

64234-1

64234-1

NO. 64234-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SCOTT SOLLESVIK,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHRIS WASHINGTON



**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Jurors are presumed to give an instruction an ordinary, common sense—rather than a strained—reading. The “to-convict” instruction read that in order to convict Sollesvik of Rape of a Child in the First Degree, the State had to prove that the rape occurred “*during a period of time intervening between August 20, 2004 through December 11, 2007.*” Does a common sense reading of the “to-convict” instruction require the State to have proven that *at a time* during the intervening period—rather than *on every day* during the intervening period—Sollesvik raped N.B.

2. Whether the trial court acted within its discretion in excluding evidence of N.B.'s age-appropriate (she was about 6 years old) touching of a 7-year-old boy when offered to attack N.B.'s credibility.

3. Whether the trial court acted within its discretion in excluding evidence of the 7-year-old boy's “playing around” with N.B. because it was too dissimilar to the 40-year-old defendant raping N.B.

4. Whether the trial court acted within its discretion in admitting evidence of Sollesvik's previous sex offenses under RCW 10.58.090.

5. Whether Sollesvik has not shown that the admission of evidence under RCW 10.58.090 violated the federal or state ex post facto clauses.

6. Whether Sollesvik has failed to establish that the legislature's enactment of RCW 10.58.090 violated the separation of powers.

7. Whether Sollesvik has not shown that RCW 10.58.090 violated his state constitutional right to a jury trial.

**B. STATEMENT OF THE CASE**

**1. BACKGROUND.**

N.B. was born on August 20, 1998. RP 364.<sup>1</sup> N.B.'s father is Ed Brookman. RP 364. N.B.'s mother is Roxanne Atkins. RP 366, 500. N.B.'s parents have not lived together since N.B. was approximately one year old. RP 390. However, during most of N.B.'s life, her parents equally shared custody. RP 367-36, 501; 2RP 12. Immediately after N.B. disclosed that Sollesvik had sexually abused her, Ed Brookman became the primary parent with sole custody of N.B. RP 367, 500; 2RP 12. Ed Brookman married Serenna Brookman in 2004; they have a son, Nathan. RP 364, 440.

From September 1999 until January 2006, Roxanne Atkins and John Sollesvik, the defendant's brother, lived together.<sup>2</sup> RP 368, 501; 2RP 2, 15. N.B. called John, "Daddy John." RP 369, 503. John and his

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<sup>1</sup> The verbatim report of proceedings consists of six volumes. Five volumes are sequentially numbered. N.B.'s testimony (August 19, 2009 - morning session) is cited as 2RP.

<sup>2</sup> The State refers to John by first name to distinguish him from Scott Sollesvik. No disrespect is intended.

ex-wife shared custody of their 13-year-old daughter, Ashley.<sup>3</sup> RP 503; 2RP 13. Roxanne and N.B. often spent time with John's immediate family—his father (Harold<sup>4</sup>), sister (Ringer), and brothers (Scott, Harold Jr. and Bob). RP 504-05; 2RP 13-15. Scott Sollesvik lived at his 80-year-old father's house and cared for him. RP 505-07.

In January 2006, following years of very poor health, John passed away. RP 502; 2RP 12. After John's death, Roxanne continued to have a relationship with the Sollesvik family, but to a lesser degree. RP 508-10, 514, 899. Scott Sollesvik became someone whom Roxanne had come to rely upon. RP 508-09. Sollesvik was placed on the “list” of adults who had permission to pick N.B. up at her elementary school.<sup>5</sup> RP 379, 509.

In September or October 2006, Roxanne began dating Joe Dizard—one of John's childhood friends. RP 379, 515-16, 721-22. Dizard lived with Roxanne at her home that she shared with N.B. RP 516. Over time, “Uncle Joe”—a non-blood relative—participated in N.B.'s bedtime routine. After Roxanne had tucked N.B. into bed, Dizard would go into N.B.'s room and do a “super tuck”—give N.B. a toy, a hug and

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<sup>3</sup> N.B. labels relatives as either “blood” or “non-blood.” For instance, her brother, Nathan, is a blood relative; but Ashley is her non-blood sister. Ex. 3, 4 at 9-10, 13.

<sup>4</sup> Roxanne and N.B. refer to Harold as “Grandpa.”

<sup>5</sup> The testimony varied as to the number of times that Sollesvik had picked N.B. up from school. RP 371 (Brookman: dozens or more times); RP 533 (Atkins: maybe six times); RP 870-71 (Sollesvik: four times).

perhaps cover her with a different blanket. RP 518-22; CP 34. One night, in December 2007, as Dizard gave 9-year-old N.B. her super tuck, she disclosed that Sollesvik had sexually abused her when she was about 7 years old. RP 521-22, 724.

## **2. SOLLESVIK'S SEXUAL ABUSE OF N.B.**

Sollesvik had sexually abused N.B. more than once; however, N.B. remembered in detail only the most recent instance. Ex. 3, 4 at 17, 38; RP 777. N.B. thought it would be fun to have a sleepover at “Uncle Scott” and “non-blooded Grandpa’s” house. 2RP 18, 29, 31; Ex. 3, 4 at 17, 19. Sollesvik's bedroom was in the basement. There was a television, a bed and a computer in the bedroom. 2RP 18. Before the “bad touching” happened, Sollesvik put on a SpongeBob cartoon. 2RP 30. Grandpa was upstairs, asleep. 2RP 28.

Sollesvik kissed N.B.; he put his tongue in her mouth. 2RP 25-26; Ex. 3, 4 at 22-23. He put his head under N.B.'s shirt and sucked on her nipples. 2RP 20; RP 773; Ex. 3, 4 at 20-25; Ex. 28. Sollesvik touched N.B. in her “private area”—where she pees from. 2RP 21-22; RP 772-74; Ex. 28. He touched N.B.'s private area with his hands and his mouth. 2RP 21-24; RP 772-74. Sollesvik sucked “like a vampire” on the inside

perhaps cover her with a different blanket. RP 518-22; CP 34. One night, in December 2007, as Dizard gave 9-year-old N.B. her super tuck, she disclosed that Sollesvik had sexually abused her when she was about seven years old. RP 521-22, 724.

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and outside of her vagina.<sup>6</sup> 2RP 23-24; RP 778; Ex. 3, 4 at 26. Sollesvik also digitally penetrated N.B. 2RP 24; Ex. 3, 4 at 36.

Sollesvik had removed his clothes. He directed N.B. to touch his penis--his "private area" where the pee comes out. 2RP 26-27, 40; RP 772; Ex. 3, 4 at 31; Ex. 28. Sollesvik put his penis in N.B.'s mouth. 2RP 27; RP 772-74. Sollesvik's penis felt "soft" and "weird." Ex. 3, 4 at 31. N.B. could not describe Sollesvik's penis beyond that it looked like a "hot dog," or like a "slug's eye." 2RP 40-43; Ex. 3, 4 at 33.

### **3. THE DISCLOSURE OF THE ABUSE.**

When N.B. was six or seven years old, she started having night terrors. RP 372-76. It was not an occasional nightmare; N.B. would awaken "absolutely scared out of her mind."<sup>7</sup> RP 373, 441-42. Brookman held N.B., but she was inconsolable. RP 375-76, 441-42. N.B. slept on the couch with Brookman or in his and Serenna's bed so that she felt safe. RP 374, 441-42. N.B. also had emotional outbursts during the day. RP 441. Brookman tried to determine whether someone had bullied N.B. at school, but N.B. would not say what the matter was. RP 373-74.

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<sup>6</sup> N.B. told Carolyn Webster, a child interview specialist, that Sollesvik had sucked on her "ass" and that she had sucked on his "ass." Ex. 3, 4 at 19; Ex 6. For N.B. the word "ass" does not refer to one's backside; it was the front part of the genitals (for men and women). Ex. 6; RP 681, 683; see also Ex. 3, 4 at 30 (N.B. said that she sucked on Sollesvik's ass--"it is a lil (*sic*) weenie.").

<sup>7</sup> The night terrors may have only occurred at Brookman's house. Roxanne Atkins did not recall N.B. having nightmares, just restlessness and anxiety. RP 517-19.

On December 3, 2007, at the house that N.B. shared with her mother and Dizard, N.B. had difficulty going to bed. RP 493-97, 521, 528, 725. She seemed anxious. RP 725. Dizard asked N.B. why she was so upset. N.B. asked for a piece of paper and a pencil. RP 725. N.B. then handed Dizard the paper; it said: "I had sex with Scott." RP 523, 726; Ex. 21. Dizard asked, "Scott who?" N.B. responded, "Uncle Scottie." RP 726.

Roxanne Atkins was in the living room when she heard Dizard say, "Oh, no, Rox, come here." RP 522. His voice sounded horrible and she immediately went into N.B.'s room. RP 522. Dizard showed Atkins N.B.'s note. RP 523. Atkins was shocked; she hugged N.B. and told her over and over again that everything was okay. RP 523-24. Atkins asked N.B. what she meant by the note because she did not think that N.B. knew what it meant to have sex. RP 524-26. N.B. said that Sollesvik had touched her "privacy," which to N.B. meant her vagina. RP 525. Atkins and Dizard called Brookman and told him what N.B. had disclosed. RP 380, 527.

Brookman immediately picked up N.B. and brought her to his home. RP 381, 528. Although panicked, Brookman did not ask N.B. any questions. His concern was to calm down his frightened, anxious daughter and to keep her safe. RP 384.

The following day, Atkins and Dizard reported N.B.'s disclosure to the police. RP 492-97, 528-29, 729. The police contacted Brookman and arranged to have N.B. interviewed by a child interview specialist and examined at the Harborview Center for Sexual Assault and Traumatic Stress. RP 384-87, 750.

During the interview with Carolyn Webster, a child interview specialist, N.B. wrote down or made drawings of matters that she found embarrassing.<sup>8</sup> Ex. 3-6. N.B. wrote: "My non-blooded uncle had sex with me who is nobody to me anymore SCOTT." Ex. 5; RP 681. N.B. also wrote that, "He sucked on my ass and I sucked on his ass and he sucked on my nipples and we slept (*sic*) naked." Ex. 6; RP 681. When N.B. used the word "ass" she meant the front part of a man's or woman's genitalia. RP 683.

During Dr. Wiester's sexual assault examination of N.B., N.B. again often wrote down answers or drew pictures in response to questions that embarrassed her.<sup>9</sup> RP 766-72. N.B. wrote: "I had sex with Uncle Scott[,] non-blooded Uncle Scott." RP 772; Ex. 28. When Dr. Wiester asked N.B. to explain what "having sex" meant, N.B. drew pictures of two sets of lips kissing and of lips kissing her "boobs." RP 772-74; Ex. 28.

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<sup>8</sup> The interview occurred on December 11, 2007. RP 559.

<sup>9</sup> Dr. Wiester examined N.B. on December 12, 2007. RP 560, 759.

N.B. then drew pictures to show how Sollesvik had made her suck on his private area, how he had sucked on her private area, and how he had rubbed his private area against—and N.B. thought inside of—her private area. RP 772-74, 777-78; Ex. 28. N.B. stated that “Uncle Scott” had touched her private area before--at her “non-blooded grandparents' house.” RP 777.

N.B. said that she had not told on Sollesvik sooner because she thought that her parents “would get mad at her.” RP 780, 804; 2RP 31. She was scared, so she kept it a secret. RP 780, 804; 2RP 31. It did not feel too good inside to keep it a secret. 2RP 31. When N.B. finally told Dizard, she felt like she just could not keep it in any longer.<sup>10</sup> 2RP 32. She thought that Dizard might get mad, but he cried. 2RP 32. The day after N.B. disclosed the sexual abuse, her demeanor changed. N.B. seemed relieved. RP 444; 2RP 33-34.

#### **4. SOLLESVIK'S PREVIOUS SEX OFFENSES.**

When J.W. completed the fifth grade, her mom and three of her siblings moved into a house across the street from the Sollesvik family.<sup>11</sup> RP 645-46. J.W. and Sollesvik's sister, Ringer, developed a very close

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<sup>10</sup> Initially, Dizard thought it odd that N.B. disclosed the abuse to him. However, he realized that N.B. was afraid to tell her parents. She thought that she would be in trouble. N.B. asked Dizard not to tell her mom, but, of course, he had to. RP 804.

<sup>11</sup> J.W.'s father had died two years earlier and her older sister was at college. RP 644-45.

relationship. Their birthdays were separated by just one month.

RP 646-47. Sollesvik is five years older than J.W. and Ringer.<sup>12</sup> RP 649.

J.W. and Ringer had the same classes and participated in the same after-school activities. RP 647. J.W. joined the Sollesviks on several family vacations. RP 647.

When J.W. was eleven years old, and in the sixth grade, Sollesvik lived at her house for about one year. RP 651, 915. Sollesvik babysat J.W., who viewed Sollesvik as “in charge,” a protective older brother. RP 650. One day, when Sollesvik was living at J.W.'s house, J.W. fell asleep in Sollesvik's room. RP 654. J.W. awakened and discovered Sollesvik's hands under her shirt and on her breasts. RP 654-55, 916. Sollesvik had removed her shorts and underwear. He put his hand in J.W.'s vagina. RP 655. J.W. told Sollesvik to stop, and he did. RP 655. Sollesvik asked J.W. not to tell anyone what had happened; he swore that nothing like that would ever happen again. RP 655. J.W. had no memory of why Sollesvik stopped living in her house and returned to his family home. RP 656.

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<sup>12</sup> Sollesvik's date of birth is November 7, 1967. RP 631, 926.

When J.W. was just 12 years old, 17-year-old Sollesvik raped her. RP 660, 919. He raped J.W. in his basement bedroom.<sup>13</sup> RP 660. J.W. told Sollesvik to stop, but Sollesvik told J.W. that he loved her—that what they were doing was okay. RP 666-67.

Over the next 3 ½ years, Sollesvik digitally, orally and vaginally raped J.W. RP 668, 670. J.W. never voluntarily engaged in sexual acts with Sollesvik; she always felt coerced and pressured. RP 671.

In 1990, Sollesvik pleaded guilty to one count of Statutory Rape in the Second Degree and one count of Statutory Rape in the Third Degree.<sup>14</sup>

#### **5. THE CHARGES, SOLLESVIK'S TESTIMONY AND THE TRIAL.**

On February 19, 2008, the State charged Sollesvik with one count of Rape of a Child in the First Degree. CP 1. On August 6, 2009, the State filed an amended information that enlarged the charging period from a period of time intervening August 20, 2005 through June 16, 2006, to a period of time intervening August 20, 2004 through December 11, 2007. CP 127; RP 11-12.

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<sup>13</sup> Sollesvik said the first time that he raped J.W. they were in his dad's camper. RP 919. Sollesvik said that he could recall having intercourse with J.W. only once. The experiences with J.W. were "not memorable." RP 921-22.

<sup>14</sup> Statutory Rape in the Second Degree and Statutory Rape in the Third Degree were re-named Rape of a Child in the Second Degree and Rape of a Child in the Third Degree respectively. LAWS OF 1988, CH. 145, §§ 2-4, codified as RCW 9A.44.073-9A.44.079.

The matter went to trial on August 6, 2009. RP 11. Prior to trial, the State moved to admit evidence relating to Sollesvik's prior sex offenses. Pretrial Ex. 1, 2; RP 22-25, 213; CP 186-88, 199-209; Supp. CP \_\_\_ (Sub. No. 157). The State made an offer of proof about the anticipated testimony of Sollesvik's prior victim and the lead detective in that case, and submitted a copy of the judgment and sentence that documented Sollesvik's convictions. Pretrial Ex. 1, 2; RP 22-25, 211-12, 219-24; CP 186-88, 200-01.

Sollesvik moved to exclude the evidence of his prior sex offenses and challenged the constitutionality of RCW 10.58.090. RP 224-28, 230-32; CP 130-31, 140-47. The trial court rejected these challenges and admitted the evidence. RP 224, 237-39.

Prior to the testimony of the witnesses relating to Sollesvik's prior sex offenses and at the conclusion of trial, the court gave the following limiting instruction:

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

However, evidence of a prior offense on its own is not sufficient to prove the defendant guilty of the crime charged in the Information. Bear in mind as you consider this evidence at all times, the State has the burden of

proving that the defendant committed each of the elements of the offense charged in the Information. I remind you that the defendant is not on trial for any act, conduct, or offense not charged in the Information.<sup>15</sup>

CP 160; RP 583-84, 624, 643.

Sollesvik testified in his defense. RP 864. Sollesvik said that N.B. had never seen him naked.<sup>16</sup> He had seen N.B. naked only once, years earlier when a dog walked in the bathroom and jumped into the bathtub with N.B. Everyone had laughed about it. RP 868. Sollesvik denied ever sucking on any part of N.B.'s body. RP 872. Sollesvik denied having N.B. ever suck on any part of his body. RP 872. Sollesvik denied that he had raped N.B. RP 872.

When Sollesvik first heard about the rape charge, he thought that Dizard had “put [N.B.] up to it.” RP 870. The defense theory, in part, was that N.B.'s disclosure came after Dizard's aunt told N.B. that she was no

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<sup>15</sup> This instruction was based on an instruction approved in United States v. Benally, 500 F.3d 1085 (10<sup>th</sup> Cir. 2007) (defendant's prior child molestation convictions admissible under FRE 414), cert. denied, 128 S. Ct. 1917 (2008).

<sup>16</sup> There was much ado about whether Sollesvik had been circumcised. Dr. Wiester asked N.B. whether she saw anything come out of Sollesvik's penis. N.B. said yes and then described what Dr. Wiester concluded was the glans and not the foreskin. Ex. 28, at 5. Pretrial, when Sollesvik refused to enter into a stipulation that stated he was uncircumcised, the State sought—and was granted—a court order for the case detective to photograph Sollesvik's penis, which, in fact, had been circumcised. RP 112, 867. Dr. Wiester testified that even with a circumcised penis there can still be some foreskin. There are different circumcisions and different amounts of foreskin that can be cut off. RP 775-76. Still, the defense vigorously argued that N.B. had described an uncircumcised penis, yet Sollesvik had been circumcised. RP 971-72, 975, 996, 998, 1002-03.

longer welcome in her house (because N.B. apparently had misbehaved). RP 851, 854-55. Evidently Dizard had told N.B. that if she wanted to get out of trouble, she should say that Sollesvik had abused her. RP 173-74, 851.

The defense also theorized that ill-will developed between Sollesvik and Dizard after John died. RP 177-81, 975, 984, 998-1001. Sollesvik reclaimed his deceased brother's belongings from Atkins and Dizard, such as a boat and some valuable diving gear. RP 177-80, 861-62. It seemed that this reclamation angered Dizard so much that he convinced N.B. to make false accusations.<sup>17</sup> RP 178-82, 975, 984, 998-1001.

The jury found Sollesvik guilty as charged. RP 165. The trial court imposed an indeterminate sentence, with a minimum term of 216 months. CP 172. This appeal follows. CP 167.

**C. ARGUMENT**

**1. SUFFICIENT EVIDENCE SUPPORTS THE VERDICT THAT SOLLESVIK RAPED N.B.**

Sollesvik claims that insufficient evidence supports the verdict of Rape of a Child in the First Degree. Specifically, he argues that based on the language of the three-year charging period in the “to-convict”

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<sup>17</sup> The defense also theorized that Dizard and Sollesvik stopped being friends after Dizard sold John illicit drugs and those drugs led to John's premature death. RP 183. The defense was unable to make an offer of proof sufficient to support such a theory. RP 183-84.

instruction, the State needed--but failed--to prove that Sollesvik raped N.B. *each* day. This claim fails. A common sense reading of the “to-convict” instruction required the State to prove that at some point in time during the three-year charging period, Sollesvik raped N.B. The jury unanimously agreed that the State had met its burden.

Due process requires that a criminal defendant be convicted only when every element of the charged crime is proved beyond a reasonable doubt. U.S. CONST. AMEND. XIV; WASH. CONST. ART. I, § 22; Jackson v. Virginia, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002).

Jury instructions are sufficient if the instructions, when read as a whole, correctly state the applicable law, are not misleading, and allow each side to present their arguments. State v. Holt, 56 Wn. App. 99, 106, 783 P.2d 87 (1989), review denied, 114 Wn.2d 1022 (1990). A “to-convict” instruction must contain a complete statement of all the elements of the offense charged. State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953). “If instructions are such as are readily understood and not misleading to the ordinary mind, they are sufficiently clear.” State v. Foster, 91 Wn.2d 466, 480, 589 P.2d 789 (1979). Jurors are presumed to give an instruction an ordinary, common sense—rather than a

strained—reading. State v. Moultrie, 143 Wn. App. 387, 392-94, 177 P.3d 776, review denied, 164 Wn.2d 1035 (2008).

Under the law of the case doctrine, “jury instructions not objected to become the law of the case.” State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). “In criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the ‘to convict’ instruction.” Id. (citing State v. Lee, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995)). A defendant may then challenge the added elements on appeal as the law of the case. Id. The challenge may include a challenge to the sufficiency of the evidence to prove the added element. Id.

This Court reviews de novo alleged errors of law in jury instructions. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005).

In this case, the State charged Sollesvik with Rape of a Child in the First Degree, alleging:

That the defendant SCOTT SOLLESVIK in King County, Washington, *during a period of time intervening between August 20, 2004 through December 11, 2007*, being at least 24 months older than N.B., had sexual intercourse with N.B., who was less than 12 years old and was not married to the defendant.

CP 127 (italics added).

The “to-convict” instruction reads:

To convict the defendant of the crime of Rape of a Child in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That *on or about the time intervening between August 20, 2004 through December 11, 2007*, the defendant had sexual intercourse with [N.B.];

(2) That [N.B.] was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;

(3) That [N.B.] was at least twenty-four months younger than the defendant; and

(4) That this act occurred in the State of Washington.

CP 156 (italics added).

In addition, the court gave a unanimity instruction that stated:

The State alleges that the defendant committed acts of Rape of a Child in the First Degree on multiple occasions. To convict the defendant of Rape of a Child in the First Degree, one particular act of Rape of a Child in the First Degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Rape of a Child in the First Degree.

CP 158.

At issue, is the language “*on or about the time intervening between August 20, 2004 through December 11, 2007.*” Sollesvik contends that, as written, the “to-convict” instruction “required jurors to find that the act of

intercourse occurred through the entire time intervening between the two dates.” Br. of Appellant at 16. Yet, the jury is presumed to not have followed such a strained reading of the instruction and instead read it in a normal, common sense fashion. Foster, 91 Wn.2d at 480; Moultrie, 143 Wn. App. at 392-94; Holt, 56 Wn. App. at 106.

The State reminded the jury in its closing argument that N.B. said the abuse happened when she was approximately seven years old, which is why the charging period encompassed that time frame. RP 957. The State then focused the jury's attention on the “to-convict” instruction, the unanimity instruction and N.B.'s testimony. RP 957-59. Although N.B. stated that Sollesvik had sexually abused her more than once, there was only one specific incident that N.B. described in detail. RP 958-59. The State encouraged the jury to pick one act of sexual intercourse—whether it was when Sollesvik placed his mouth on N.B.'s vagina and sucked like a vampire, or whether it was when N.B. placed her mouth on Sollesvik's penis—the jury needed to unanimously pick one act. RP 959.

Sollesvik's reliance on Hickman is misplaced. In Hickman, the State failed to object to the inclusion of venue as an element of the crime. On appeal, Hickman challenged the sufficiency of the evidence and the “law of the case” doctrine defeated the State's argument that it was not

required to prove the element. Hickman, 135 Wn.2d at 102. Finding insufficient evidence of venue, the court reversed Hickman's conviction.

Hickman is not helpful here. This is not a case in which the State undertook an additional element. To the ordinary mind, the “to-convict” instruction was “readily understood and not misleading.” Foster, 91 Wn.2d at 480. Sollesvik's claim fails.

**2. THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE OF N.B.'S “SEXUAL ACTIVITY” WITH A SEVEN YEAR OLD BOY.**

Sollesvik contends that his constitutional rights to present a defense was violated because the trial court excluded evidence of N.B.'s prior sexual behavior (when she was about six years old) with Zach (when Zach was seven years old). The purposes for which the defense sought to introduce the evidence were to attack N.B.'s credibility and to rebut the inference that the source of N.B.'s “precocious knowledge” was Sollesvik. CP 136; RP 156-69. Because the Rape Shield Statute prohibits the use of a victim's prior sexual behavior to attack her credibility and because N.B. did not have “precocious knowledge,” the trial court properly excluded the evidence.

a. Relevant Facts.

Sollesvik's sister, Ringer, and Mike Kingsbury are girlfriend and boyfriend. RP 859-60, 863. Kingsbury has a son, Zach. When Zach was

seven years old and N.B. was approximately six years old, they touched each other's bodies on three occasions. CP 185; RP 156. At some point, Ashley (John Sollesvik's daughter) apparently saw Zach and N.B. touching and reported it to an adult. CP 186. Ed Brookman, Roxanne Atkins and Mike Kingsbury discussed the touching; N.B. and Zach no longer had contact with one another. CP 186.

i. State's interview with Zach.

Zach said that the touching occurred during a game of tag, and then on another occasion inside the house. RP 159-60; CP 185-86. During the tag game, Zach and N.B. were hiding together; Zach asked N.B. if he could touch her privates. CP 185. N.B. pulled down her pants and Zach touched her over and underneath her underwear. N.B. kissed Zach on the mouth but she did not touch any other part of his body. CP 185.

The next time N.B. and Zach touched was inside the Kingsbury home during a sleepover. Zach touched N.B.'s body over and underneath her underwear. N.B. kissed Zach. CP 185.

The third time that any touching occurred was at Zach's house inside his bedroom. N.B. and Zach had made a "fort" inside the bedroom and Zach once again touched N.B. over and under her underwear. CP 185-86. N.B. never saw Zach with his underpants off; Zach never

exposed his private area to N.B. CP 186; RP 159-60, 163. Zach never said anything about oral intercourse or penile or digital penetration. RP 159-60.

- ii. N.B.'s discussions with Carolyn Webster and Dr. Wiester.

During Carolyn Webster's interview of N.B., N.B. said that she had done pretty much the same thing with her non-blooded cousin Zach as she had done with Uncle Scott. Pretrial Ex. 4 at 38; Pretrial Ex. 3 (17:20:50 - 17:21:04). N.B. said that during a sleepover with Ashley and Zach, N.B. and Zach were together in a "fort" that they had made in Zach's house. Pretrial Ex. 4 at 39; Pretrial Ex. 3 (17:22:17). N.B. said she had "sex with [Zach]." Pretrial Ex. 4 at 40; Pretrial Ex. 3 (17:23:16). N.B. said, "[T]hen we had sex for about 30 minutes or something." Pretrial Ex. 4 at 43; Pretrial Ex. 3 (17:26:13). Ashley saw Zach and N.B. "having sex," so Ashley kicked Zach. Pretrial Ex. 4 at 43-44; Pretrial Ex. 3 (17:22:50).

Webster asked N.B. what she meant by "having sex." Pretrial Ex. 4 at 44; Pretrial Ex. 3 (17:26:53). N.B. said, "Kissing." Pretrial Ex. 4 at 44; Pretrial Ex. 3 (17:27:33). N.B. then pointed to different parts of her body by way of explanation as to where each had kissed the other. Pretrial Ex. 4 at 44-45; Pretrial Ex. 3 (17:26:45 - 17:27:30). At no point did N.B.

state or imply that any of the kissing had occurred under either her or Zach's clothing.

During Dr. Wiester's examination of N.B., Dr. Wiester asked N.B. whether anybody else had ever done anything to her like what Sollesvik had done. N.B. said that Zach did the "[s]ame things pretty much." Supp. CP \_\_\_ (Pretrial Ex. 8). N.B. did not elaborate.

b. The Trial Court's Ruling.

Sollesvik's counsel argued that the prior contact between Zach and N.B. is relevant because N.B. has "some memory issues." RP 161, 166. N.B. described what happened with Zach as being "identical" to what had occurred with Sollesvik. Zach, according to defense counsel, was prepared to testify that some of N.B.'s assertions "are not true." RP 161-62. For instance, Zach denied having been kicked by Ashley; Zach described N.B.'s assertion as "flat out fantasy on her part." RP 162.

Counsel also argued that the incident with Zach should be admitted because "it explains her knowledge of the male anatomy." RP 162-66.

The trial court stated that what happened between Zach and N.B. is dissimilar to Sollesvik's sexual abuse of N.B. The court said that from the facts of the case, it seemed to be "apples and oranges." RP 160. One

incident involved an adult; the other incident involved a child. RP 169. The court noted that what had occurred between Zach and N.B. was not rape, was not sexual abuse; “it was just two kids playing around.” RP 165, 169. The court found that “the confusion and possible misuse” of what had happened “overwhelms the probative value.” RP 166. In addition, the court did not find “sufficient similarity between the two incidents to be probative of [N.B.’s] knowledge.” RP 169. The court ruled that N.B.’s prior behavior with Zach was inadmissible. RP 166, 169.

c. The Rape Shield Statute Precluded Admission Of The Evidence.

This Court reviews a trial court's decision to exclude evidence for an abuse of discretion. State v. Hudlow, 99 Wn.2d 1, 17, 659 P.2d 514 (1983). The court abuses its discretion if its decision is based on untenable grounds or is manifestly unreasonable. State v. Harris, 97 Wn. App. 865, 869, 989 P.2d 553 (1999). “A trial judge, not an appellate court, is in the best position to evaluate the dynamics of a jury trial and therefore the prejudicial effect of a piece of evidence.” Id. This Court may uphold a trial court's evidentiary ruling on any ground that the record supports. State v. Powell, 126 Wn.2d 244, 259, 893 P.2d 615 (1995).

The Sixth Amendment<sup>18</sup> and article I, § 22 of the state constitution<sup>19</sup> guarantee defendants in a criminal case the right to present evidence in their defense and to confront and cross-examine adverse witnesses. The right of confrontation, however, does not confer an absolute right on defendants to cross-examine witnesses; reasonable limitations consistent with due process may be imposed. See State v. Kalamarski, 27 Wn. App. 787, 789, 620 P.2d 1017 (1980) (holding that the limitation on cross-examination found in RCW 9.79.150 is not a denial of a defendant's due process rights).<sup>20</sup>

The rape shield statute provides, in pertinent part, that “[e]vidence of the victim's past sexual behavior ... is inadmissible on the issue of credibility....” RCW 9A.44.020(2); Hudlow, 99 Wn.2d at 8. Yet, that is precisely one of the purposes for which defense counsel sought to admit the evidence. Counsel said that Zach's testimony was significant because he would say that some of N.B.'s assertions “are not true.” RP 161. In

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<sup>18</sup> U.S. Const. amend. VI provides, in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor....

<sup>19</sup> Const. art. I, § 22 provides in part:

In criminal prosecutions the accused shall have the right to ... meet the witnesses against him face to face, [and] to have compulsory process to compel the attendance of witnesses in his own behalf....

<sup>20</sup> RCW 9.79.150 was recodified as RCW 9A.44.020 in 1979.

addition, Zach's testimony would demonstrate that N.B. has "some memory issues," and that the incident in which Ashley allegedly kicked him in the head was "flat out fantasy on [N.B.'s] part." RP 161-62, 166. An attack on N.B.'s memory is, in fact, an attack on her credibility. See e.g., State v. Froehlich, 96 Wn.2d 301, 305-06, 635 P.2d 127 (1986) (finding that probing cross-examination designed to demonstrate a witness's poor memory is an attack on the credibility of that witness). The trial court properly excluded the evidence.

d. The Trial Court Properly Found The Evidence Was Irrelevant And More Prejudicial Than Probative.

The rape shield statute does not bar evidence of similar *sex abuse* of the victim when offered to rebut the inference that the victim would not know about or be able to describe the alleged sexual acts unless the victim had experienced such acts with the defendant. State v. Carver, 37 Wn. App. 122, 124-25, 678 P.2d 842, review denied, 101 Wn.2d 1019 (1984). If the rape shield statute does not apply, the general evidentiary principles of relevance, probative value and prejudice govern. Carver, 37 Wn. App. at 124. The defendant must establish the relevance of the proffered testimony. Harris, 97 Wn. App. at 872. Relevant evidence is evidence that tends to increase or decrease the likelihood that a material fact exists. ER 401. Material facts are those "of consequence to the

determination of the action.” ER 401. Relevant evidence is admissible unless otherwise prohibited by statute or the rules of evidence. ER 402. “Evidence which is not relevant is not admissible.” ER 402.

Here, Sollesvik failed to show that Zach's testimony was relevant. The record shows that Zach would have testified that N.B. never saw his penis. RP 163; CP 186. Testimony that N.B. never saw Zach's penis does not tend to prove that N.B.'s “precocious knowledge” came from someone other than Sollesvik. Moreover, N.B.'s drawings and her description of Sollesvik's penis as similar to a “hot dog” or like a “slug's eye,” does not demonstrate a maturity beyond N.B.'s tender years. The evidence was thus irrelevant and properly excluded. The trial court's decision therefore was based upon a tenable ground that the record supports. See Powell, 126 Wn.2d at 259.

Sollesvik relies on Carver, a case that is distinguishable. In Carver, the defendant was charged with one count of indecent liberties with one stepdaughter and one count of statutory rape with his other stepdaughter. 37 Wn. App. at 123. Prior to trial, Carver tried to introduce evidence that his stepdaughters had been *previously sexually abused in a similar manner*. Id. Carver argued the evidence was necessary to rebut the inference that the only way the two complaining witnesses would have knowledge of sexual matters was because Carver had abused them. Id.

The trial court found the evidence inadmissible under the rape shield statute. Id. at 123-24. The Court of Appeals held that the evidence proffered by defendant did not fit within the concepts and purposes of the rape shield statute because the evidence was prior *sexual abuse*, not sexual *misconduct*. Id. at 124. The court then determined the evidence was highly relevant to rebut the inference that the complaining witnesses were knowledgeable about sexual matters because Carver had abused them. Id. at 124-25.

Here, as the trial court recognized, what happened between Zach and N.B. and Sollesvik and N.B. was like “apples and oranges.” RP 160. Zach and N.B. were “just two kids playing around.” RP 169. This Court should affirm the trial court's exclusion of irrelevant and prejudicial evidence.

**3. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF SOLLESVIK'S PREVIOUS SEX OFFENSES.**

Sollesvik claims that the trial court erred in admitting the evidence of his prior sex offenses under RCW 10.58.090. He argues that the statute's non-exclusive factors weigh against admission of Sollesvik's prior rapes. This claim is without merit. After reviewing all the relevant factors, the court concluded that the probative value of the substantially similar offenses as the crime charged outweighed the prejudicial effect.

RP 209-38. The trial court acted well within its discretion in admitting evidence of Sollesvik's prior sex offenses.

This Court reviews a trial court's decision whether to admit evidence under RCW 10.58.090 for an abuse of discretion. State v. Scherner, 153 Wn. App. 621, 656, 225 P.3d 248 (2009), review granted, 168 Wn.2d 1036 (2010). 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 RCW 10.58.090, in a sex offense case, evidence of the defendant's commission of another sex offense is admissible subject to the court's balancing of factors under ER 403. RCW 10.58.090(1). Under the statute, the court considers 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).

Individual factors are not dispositive. As this Court has noted:

RCW 10.58.090 does not instruct the court on how to weigh the articulated factors. It only states the trial court must consider all of the factors when conducting its ER 403 balancing test. The ultimate decision on admissibility or exclusion remains with the court.

Schnerer, 153 Wn. App. at 658.

Here, the court did not expressly weigh some of the factors, but the record as a whole showed the court had fulfilled the requirements of the statute. Cf. State v. Carleton, 82 Wn. App. 686, 919 P.2d 128 (1996) (finding that the trial court's failure to weigh the probative value against its prejudice is harmless under ER 404(b) when the record is sufficient for the reviewing court to determine that had the trial court properly weighed the relevant factors, it would still have admitted the evidence). The record as

a whole reveals that the court, after weighing the consequences of admission, made a “conscious decision” to admit the evidence because the probative value of the evidence outweighed any unfair prejudice.

Cf. Carleton, 82 Wn. App. at 686 (quoting State v. Tharp, 96 Wn.2d 591, 597, 637 P.2d 961 (1981)); RP 209-39; CP 130-31, 140-47, 199-209, Supp CP \_\_\_ (Sub. No. 157). The trial court's conclusion was a reasoned decision and not an abuse of discretion.

First, as the trial court noted, the evidence of Sollesvik's prior rapes of J.W. and his rape of N.B. were similar. RP 237-38. The court found the similarity in the age of the victims “most significant.”<sup>21</sup> RP 230, 238. There were similarities in the nature of the sexual activity. Sollesvik orally and digitally raped J.W. and N.B.<sup>22</sup> 2RP 23-24; RP 666, 668-69. The location of the rapes was similar; the first time Sollesvik raped J.W. and when Sollesvik raped N.B., the rapes occurred in Sollesvik's basement bedroom. 2RP 18; RP 660. Finally, Sollesvik abused a position of trust with both J.W. and N.B. The court noted that Sollesvik had a familial relationship--or lived in the household--of both victims. RP 231, 237-38.

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<sup>21</sup> Sollesvik argues that the ages of the victims are dissimilar because J.W. was “post-pubescent” and N.B. was “pre-pubescent.” The trial court rejected this premise because it had no way to determine the maturity rate of either victim. RP 231.

<sup>22</sup> The appellant argues that the events were dissimilar, in part, because Sollesvik did not vaginally rape N.B. Br. of Appellant at 24. However, N.B. stated that Sollesvik's penis had “probably” gone inside her vagina. Ex. 28, at 5.

With respect to the closeness in time between the prior acts and the current offense, the court noted the passage of time (about 15 years). However, 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.<sup>23</sup> Similarly, in State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003), the Washington Supreme Court held that evidence of the defendant's prior sex offense, occurring 15 years earlier, was admissible under ER 404(b) in the defendant's trial for 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. Consistent with these authorities, the trial court properly found that this factor was not dispositive. RP 237-38.

The frequency of the prior acts supported their admission. The evidence established that Sollesvik had raped J.W. on multiple occasions and, although N.B. could not describe with any particularity Sollesvik's

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<sup>23</sup> See United States v. Kelly, 510 F.3d 433, 437 (4<sup>th</sup> 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 (10<sup>th</sup> 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 (8<sup>th</sup> Cir. 2001) (upholding district court's admission of evidence of sexual molestation committed 20 years earlier).

sexual abuse of her other than what occurred in December 2007, N.B. said that the abuse happened more than once.

There were no intervening circumstances between Sollesvik's prior rapes of J.W. and his rape of N.B. that undermined the probative value of this evidence. In fact, despite Sollesvik's statement that he had been required to do "some treatment" after his 1990 rape convictions, Sollesvik took almost no responsibility for his prior deviant behavior. He testified that he recalled only one instance of sexual intercourse with J.W., which Sollesvik attributed his prior abuse of J.W. to his extensive drug use. RP 877, 922-23.

The court discussed with counsel the necessity of the evidence. As the State pointed out, here, as is typical in most rape cases, the primary evidence was N.B.'s testimony and her prior statements. There were no other witnesses to the crimes and no forensic evidence. Sollesvik denied raping N.B. "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).

Sollesvik's prior rapes of J.W. resulted in two convictions: one count of Statutory Rape in the Second Degree and one count of Statutory Rape in the Third Degree. RP 222-23.

Finally, the trial court did not abuse its discretion in finding that the probative value of the evidence outweighed any prejudicial effect. RP 238-39. Because the State's primary case rested on the testimony of N.B., credibility was the central issue. Thus, evidence of Sollesvik's prior rape of a young girl under very similar circumstances was extremely probative. As the trial court recognized, the evidence is prejudicial for the same reason it is probative; i.e., it tended to prove Sollesvik's sexual desire for young girls. RP 234. However, Sollesvik fails to show that the evidence was *unfairly* prejudicial. See Sexsmith, 138 Wn. App. at 506; see also United States v. Gabe, 237 F.3d 954, 960 (8<sup>th</sup> Cir. 2001). Sollesvik's challenge should be denied.

**4. SOLLESVIK HAS NOT ESTABLISHED THAT RCW 10.58.090 IS UNCONSTITUTIONAL.**

Sollesvik argues that RCW 10.58.090 is unconstitutional. As a general principle applicable to all of Sollesvik'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). Sollesvik bears the burden of showing the statute is unconstitutional beyond a reasonable doubt. State v. Shafer, 156 Wn.2d 381, 387, 128 P.3d 87 (2006).

Specifically, Sollesvik argues that RCW 10.58.090 violates the federal and state ex post facto clauses, the state separation of powers

clause, and “state constitutional fair trial protections.” Br. of Appellant at 28-45. This Court has previously rejected these claims. State v. Scherner, 153 Wn. App. 621, 225 P.3d 248 (2009), review granted, 168 Wn.2d 1036 (2010); State v. Gresham, 153 Wn. App. 659, 223 P.3d 1194 (2009), review granted, 168 Wn.2d 1036 (2010). Sollesvik does not discuss either of these decisions beyond citing the cases in a footnote and questioning the validity of the decisions simply because the supreme court granted review. Br. of Appellant at 22 n.4. For the reasons set forth in Scherner and Gresham, this Court should reject Sollesvik's claims and affirm his conviction.

a. RCW 10.58.090 Does Not Violate The Ex Post Facto Clauses.

Sollesvik 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<sup>24</sup>; CONST. ART. I, § 23.<sup>25</sup> “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,

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<sup>24</sup> “No state shall . . . pass any . . . ex post facto law.”

<sup>25</sup> “No . . . ex post facto law . . . shall ever be passed.”

(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.”<sup>26</sup> 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)).

Sollesvik 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 based on an

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<sup>26</sup> Both the United States Supreme Court and the Washington Supreme Court have repeatedly endorsed the analytical framework articulated in Calder v. Bull, 3 U.S. 386, 1 L. Ed. 648 (1798), for analyzing ex post facto violations. See Scherner, 153 Wn. App. at 635. Sollesvik attempts to alter the applicable framework by relying on State v. Hennings, 129 Wn.2d 512, 919 P.2d 580 (1996), a case that is inapposite. Br. of Appellant at 28-33. At issue in Hennings was an amendment to a restitution statute, not a rule of evidence. Hennings, in turn, cites Weaver v. Graham, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981), which addressed a Florida statute altering the computation of a prisoner’s “good time,” and Collins v. Youngblood, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990), which addressed a Texas statute that allows an appellate court to reform an improper verdict that assesses a punishment not authorized by law.

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, the Supreme Court found that a statutory amendment, which applied retroactive to the amendment's effective date, violated the ex post facto clause. See Carmell v. Texas, 529 U.S. 513, 120 S. Ct. 1620, 146 L. Ed. 2d 477 (2000). Carmell involved the defendant's sexual assault of his step-daughter between 1991 and 1995 when the victim was 12 to 16 years old. Before 1993, sexual assaults against child victims over 14 years old could be proved either by testimony from the victim alone if the victim reported within six months of the assault, or with corroboration if the victim reported more than six months post-assault. The 1993 amendment to the statute removed the corroboration requirement. Carmell, 529 U.S. at 516-19. Under the facts of the case, the Supreme Court found that the State's evidence would have been insufficient prior to the 1993 amendment, because the victim's testimony was uncorroborated. Thus, the quantum of evidence necessary to convict the defendant was less than previously required, putting the defendant's case squarely within the fourth category of circumstances which violated the ex post facto clause. Id. at 531.

The Washington Supreme Court similarly found a violation of the ex post facto clause in Ludvigsen) v. City of Seattle, 162 Wn.2d 660,

174 P.3d 43 (2007). The 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).

Sollesvik complains that RCW 10.58.090 is not even-handed; "it dramatically tilts the playing field in favor of the state." Br. of Appellant at 31-33. But that is not the test for determining an ex post facto violation. If it were, the changes to the spousal privilege statute at issue in Clevenger

and the child hearsay statute at issue in Ryan would have run afoul of the ex post facto clauses. In both cases, the new statutes serve to permit testimony that would undoubtedly favor the State in criminal cases. 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.<sup>27</sup>

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

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<sup>27</sup> 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).

evidence necessary to convict, it does not violate the constitutional prohibitions against ex post facto laws.

153 Wn. App. at 673; see also Scherner, 153 Wn. App. at 635-43.

Sollesvik does not discuss Gresham or Scherner, let alone show that they were wrongly decided. He has failed to establish that admission of evidence under RCW 10.58.090 violated the ex post facto clauses.

b. The State Ex Post Facto Clause Does Not Provide Greater Protection Than The Federal Clause.

Sollesvik argues that the ex post facto clause in article I, section 23 of the Washington State Constitution provides greater protection than the ex post facto clause in the United States Constitution. Br. of Appellant at 33-39. 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 Sollesvik'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 Sollesvik'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. I, § 23. The only difference is the addition of the word “ever” in the State version. That word does not create any difference between the two clauses since there is no exception to the prohibition against ex post facto laws in the federal version of that clause. Furthermore, 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.”).<sup>28</sup>

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 I, 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,

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<sup>28</sup> See also Fox v. Territory, 2 Wash. Terr. 297, 5 P. 603 (1884), a case that pre-dated the adoption of Washington's Constitution and which suggests that the court accepted the test for an ex post facto law set out in Calder. The court found the law at issue in Fox did not constitute an ex post facto law by distinguishing it from other laws at issue in authority cited by the appellant:

It was an attempt of congress in the one case, and the state of Missouri in the other, to prescribe punishment by legislative enactment for participation in the rebellion, directed at particular classes, prescribing additional penalties for acts before that declared crimes, rendering punishable acts not before criminal, and *changing the rules of evidence by which less or different testimony was made sufficient to convict.*”

Id. at 300 (italics added).

87 Wn.2d 922, 923-28, 557 P.2d 1299 (1976). Washington caselaw provides no support for Sollesvik'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, Sollesvik 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." Fugate, 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.”<sup>29</sup> 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.

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<sup>29</sup> The court did not discuss what it meant to “make conviction more easy.”

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 Sollesvik 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 does not violate article I, section 23 of the State Constitution.

c. The Legislature's Enactment Of RCW 10.58.090 Does Not Violate The Separation Of Powers Doctrine.

Sollesvik argues that the legislature's enactment of RCW 10.58.090 violates the separation of powers doctrine. This Court also rejected this claim in Gresham and Scherner, and Sollesvik does not address or 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.<sup>30</sup> 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 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

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<sup>30</sup> 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.”).

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.<sup>31</sup> The legislature has enacted a number of statutes that relate particularly to evidence and testimony in sex offense cases.<sup>32</sup>

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, 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.” Id. at 178.

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<sup>31</sup> 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).

<sup>32</sup> 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).

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, 153 Wn. App. at 648; see also Gresham, 153 Wn. App. at 665-70. The Court should reject Sollesvik's separation of powers challenge to the statute.

d. RCW 10.58.090 Does Not Violate Sollesvik's State Constitutional Right To A Jury Trial.

In a brief argument citing little authority, Sollesvik claims that RCW 10.58.090 is unconstitutional because it violates “state constitutional fair trial protections.” Br. of Appellant at 44-45. 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.

Sollesvik claims that the state constitutional right to a jury trial, set forth in Const. art. I, §§ 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. Sollesvik has not made a due process claim, and this Court has rejected a due process challenge to RCW 10.58.090. Schnerer, 153 Wn. App. at 651-53. 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.<sup>33</sup>

Perhaps because the weight of authority is so strongly against him on a due process challenge, Sollesvik 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.

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<sup>33</sup> 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).

**D. CONCLUSION**

For the reasons stated above, this Court should affirm Sollesvik's judgment and sentence.

DATED this 3 day of November, 2010.

Respectfully submitted,

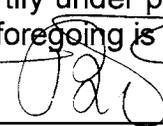
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of Brief of Respondent, in STATE V. SCOTT SOLLESVIK, Cause No. 64234-1-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.

  
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Name Bora Ly  
Done in Seattle, Washington

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