R. in Mukilteo was admissible under ER 404 (b) and RCW 10.58.090.
4. Whether the trial court acted within its discretion to deny Grubb's belated request to exclude the State's expert witness, Joan Gaasland-Smith, from testifying when Grubb was aware she was a witness months prior to trial and where Grubb was given an opportunity to interview Gaasland-Smith regarding the substance of her testimony and determine if a continuance was needed, before trial.
5. Whether Grubb is entitled to a new trial when the record reflects Grubb received a fair trial.

C. FACTS

1. Substantive facts

Between December 1st, 2004 and January 31st 2008, E.R., born on 7/29/97, lived with her younger brother and parents Ralph and Tammy Riddle at her family home in Lynden, Washington. RP 106. Larry Grubb, 55 years old, E.R.'s step grandfather, lived with his wife and maternal grandmother of E.R., Lynn Grubb, 70 minutes away in Mukilteo, Washington. RP 244.

As E.R. was growing up, she and her family saw their grandparents, Larry and Lynn Grubb a few times a year, usually in Lynden and occasionally in Mukilteo. These family gatherings typically occurred around holidays, birthdays, summer vacation and special occasions. RP 111, 219, 300. Additionally, the Grubbs would occasionally babysit the Riddle children in Lynden at the Riddle home. RP 219. The Riddles considered themselves to have a good relationship with the Grubbs prior to allegations of abuse. RP 112.

During a visit in 2006 however, Tammy became alarmed with Grubb's behavior. RP 121. She observed E.R. sitting on top of Grubb on a loveseat under a blanket in the family room. RP 227. When Grubb briefly lifted the blanket, Tammy could see E.R.'s skirt was up and

Grubb's hands were under her thighs. RP 230. Tammy became so concerned something sexually inappropriate was happening, she alerted her husband to check the situation out. RP 129. After being alerted to a potential problem, Ralph watched Grubb and E.R. for a few minutes but didn't see anything alarming going on. RP 129. Nonetheless, Ralph removed E.R. from the situation by telling her to get ready for dinner. E.R. 133. Ralph later spoke with E.R. about the incident and E.R. told Riddle "nothing happened." RP 133. Ralph then told E.R. not to lie under the blankets with Grubb anymore. RP 130. Thereafter, the Riddles distanced themselves from the Grubbs and were careful not to place E.R. alone with Grubb in what they considered to be potentially vulnerable situations. RP 230.

With the passage of time, the Riddles eventually let their guard down and decided it would be ok to send E.R. and her brother to Mukilteo for a weekend with the Grubbs to attend a family wedding in July 2008. RP 173. When E.R. returned from this weekend trip, she disclosed to her mom that Grubb had touched her inappropriately on numerous occasions during the past few years. RP 239. E.R. appeared sad and a bit scared when she disclosed to her parents. RP 114. E.R.'s parents thereafter

called the Lynden Police Department and CPS to report the abuse. RP 241.

E.R. disclosed specifically that Grubb had done something “very bad to me” and “touched in a very awkward place” when they were on the couch in their living room in Lynden in the Riddle’s house. RP 306, 307. At trial, E.R. wasn’t sure what occasion brought the Grubbs to her home when this incident occurred. RP 308. E.R. explained Grubb touched her with his finger, put it in her privates and rubbed up and down, underneath her clothing, on multiple occasions. RP 310, 312. She stated the first time Grubb raped her, he moved his hand in an up and down motion on her private and then told her “don’t tell anyone, this is our little secret.” RP 314. Grubb did this again to her several months later during another family gathering but didn’t say anything to her. RP 314. E.R. promised Grubb she wouldn’t tell. RP 431. E.R. explained she felt “really weird” and “all tingly” after her grandfather, Grubb did this to her. RP 317.

E.R. recalled Grubb next digitally raped her in 2005 around the holidays-around Halloween, Thanksgiving, Christmas or New Years, when E.R. was eight years old. RP 319. E.R. recalled she and Grubb were again sitting on the couch alone in the living room of her Lynden home. RP 320. Soon after this incident, when the Grubbs were up in Lynden

babysitting for a holiday party, E.R testified Grubb again raped her while they were sitting together in her living room. RP 326. She recalled her grandmother had fallen asleep and that she was wearing pink pajamas and hoping to stay up until midnight. Id.

The next incident E.R. recalled occurred around the Thanksgiving holiday in 2006. RP 331. E.R. recalled Grubb raped her as they sat together in the living room lying under one blanket, while her parents and grandmother were busy making dinner. RP 332. E.R. remembered she was wearing underwear and a brown skirt when Grubb assaulted her. RP 334. E.R. testified the next incident occurred around the Christmas holidays; Grubb raped her while her parents and grandmother were preparing Christmas Eve dinner. RP 335. Afterward, E.R. felt like she had to go to the bathroom. RP 338. Next, E.R. recalled Grubb again raping her around Thanksgiving 2007 when they were alone, under a blanket in the living room of the Riddle's Lynden home. RP 338. E.R. explained she didn't tell Grubb to stop because she didn't understand it was wrong. RP 340. The last incident E.R. recalled occurred during the 2007 Christmas holidays. Again, Grubb raped her while they sat together in the living room of the Riddle home. RP 342. E.R. testified to eight

separate instances where Grubb digitally raped her between December 2004 through January 2008. RP 316-342.

In addition to the multiple occasions when Grubb abused E.R. during visits to E.R.'s home in Lynden, E.R. also recounted that on one occasion when she was in Mukilteo visiting the Grubbs she woke up to find Grubb holding her foot and rubbing it on his penis in the middle of the night. RP 353. Lynn Grubb confirmed that E.R. did sleep in their Mukilteo bed on this occasion and that she remembered waking up, feeling like someone was moving around and then saw Grubb holding E.R.'s foot. RP 713. According to Lynn, Grubb explained to her he was touching E.R.'s foot to move it away from his privates because it had touched his privates while Grubb was sleeping. RP 715, 672.

E.R. did not disclose abuse to her parents until July 2008. RP 114. However, E.R. had disclosed to her friend Tara while they were hanging out at a dance recital months prior to her disclosure to her parents and her friend advised to tell her parents. RP 546, 549, 551.

At trial E.R. couldn't recount the exact dates Grubb abused her, only that Grubb touched her this way on multiple occasions when he would be up with his wife to visit during various holidays and special occasions. RP 306-342. Testimony from both the Riddles and Lynn

Grubb confirmed that the Grubbs came up to see the Riddle's Lynden home at least four times a year usually around holidays and special occasions but they could not specify the exact dates. RP 740, 768, 219, 251, 300.

At trial, E.R. recounted that Grubb's fingernails were very long, that Grubb would often cover E.R. and himself with a blanket and she felt like she needed to go to the bathroom or felt "tingly" in her privates after Grubb would touch her. RP 322, 328, 332. E.R. explained she didn't tell her parents because she didn't understand it was wrong. RP 329. She discovered it was wrong after completing a puberty class at school. RP 372.

At trial, E.R. explained that it was hard to remember the specific dates when Grubb had sexually touched her, only that it occurred during visits with the Grubbs around holidays, special occasions and summer visits. RP 405-406. This information was consistent with the disclosures made to Detective Beld during his investigation and included in the affidavit of probable cause filed against Grubb. RP 482, CP 148-149.

When Detective Beld of the Lynden Police Department spoke to Grubb and advised him of the allegations, Grubb asserted E.R. may have misconstrued his touches because he often tickled E.R. and her brother on

the inside of their thighs. RP 488. When Grubb was reminded of the specific allegations he told Detective Beld that he was no pervert and he didn't remember anything like that happening. \RP 489.

2. Procedural facts

On August 28th, 2008 Grubb was charged with nine counts of rape of a child in the first degree alleged to have occurred between July 29th, 2005 and December 31st, 2007. CP 150-152. One of the alleged charges pertained to allegations that Grubb had rubbed his penis with E.R.'s foot while E.R. was visiting the Grubb's in Mukilteo. Grubb was arraigned on these charges on September 5th, 2008. Supp CP 159.

On December 29th, 2008 Grubb filed a motion for a bill of particulars alleging the information charging Grubb was vague and didn't place him on sufficient notice of the allegations against him because the charging period was too broad. CP 144-146. Grubb requested the trial court direct the State to allege the specific dates the alleged offenses occurred in order to enable Grubb to prepare an alibi defense. CP 144-146. After considering argument and reviewing pertinent case law, the trial court denied Grubb's request. RP 20-25, Supp CP 158.

On April 13th, 2009 the trial court considered motions in limine from both Grubb and the State. RP 29, 31. During this hearing, Grubb

moved to exclude evidence of prior sexual misconduct between Grubb and E.R. in Mukilteo after the State indicated it would be dismissing the charged offense related to this incident and moving for its admission under ER 404(b) and RCW 10.58.090. RP 36, 41-4. The trial court granted the State's request to amend the information and, after hearing argument, agreed evidence pertaining to the Mukilteo incident would be admissible pursuant to ER 404(b) and RCW 10.58.090. RP 54-56.

Prior to jury selection, the trial court outlined the procedure it would follow during jury selection. RP 75-79. The trial court also advised Grubb's trial attorney, Mr. Mazzone, and the State that it would follow State v. Momah, if there were any potential jurors who wanted to answer sensitive relevant questions in a more private setting. RP 82. Mr. Mazzone failed to note any objection and instead advised the trial court "Based on case law, Mr. Grubb will have to be there." RP 82. The trial court confirmed that all the parties, including Mr. Grubb, would be there and that if anyone did object to the proposed in chamber's proceedings, voir dire would have to remain in the open courtroom. Id. Mr. Mazzone then responded, "All right, Your Honor." RP 82-3. Mr. Mazzone then inquired when the court anticipated starting voir dire. Id.

During voir dire the trial court noted three jurors indicated on the jury questionnaire that they had some questions they were uncomfortable speaking of in such a large group. The trial court then inquired whether anyone in the courtroom objected to the parties going into chambers with these potential jurors so they could answer those questions in a more private setting. RP 30-31. While in chambers, Grubb's attorney, Mr. Mazzone, actively questioned each of the potential jurors, even challenging one for cause and revealing to another that he [Grubb's attorney] preferred to inquire of one juror in chambers rather than in the courtroom. RP 34, 35, 40, 43, 47. In all, four potential jurors were brought into chambers for limited questioning. A fifth juror was also mistakenly brought into chambers but not questioned after he advised the parties he did not need to answer questions privately. RP 49.

After jury selection, the trial court placed on the record its basis, pursuant to State v. Bone-Club, for allowing the parties to question four potential jurors in chambers on issues sensitive to their ability to serve impartially on the jury. RP 201-203. The trial court explained that it felt there was a compelling basis to bring these four jurors back into chambers with the parties because they were reluctant to answer sensitive relevant questions in public, the questioning was limited in scope and time and, the

court ensured before hand that neither the parties nor the public objected to the proposed procedure. Under these circumstances, the court determined Grubb and the public's rights to a public and fair trial were sufficiently protected and balanced, not violated by the limited in chamber questioning. RP 202.

Following a jury trial, Grubb was convicted as charged and sentenced to a minimum term of 280 months. CP 22-35. Grubb timely appeals. CP 6-21.

D. ARGUMENT

- 1. Grubb did not suffer actual prejudice from limited questioning of four potential jurors when he knowingly participated and benefited from this questioning and where, the trial court sought to balance the public's right to a public trial with Grubb's right to a fair trial explaining that this limited questioning was compelled by the circumstances of this case.**

In Grubb's supplemental brief, he asserts for the first time on appeal, his conviction should be reversed because the trial court deprived him of his right to a public trial. Grubb asserts there is nothing in the record to support the trial court's basis for questioning four potential jurors in chambers on sensitive relevant issues that jurors had indicated, in a jury questionnaire prepared by both parties, they did not want to reveal in a public forum. Br. of App. 8-9. Contrary to Grubb's contention, the record

repeatedly reveals the trial court and the parties were well aware and determined to safeguard Grubb's right to a fair trial and public trial. Under these circumstances, reversal is not warranted.

Whether there is a violation of the right to a public trial is a question of law reviewed de novo. State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009). Grubb has the right to a public trial pursuant to the Washington State constitution and that right extends to voir dire. Const. Art. I, §22, Momah at 148.

In State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009) our Supreme Court denied Momah's request to reverse his conviction, even though a violation of his right to public trial occurred when the parties conducted a portion of voir dire in chambers. *Id.* at 154-55. The majority of the court emphasized that the "central aim of any criminal proceeding must be to try the accused fairly," and that a defendant's right to public trial does not exist, and cannot be considered, in isolation from his other constitutional rights. Momah, 167 Wn.2d at 147-48. The right to a public trial is not absolute, but exists so that the public may see that the defendant is dealt with fairly and that his triers are kept keenly aware of their responsibility and the importance of their function. *Id.* at 148. Where Art. I, §§10 and 22 conflict, a court "must harmonize the right to a public trial

with the right to an impartial jury. Momah at 152-53, *citing* Federated Publications v. Kurtz, 94 Wn.2d 51, 61, 615 P.2d 440 (1980).

In Momah the majority held that the determination of whether a closure error constitutes structural error necessarily depends upon the nature of the violation: “If, on appeal, the court determines that the defendant’s right to public trial has been violated, it devises a remedy appropriate to the violation.” *Id.* at 149. If the error is structural, automatic reversal is warranted. *Id.* An error is only structural though if the error ““necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.”” *Id.* (*quoting* Washington v. Recuenco, 548 U.S. 212, 218-19, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)).

The court noted that in its prior cases of State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006) and In re Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004), new trials were required because the trials had been rendered fundamentally unfair by the closure. *Id.* at 150-51. In Easterling, the closure prevented the defendant from being present at a portion of his own trial, without the court ever having consulted with him. *Id.* at 150. In Orange, the trial was rendered fundamentally unfair because the closure excluded the defendant’s family and friends from

being present during voir dire, despite the defendant's repeated requests that they be present. *Id.* at 150-51. In those cases, where the prejudice was sufficiently clear, the errors were deemed to be structural. *Id.* at 151.

In distinguishing those prior cases where structural error was found, the court noted that in Momah's case, the defendant had "affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it and benefitted from it." *Id.* at 151. In concluding that the closure in Momah was not structural error, that the closure occurred to protect the defendant's rights and did not prejudice him, the court presumed that the defendant made "tactical choices to achieve what he perceived as the fairest result." *Id.* at 155. In addition, the court noted that the closure only occurred after the court consulted with the defense and prosecution. *Id.* Finally, the closure had occurred to safeguard the defendant's constitutional right to an impartial jury. *Id.*

In contrast to the Momah decision, the plurality opinion in State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009), issued the same day as Momah, provides little guidance in addressing the remedy for a violation of the right a defendant's right to a public trial under the circumstances of this or any other case. "A plurality opinion has limited precedential value

and is not binding on the courts.” In re Isadore, 151 Wn.2d 294, 303, 88 P.3d 390 (2004). “Where there is no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds.” State v. Zake, 61 Wn. App. 805, 808, 812 P.2d 512 (1991), *aff’d*, 119 Wn.2d 563, 834 P.2d 1046 (1992).

The plurality in Strode found that the record in Strode did not reflect that either the closing of the courtroom was necessary to safeguard the defendant’s right to a fair trial or that there was a knowing and voluntary waiver of that right. Strode, 167 Wn.2d at 234. In Strode, the plurality opinion held that a court must perform a Bone-Club analysis on the record prior to closing a courtroom in unexceptional circumstances, and that failure to do so is structural error that can never be harmless. Strode, 217 P.3d at 1. The concurring opinion took exception to the plurality opinion’s requiring an on-the-record colloquy before waiver could be found and to allowing a defendant to raise the public’s, and the media’s, right to open proceedings on appeal in order to overturn his conviction. *Id.* at 26, 28. The concurring opinion therefore concurred in the result only because it concluded that under the facts of the Strode case the defendant’s public trial rights had not been waived or safeguarded per

State v. Bone-Club¹ as it asserted it was in Momah, because the court did not weigh the right to public trial against competing interests. *Id.* at 232, 235.

This case is more consistent with Momah and distinguishable from Strode. In Momah, the defendant did not expressly seek to privately voir dire potential jurors but did tacitly encourage and actively participate in the process. Much as Grubb, through his trial attorney Mr. Mazzone, did in this case. The parties in this case, as in Momah, used jurors' responses to a jury questionnaire prepared by both parties to determine if any jurors wished to be questioned individually on sensitive issues relevant to jury selection and then actively engaged in questioning these potential jurors on sensitive issues. RP 20, 74. Consequently, as in Momah, Grubb benefitted from the proceedings determining it was appropriate to challenge one potential juror for cause as a result of the information that was revealed. RP 143, *see also*, Momah, at 146-47, RP 43. Grubb's attorney additionally revealed that as to at least one question, he preferred to ask the particular question in chambers, rather than in the open courtroom. RP 34.

¹ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

In addition to Grubb participating and benefitting from the limited in chamber questioning, the record also reflects the trial court considered the competing constitutional rights and the Bone-Club factors when it determined there were compelling circumstances warranted limited in chambers questioning of four potential jurors. RP 82. These measures safeguarded Grubb's right to both obtaining an impartial jury and receiving a fair and public trial. Under these circumstances Grubb cannot show he suffered the requisite prejudice that would warrant reversal of his conviction as there was in Orange, Easterling and Strode. As such, no structural error occurred. As the court summarized in Momah:

... courts grant automatic reversal and remand for a new trial only when errors are structural in nature. An error is structural when it necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. In each case, the remedy must be appropriate to the violation.

217 P.3d at 155-56. A new trial would not be an appropriate remedy in this case because the closure here did not render Grubb's trial fundamentally unfair. To the contrary, this process assisted Grubb's attorney in ensuring Grubb obtained a fair trial. As in Momah, Grubb made "deliberate, tactical choices" in an effort to protect his right to an impartial jury and the trial court revealed in was keenly aware of Grubb's right to a public trial and to a fair trial throughout the proceedings below.

Momah at 156-56. The court informed the parties it would follow the Momah case if there were sensitive relevant information potential jurors did not want to reveal in open court. The court then inquired to make sure neither the parties nor the public objected to the proposed in chamber questioning of a few jurors and finally, the court placed on the record the compelling reasons and circumstances, pursuant to Bone-Club, that warranted the in chamber questioning. Grubb's argument should be rejected.

State v. Paumier, 155 Wn.App. 673, 230 P.3d 212 (2010), Division Two held that despite Momah, the appropriate remedy when a defendant's right to a public trial is violated is automatic reversal in all cases unless the trial court considers reasonable alternatives or makes findings appropriately justifying the closure, pursuant to the United States Supreme Court decision in Presley v. Georgia, __ U.S. __, 130 S.Ct. 721, __ L.Ed.3d (2010). The Presley decision on which the Paumier court misguidedly relied however, was a per curium decision predicated on existing precedent where the Georgian trial court violated the defendant's right to a public trial by excluding the public from the voir dire proceedings over Presley's objection. Under those circumstances the Presley court summarily confirmed Presley's right to a public trial had

been violated and determined reversal was appropriate because the court neither considered reasonable alternatives or made findings to justify the closed proceeding.

Contrary to Paumier, Presley does not provide any new guidance to this case or alter the applicability of the Momah decision because Grubb did not object below, actively participated in limited in chamber voir dire and nothing in the record demonstrates the Grubb suffered any actual prejudice as a result of the violation. The Presley court acknowledged consistent with Momah that while a defendant has the right to insist that voir dire be public there are exceptions where this constitutional right “may give way in certain cases to other rights or interests, such as the defendant’s right to a fair trial or the governments interests in inhibiting disclosure of sensitive information.” Presley at 130 S.Ct. at 724 (*quoting Waller*, 467 U.S. at 45). That is precisely what happened in this case; therefore automatic reversal is not appropriate.

While Momah and Strode make clear that the process of conducting limited voir dire of potential jurors in chambers on sensitive issues does violate a defendant’s constitutional right to a public trial, these cases do not require automatic reversal. Momah makes clear that only when the violation is structural in nature, undermines the fundamental

fairness of the trial, is reversal required. Strode suggests that the court should also examine the facts of the violation to determine if the defendant waived his rights, whether the violation was necessary to safeguard the fairness of the defendant's trial or whether the trial court safeguarded those rights pursuant to the Bone-Club factors.

As in Momah, Grubb actively participated in the in chamber voir dire proceedings and benefited by learning sensitive information that was relevant to determining whether potential jurors could be or would be unbiased. Conducting individual jury voir dire in chambers regarding sensitive issues regarding the jurors' experiences with sexual abuse promoted the jurors' ability to be candid and prevented other prospective jurors from being tainted by any information they would learn from such questioning. As such, conducting limited individual jury voir dire in chambers, while procedurally conducted in error, safeguarded rather than undermined Grubb's right to a fair and impartial jury.²

Therefore pursuant to Momah and Strode, as examined together, Grubb's violation of his right to a public trial did not undermine the

² See, Commonwealth v. Horton, 753 N.E.2d 119, 128 (Mass. 2001) ("In light of the defendant's consent to the procedure, his presence throughout the voir dire, and the fact that the less public setting for the voir dire in all likelihood helped rather than harmed the defendant, we find no prejudice to the defendant from the setting in which this voir dire was conducted.")

fundamental fairness of his trial, does not constitute a structural error and automatic reversal is not required.

2. **The trial court acted within its discretion when it denied Grubb's request for a bill of particulars requesting the State commit to specific dates for each rape because Grubb is not entitled to such specificity in a multi count rape case where time is not an element of rape and Grubb, regardless of the exact dates, had repeated access and opportunity to E.R. during the charging period.**

Grubb argues the trial court abused its discretion by denying his motion for a bill of particulars. Br. of App. at 20. Grubb asserted below that the information charging him with eight counts of rape in the first degree was too vague and did not sufficiently place him on notice of the charges against him or reasonably enable him to prepare an alibi defense. CP 144-156, Br. of App. at 19.

On appeal Grubb also complains the trial court's alleged error denying his request for a bill of particulars violated his right to due process of law and ultimately, of a fair trial in light of evidence allegedly obtained in a defense interview, completed after the motion for particulars was considered, where according to defense notes,³ eleven year old E.R. was able to specify exact dates Grubb raped her during the two plus year

³ Defense exhibit 17, defense interview of E.R. was marked only and not admitted in Grubb's trial below. See, Br. of App. at 6, CP 52.

charging period.⁴ Grubb's argument is without merit because Grubb was on reasonable notice of the charges against him and had no constitutional right to require the State commit to specific dates given the nature of the allegations in this case. Grubb's argument should therefore be rejected.

Due process requires that an accused must be informed of the nature and cause of the accusation against him in order to place the defendant on notice of the charges against him and to give him a meaningful opportunity to respond. State v. Cozza, 71 Wn.App. 252, 254-55, 858 P.2d 270 (1993). To that end, the Washington court rules require that the charging information include a 'plain, concise and definite written statement of the essential facts constituting the offense charged.' CrR 2.1(a)(1), Cozza at 254.

Washington courts distinguish charging documents which are constitutionally deficient from those charging documents which are merely vague. State v. Noltie, 116 Wn.2d 831, 843, 809 P.2d 190 (1991). If a charging document/information states each statutory element of the crime

⁴ Grubb states he made an offer of proof in his trial brief that demonstrating that during a defense interview E.R. was able to specify the exact dates Grubb raped her. See, Br. of App. at 23. Grubb's alleged offer of proof as stated in his trial brief however, was not filed until April 1st, 2009 after Grubb interviewed E.R. and well after the trial court considered Grubb's motion for particulars, filed December 29, 2008. CP 144 -146. Grubb's offer of proof should not therefore be considered in determining whether the trial court abused its discretion in denying Grubb's motion for particulars.

but is otherwise vague as to some other matter significant to the defense, a bill of particulars to correct the defect may be appropriate. State v. Bergeron, 105 Wn.2d 1, 18, 711 P.2d 1000 (1985).

The function of a bill of particulars is to clarify particular matters considered essential to the defense. State v. Noltie, 116 Wn.2d at 843. Granting a motion for a bill of particulars rests within the discretion of the trial court and its ruling will not be disturbed on appeal absent a showing of abuse of discretion. State v. Noltie, 116 Wn.2d at 840.

The information charging Grubb with eight counts of rape in the first degree sufficiently placed him on notice as to the nature of the charges against him and the time frame within which this conduct took place. CP 122-124. The very nature of multiple count child rape cases do not lend themselves to specifying exact dates as children typically can recall events, not dates. Consistent with this observation, the crime of rape of a child in the first degree does not make time an element of the crime. *See*, RCW 9A.44.073, State v. Cozza, 71 Wn.App. 252, 258-59, 858 p.2d 270 (1993).

A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.

RCW 9A.44071(1).

Grubb's insistence that the trial court should have ordered the State to specify the exact dates the charged acts of rape allegedly occurred because he wished to present an alibi defense, is unreasonable. Due process entitles a defendant to a meaningful opportunity to present a complete defense. City of Auburn v. Brooke, 119 Wn.2d 623, 629-30, 836 P.2d 212 (1992). Due process is a flexible concept however, requiring balancing of competing interests involved. Our State has resolved those competing interests in single and multiple act sexual assault cases holding defendants do not have a due process right to raise an alibi defense in these cases. State v. Cozza, 71 Wn.App. at 259. Time does not become an element of this type of offense merely because the defendant pleads an alibi defense. *Id.* Furthermore, any discrepancy between E.R.'s statements to Detective Beld, trial and the defense interview regarding the specificity of E.R.'s recollection of the dates or occasions Grubb raped E.R. goes to the weight to be given to E.R.'s testimony and should not be permitted to be used as a preemptive measure to foreclose the State from prosecuting an offender who rapes a child multiple times over a prolonged period of time. *See, State v. Guerin*, 63 Wn.App. 117, 123, 816 P.2d 1249 (1991).

In sexual abuse cases where multiple counts are alleged to have occurred during the charging period, the State need not elect particular acts associated with each count so long as the evidence clearly delineates specific and distinct incidents of sexual abuse during the charging period. State v. Hayes, 81 Wn.App. 425, 431, 914 P.2d 788 (1996). A defendant is not deprived of his right to due process of law when a child victim's testimony fails to provide specific dates the offense occurred on. Hayes at 441. As long as the jury is correctly instructed on the unanimity requirement, as it was in this case, the evidence need only be sufficiently specific to describe the conduct, the number of acts which occurred and the general time period these acts occurred in to provide due process of law. CP 41-65; State v. Brown, 55 Wn.App. 738, 748, 780 P.2d 880 (1989); Hayes, at 435.

A bill of particulars detailing specific dates within the charging period when multiple count sexual abuse is alleged is similarly not appropriate in child rape case. Particularly, where the uncontroverted evidence demonstrates the Grubb had repeated access and opportunity to rape E.R. during the charged time frame. While the Grubbs refuted whether Grubb was even around for particular family gatherings, his wife

Lynn conceded Grubb nonetheless had access to E.R. on multiple occasions during the charged time frame.

Moreover, a bill of particulars is not necessary when the information sought is provided in some other satisfactory form. State v. Noltie, 116 Wn.2d at 844. In this case, Grubb had the affidavit of probable cause outlining generally when the abuse allegedly occurred and prior to trial, Grubb had additional details from a defense interview of E.R. wherein E.R. allegedly specified the exact dates or occasions Grubb raped her within the charging period. See, Br. of App. at 6. Grubb therefore had sufficient evidence to present an alibi defense and to the extent E.R. testified inconsistently with her interview, Grubb had sufficient information to impeach E.R.'s credibility and recollection of abuse.

Grubb contends however, based his defense interview of E.R. conducted *after* the motion for a bill of particulars was held, that the trial court violated Grubb's right to due process when it denied his motion for a bill of particulars because E.R.'s interview allegedly demonstrates E.R. could specify the exact dates she was raped. Br. of App. at 26. Grubb's argument is flawed for two reasons. First, evidence of E.R.'s alleged

defense interview and Grubb's offer of proof⁵ were not before the trial court when it denied Grubb's request for more particulars and is therefore not relevant in determining whether the trial court abused its discretion. Grubb cannot demonstrate based on the record considered by the trial court below on January 14th, 2009, that the trial court erred by denying his motion given the nature of the charges against Grubb and the record provided to the court.

Second, even if Grubb had made an offer of proof claiming E.R. could provide specific dates based on a defense interview, the State is not required to commit to specific dates, particularly in a case like this where the uncontroverted evidence demonstrates Grubb has repeated access to E.R. on multiple occasions each year and a true alibi defense is not feasible. Under these circumstances Grubb's desire to have the State commit to specific dates in order to present an alibi defense is impractical and inappropriate. Grubb may not have been a resident molester but the allegations were that Grubb repeatedly raped E.R. when he had access to her over the course of several years. Thus, the issue before the jury was

⁵ Grubb contends throughout his argument that he made an offer of proof to the trial court when he moved for a bill of particulars. Br. of App. at 21. The offer of proof Grubb references however, was a trial brief filed several months after the court considered Grubb's motion. CP 130.

not whether Grubb *could have* had access to E.R. but whether he raped E.R. when he did have access and opportunity, as she alleged. The specifics “regarding date, time, place and circumstance are factors regarding credibility and are not necessary elements that need to be proved to sustain a conviction.” State v. Hayes, 81 Wn.App. 425, 914 P.2d 788 (1996), *quoting*, State v. Jones, 270 Cal.Rptr. 611, 623, 792 P.2d 643 (1990). The fact that E.R. was specific during a defense interview but not sure of dates at trial demonstrates Grubb was on sufficient notice to prepare a defense and was prepared to, as he did, challenge E.R.’s credibility based on her generalized testimony and inability to give specific dates at trial which ultimately was a factor for the jury to consider in determining E.R.’s credibility and Grubb’s guilt.

The trial court recognized in this case that Grubb, like the defendant’s in the Hayes and Cozza cases wherein multiple sex counts were alleged over a period of time, had sufficient access to E.R. over a protracted period of time as to render Grubb’s request for the State to commit to specific dates in the information unreasonable. Therefore, the trial court reasonably rejected Grubb’s assertion that the information was vague and acted within its considerable discretion to deny Grubb’s request for a bill of particulars.

3. The trial court acted within its discretion to admit evidence Grubb had sexually molested E.R. during trip to the Grubb home in Mukilteo pursuant to ER 404(b) and RCW 10.58.090.

Next, Grubb asserts the trial court abused its discretion by admitting evidence Grubb molested E.R. on another occasion while she was visiting the Grubbs in Mukilteo. Br. of App. At 30. Grubb contends the trial court misinterpreted and applied RCW 10.58.090, failed to consider the appropriate factors under the 10.58.090 and ER 404(b) and should have excluded this evidence because he alleges, the State failed to place him on notice of its intent under RCW 10.58.090 and ER 404(b) to rely on this evidence. The record belies Grubb's assertion.

During the 2008 legislative session, Washington law makers enacted RCW 10.58.090. They based this statute on federal evidence rules 413,414 and 415. The statute provides evidence of a defendants commission of another sex offense is admissible in sex offense cases subject to the court's balancing of factors pursuant to ER 403. The statute provides in 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 admissible pursuant to Evidence Rule 403.

Initially, the State charged Grubb with nine counts of rape in the first degree. CP 150-152. Count nine pertained to an incident in Mukilteo wherein E.R. alleged she woke up to find Grubb holding her foot and rubbing it on his penis while she was in Grubb's bed during a weekend visit in July 2008. Grubb filed a motion to dismiss this charge and the State ultimately agreed, amending the information on April 13th, 2009 against Grubb to the remaining eight counts of rape that allegedly occurred in Lynden at E.R.'s home. CP 122-124, RP 36-37. The State formally notified Grubb when it amended the information prior to trial, that instead of prosecuting Grubb for the Mukilteo conduct, it intended to seek introduction of this evidence pursuant to ER 404(b) and RCW 10.58.090.

Grubb objected asserting he wasn't given adequate notice of the State's intent to use this evidence and asserted this evidence is not admissible pursuant to these rules. During the hearing however, Grubb conceded that he had been anticipating the Mukilteo incident was going to trial and wasn't claiming there was a notice violation. RP 51. After hearing argument from the State and Grubb, the trial court rejected Grubb's argument and admitted the testimony under RCW 10.58.090 and ER 404(b).

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 other 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) The necessity of the evidence beyond the testimonies already offered at trial;
- (g) Whether the prior act was a criminal conviction;
- (h) 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, wasted of time, or needless presentation of cumulative evidence; and
- (i) Other facts and circumstances.

RCW 10.58.090.

Under ER 403, the trial court may exclude relevant evidence if the probative value is outweighed by the dangers of confusion of the issues or misleading the jury or by considerations of under delay, waste of time, or needless presentation of cumulative evidence. The trial court's ruling is afforded great deference and is reviewed under an abuse of discretion standard. State v. Scherner, 153 Wn.App. 621, 225 P.3d 248 (2009).

Grubb asserts the trial court abused its discretion because he alleges the trial court found that RCW 10.58.090 mandated admission of the Mukilteo incident. Br. of App. at 33. The record belies Grubb's contention. The trial court, after reviewing RCW 10.58.090 on the record ultimately concluded RCW 10.58.090 favors admissibility of other sexual misconduct subject to the restrictions of ER 403. RP 54-55, 56. The trial court then explained that evidence of prior sexual activity with the alleged victim, as was alleged in the Mukilteo incident, is routinely admissible under ER 404(b) as evidence of lustful disposition and consequently would not be excluded by ER 403. RP 54-55. The trial court therefore did not impermissibly misapprehend or apply RCW 10.58.090.

Next, Grubb contends he was not given adequate notice of the State's intent to admit the Mukilteo incident pursuant to RCW 10.58.090 and ER 404(b). RCW 10.58.090 states in pertinent part:

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

As a preliminary matter, Grubb was on notice of the State's intent to use the Mukilteo incident when the information charging Grubb with nine counts of rape, one count of which pertained to this Mukilteo incident. Consequently, Grubb was provided discovery related to the Mukilteo incident months before trial and was preparing for this information to be introduced at trial at the time the State formally notified him of its intent to dismiss this count and admit this evidence as evidence of other sexual misconduct. RP 46. Grubb acknowledged this below and clarified then that he was not claiming "there was a violation with respect to the lack of notice." RP 51. Grubb therefore waived his claim that the State's notice was insufficient under RCW 10.58.090 and should not under the circumstances of this case be permitted to claim he did not know or was not prepared to meet this evidence.

Additionally, contrary to Grubb's argument, ER 404(b), unlike its federal counter part, does not require the State to provide notice to submit ER 404(b) evidence pretrial or in an offer of proof. State v. Powell, 166

Wn.2d 73, 206 P.3d 321 (2009), *contrast* Fed.R.Evid. 404(b) with ER 404(b). Therefore the State complied with RCW 10.58.090, ER 404(b) and Grubb's assertion should be rejected.

Finally, Grubb contends the trial court erred admitting evidence of the Mukilteo incident because it failed to weigh the factors outlined in RCW 10.58.090 and failed to weigh the probative value and prejudicial concerns pursuant to ER 403. Where a trial court fails to conduct a ER 404(b) analysis on the record, the error is harmless unless the failure to do the balancing, within reasonable probability, materially affected the outcome of the trial. State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993).

In this case any error of the trial court in not conducting a balancing on the record is harmless because evidence of the Mukilteo evidence was admissible under either RCW 10.58.090 or ER 404(b). As the prosecutor outlined below, the factors to be considered pursuant to RCW 10.58.090 favored admission of the Mukilteo incident. RP 40-51. The Mukilteo evidence demonstrates marked similarities with the charged allegations. Grubb was obtaining sexual gratification from his step granddaughter when and as he had access and opportunity with her during

a weekend visit, just as he did in Lynden during family gatherings.

Therefore, this factor supports admission.

With respect to closeness and time, this incident occurred during the charged time frame and demonstrates Grubb's escalating predatory behavior toward E.R. anytime he had access to her. Additionally, there are no intervening circumstances between the rapes that occurred in Lynden and the Mukilteo incident that undermines the probative value of this evidence.

While this incident had not resulted in a criminal conviction, the reason was not because of veracity concerns but practical considerations stemming from venue/multiple jurisdiction issues. As for necessity of this evidence, courts generally 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). In this case, the victim's testimony was corroborated only by circumstantial evidence confirming Grubb had access to E.R., was observed sitting under blankets with E.R. but no one and no medical evidence was offered to corroborate the sexual acts themselves. The defendant's wife Lynn however, did corroborate important details of the Mukilteo incident that corroborated

unintentionally E.R.'s recollection of events. This evidence was therefore highly probative to the central issues of credibility of both E.R. and Grubb. Furthermore, Grubb has not demonstrated that the danger of unfair prejudice outweighed the probative value of this evidence pursuant to ER 403. Therefore, this evidence was admissible pursuant to RCW 10.58.090.

Additionally, as noted by the trial court, the Mukilteo incident is admissible as under the lustful disposition exception to ER 404(b). Washington has consistently recognized that evidence of collateral sexual misconduct may be admitted under ER 404(b) when it shows the defendant's lustful disposition directed toward the offended female. State v. Scherner, 153 Wn.App. 621, 225 P.3d 248 (2009).

Furthermore, in order to limit any potential undue prejudice, the trial court gave the following limiting instruction:

Evidence suggesting that the defendant may have had sexual contact with [E.R.] in Mukilteo, Washington is not evidence of the defendant's guilt of the offenses charged. You must not consider that evidence as a basis for finding the defendant guilty on any of the charged counts.

CP 41-65, instruction 11.

Under these circumstances, the trial court did not err in admitting evidence of Grubb's sexual misconduct with E.R. while she was visiting her grandparents in Mukilteo in July 2008. Any error made by the trial

court failing to balance the pertinent factors on the record beyond what was discussed in detail by counsel during argument, was harmless.

Grubb's arguments should be rejected.

4. The trial court acted within its discretion to deny Grubb's belated request to exclude the State's expert witness, Joan Gaasland-Smith.

Next, Grubb contends the State violated CrR 4.7 by allegedly failing to "disclose its expert witness" Joan Gaasland-Smith. Br. of App. at 41. Grubb argues the trial court erred by not excluding Gaasland-Smith to remedy the alleged violation. The record reflects however, that Grubb was on notice months before trial Gaasland-Smith would be testifying and though the State failed to inform Grubb of the substance of her expected testimony, exclusion was not the appropriate remedy under the circumstances of this case. The trial court therefore did not abuse its considerable discretion in denying Grubb's request because Grubb was informed prior to trial of the substance of Gaasland-Smith's expected testimony, was provided with a copy of Gaasland-Smith's curriculum vitae,⁶ had an opportunity to interview her and was given an opportunity to request a continuance if necessary. RP 62.

⁶ The State asserted below that it had previously given Grubb Gaasland-Smith's cv months before trial. After Grubb's objection the week before trial, the State promptly provided another copy. RP 63.

Discovery decisions based on CrR 4.7 are within the trial court's sound discretion. State v. Hutchinson, 135 Wn.2d 863, 882, 959 P.2d 1061 (1998). A trial court abuses its discretion when it makes decisions based on untenable grounds or for untenable reasons. State v. Venegas, 155 Wn.App. 507, 228 P.3d 813 (2010). CrR 4.7 requires the State to inform Grubb of their intent to call an expert witness, including the subject of their testimony and any reports they have submitted to the prosecuting attorney. CrR 4.7(a)(1)(ii).

CrR 4.7(h)(7) provides in pertinent part for discovery violations:

[I]f ... a party has failed to comply with an applicable discovery rule, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.

CrR 4.7(h)(7)(i). Excluding evidence is an "extraordinary remedy" under CrR 4.7(h) that "should be applied narrowly" Hutchinson, 135 Wn.2d at 882. The Hutchinson court identified four factors the trial court should consider when determining whether to exclude evidence as a sanction for a discovery violation. The court should weigh the effectiveness of less severe sanctions, the impact of witness preclusion on the evidence at trial and outcome of the case, the extent of which the testimony will surprise of prejudice the other party and whether the violation was willful. *Id.*

While Grubb was on notice Gaasland-Smith was going to be an expert witness months before trial, the State did not provide formal notice of the substance of her expected testimony. Supp. CP 157, RP 64. To that extent, the State did not fully comply with discovery obligations under CrR 4.7. Nonetheless, after Grubb raised this concern, the State disclosed all pertinent information regarding this witness, set up an opportunity for Grubb to interview this witness and the court advised Grubb it would entertain a continuance prior to trial if Grubb determined he would need to get his own expert to counter her testimony. RP 61-62. But, after interviewing Gaasland-Smith, Grubb did not seek a continuance but instead waited until the venire panel was empanelled and sworn in to object and request Gaasland-Smith be excluded as a witness. RP 101, 103. Grubb's demand that Gaasland-Smith be excluded was unreasonable and untimely. The trial court had indicated previously that it would consider granting a continuance, a less severe sanction, if Grubb after interviewing Gaasland-Smith, thought additional time to prepare his defense was necessary. Grubb also conceded the State had not willfully violated its discovery obligations and that he had been given the opportunity to meet and interview Gaasland-Smith prior to the venire panel being chosen and sworn in. Under these circumstances Grubb could no longer assert he was

surprised or prejudiced by her proposed limited testimony and the trial court reasonably rejected his request to exclude Gaasland-Smith from testifying.

5. Grubb received a fair trial.

Finally, Grubb asserts cumulative error collectively deprived him of a fair trial. Br. of App. at . A close examination of the transcript and the errors asserted reveals however, that no material error occurred below that resulted in sufficient prejudice to warrant granting Grubb a new trial.

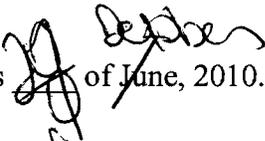
Where there are trial errors that standing alone may not warrant reversal, the combined affect or cumulative nature of such errors may deprive a defendant of a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

Grubb has not demonstrated the trial court materially erred by denying his motion for particulars, his request to exclude a state witness or his request to exclude relevant evidence. As such, Grubb cannot demonstrate from the record below that these alleged errors cumulatively have resulted in an enduring prejudice that warrants reversal. The evidence against Grubb was strong and compelling. Grubb, his wife Lynn, E.R. and the Riddles independently corroborated critical components of E.R.'s testimony pertaining to Grubb's observable interactions with E.R.

and his repeated access to E.R. throughout the charging period. Grubb's argument that cumulative errors deprived him of a fair trial is without basis and should be rejected.

E. CONCLUSION

For the reasons set forth above, the State respectfully requests that this court affirm Grubb's conviction and sentence for eight counts of rape of a child in the first degree.

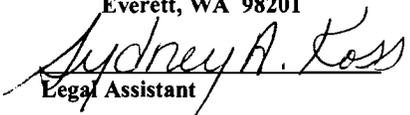
Respectfully submitted this  of June, 2010.


KIMBERLY THULIN, WSBA #21210
Appellate Deputy Prosecutor
Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this certificate is attached to this Court, and appellant's counsel of record, Peter Mazzone, addressed as follows:

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Date