

66546-4

66546-4

NO. 66546-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

EARL FLEMING,

Appellant.

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COURT OF APPEALS
DIVISION I
CLERK'S OFFICE

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE HELLER

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the trial court exercised its discretion properly under either RCW 10.58.090 or ER 404(b) when it admitted Fleming's similar uncharged act of sexual abuse against another one of his daughters as evidence of a common scheme or plan by Fleming to isolate and abuse his daughters.

2. Whether this Court should apply its reasoning in State v. Scherner to this case and hold that RCW 10.58.090 is not unconstitutional.

3. Whether the trial court properly prohibited Fleming from eliciting improper opinion evidence from one witness as to the credibility of another witness.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

By amended information, the State charged defendant Earl Fleming with two counts of rape of a child in the second degree (counts 1 and 2), one count of rape of a child in the third degree (count 3) and one count of misdemeanor violation of a sexual assault protection order (count 4). CP 210-12. Following trial, a jury convicted Fleming as charged in counts 1 - 3, but found him

not guilty of the violation of a sexual assault protection order.

CP 134-37.

At sentencing, the Honorable Bruce Heller (the trial judge), explained that he would impose a sentence at the high end of the standard range because Fleming had committed the worst crime a father can commit: he had raped his daughter “time and time again.”¹ 13RP 13.² This appeal follows. CP 155.

2. SUBSTANTIVE FACTS

a. Background.

T.F. (D.O.B. 8/30/94) has four siblings: Jermaine (age 26), Corey (age 24), K.F. (age 20) and Christiana (“Christie”) (age 9). 4RP 59-63; 5RP 43-44, 47; 6RP 85-88. Fleming fathered all five children, but only T.F. and Christie share the same mother (Champagne).³ 4RP 57-59, 62-63; 5RP 48; 6RP 87-88.

T.F., Christie and Champagne moved from Renton to Michigan on September 22, 2009 (after Fleming’s arrest but before

¹ The court imposed an indeterminate sentence, with a minimum term of 194 months in custody on counts 1 and 2, concurrent to one another and concurrent with the 53 month sentence imposed on count 3. CP 159-60.

² The State adopts the appellant’s designation of the verbatim report of proceedings. See Br. of Appellant at 6 n.1.

³ The State refers to Ms. Fleming by her first name to avoid any confusion with Earl “Tyrek” Fleming. No disrespect is intended.

trial began). 4RP 63-64; 5RP 11-12, 28-29, 52. At that time, T.F. was in 9th grade. 4RP 130; 5RP 55, 125. In Renton, T.F. and Christie generally shared a bedroom, but for parts of 8th and 9th grades, T.F. had a bedroom all to herself. 4RP 65; 5RP 65-66. T.F. referred to this bedroom as the “brown wall room.” 5RP 68. The brown wall room had two beds. 5RP 68, 155.

From approximately December 2007 until March or April 2008, K.F. returned from Atlanta – where she had been living with her mother – and lived in Renton. 4RP 68, 150; 6RP 91, 102-04. K.F. slept in what had previously been Corey’s bedroom, referred to by T.F. as the “blue wall room.” 4RP 65-67; 5RP 68. The blue wall room had one bed – a mattress on the floor. 5RP 68, 87.

T.F. lived in Kent (along with Christie, Champagne and Fleming) from part of 6th grade until 8th grade. 4RP 70-71; 5RP 55. Before that, they lived in Auburn, where T.F. attended elementary school through part of 6th grade. 4RP 72-73; 5RP 54. In Kent and Auburn, T.F. and Christie shared bunk beds. 5RP 67. T.F. had the top bunk. 5RP 103.

In each of the three homes – Auburn, Kent and Renton – Fleming raped T.F.

b. Auburn.⁴

During January 2005, Fleming's daughter (and Champagne's step-daughter), K.F. (D.O.B. 12-19-89), lived with them in Auburn. 6RP 85, 88-89, 91-92. One day while Fleming and K.F. were alone in the house, Fleming went into K.F.'s room and massaged her back. 6RP 94-95. At first, it seemed harmless – Fleming rubbed K.F.'s back over her clothing. 6RP 95-96. Fleming next reached under K.F.'s shirt and touched the side of her breasts over her bra. 6RP 96-98. Fleming then pulled K.F.'s pants (but not her underwear) down to her knees and touched her bottom. 6RP 98-100. This touching felt wholly inappropriate to K.F., who asked Fleming what he was doing, and then told him to stop. 6RP 99-100. Fleming acted shocked, but he stopped touching K.F. and left her room. 6RP 100. Afterward, K.F. felt confused and she wanted to leave. 6RP 100. So, K.F. called her brother, Corey, who came and got her. 6RP 100.

⁴ All of the Auburn instances a propos T.F. were uncharged acts. Fleming does not challenge the admission of these uncharged acts. Pursuant to ER 404(b) and RCW 10.58, the trial court also admitted uncharged acts vis-à-vis T.F.'s half-sister, K.F., as evidence of Fleming's common scheme or plan to initiate sexual contact with his daughters. These rulings are challenged on appeal and are discussed fully below in section C.1-3 of the Respondent's brief.

After Corey confronted either Fleming or Champagne about what had happened, Champagne packed K.F.'s bags. 6RP 101. About three or four days after the incident, K.F. returned home to her mother in Atlanta. 6RP 101. K.F. never reported the incident to the police. Fleming was the family's sole source of income and K.F. did not want to complicate matters for T.F. or Christie.⁵ 6RP 102.

The first time that Fleming touched T.F. in a sexual way, she was in the 6th grade. 5RP 89. It was almost Halloween. T.F. had a devil costume, but her parents would not let her try it on before Halloween. 5RP 89-90. Early one morning – around 1:00 or 2:00 A.M. – T.F. got out of bed because she was hungry. 5RP 91-93. Fleming was in the living room and he told T.F. that she could try on her costume. 5RP 89, 93.

Elated, T.F. changed clothes and then went back into the living room to show off her costume to Fleming. 5RP 91, 94. Fleming said that his back hurt; he asked T.F. to rub it. 5RP 94-95. Fleming lay on the floor. He wore only his boxer shorts. 5RP 95. T.F. straddled Fleming and rubbed his back. 5RP 89-90, 95. T.F.

⁵ In 2007, K.F. returned to Fleming and Champagne's house to finish high school and to try and protect her younger sisters. 6RP 103-04, 117.

did not think anything of this until Fleming wanted her to touch his lower back, by his buttocks. T.F. did not want to touch Fleming there. 5RP 97. After the massage, Fleming whispered to T.F. that she should not tell anybody about what had happened. 5RP 98. T.F. returned to her room and did not think anything about the backrub. 5RP 98.

For a few weeks, the backrubs continued. 5RP 99. While Champagne and Christie slept, Fleming went into T.F.'s bedroom and tapped her shoulder. T.F. knew to go to the living room and rub Fleming's back. 5RP 100-01. The back rubs lasted about 15 minutes. 5RP 102.

Fleming then progressed from grooming to molesting T.F. 5RP 102-05. For weeks – almost every other night – Fleming would tap T.F. on the shoulder while she slept on the top bunk – and Christie slept on the bottom bunk. 5RP 104-05. Fleming touched T.F.'s breasts over and under her clothing. 5RP 103-04. When T.F. scooted toward the wall and mumbled for Fleming to stop, he did. 5RP 103-05.

In Auburn, for the first time, Fleming anally raped T.F. 5RP 105. T.F. did not recall the details, but she knew that it occurred in her room while she was in the 6th grade. 5RP 105-07.

Fleming awakened T.F., told her to come down from her bunk to the bedroom floor and Fleming then inserted his penis into T.F.'s anus. 5RP 105-07.

Also in Auburn, Fleming had T.F. fellate him. 5RP 135, 139, 198. The incident occurred in her brother's (Corey's) room when Champagne and Corey were not at home. 5RP 136. Fleming sat on the bed, pulled his penis out of the hole in his boxer shorts and told T.F. to put his penis in her mouth. 5RP 136-38. Fleming ejaculated. T.F. said that was "really gross." 5RP 135. The ejaculate looked like "snot" and had a bitter taste – T.F. spit it out all over Corey's bed. 5RP 138-39, 198.

c. Kent.⁶

Fleming vaginally and anally raped T.F. when they lived in Kent, although many of the details escaped T.F. 5RP 140. One instance of anal intercourse stood out in T.F.'s mind. 5RP 132, 135. She was in 6th grade at Totem Middle School (her "uniform" school) and Fleming anally raped her one morning before school. 5RP 132-35. It felt "really, really, really bad." 5RP 133. T.F. could

⁶ Because T.F. testified about multiple instances of rape, the jury was instructed that, in order to convict Fleming of second or third degree rape of a child, jurors had to unanimously agree that particular incidents occurred. CP 121-22, 126.

barely walk afterward. 5RP 133-35. T.F. did not visit the school nurse because she knew why her bottom hurt. 5RP 133.

T.F. recalled that Fleming vaginally raped her on the hardwood floor in her bedroom, which hurt T.F.'s back. 5RP 141-42. Another time, when Champagne and Christie were listening to music in Champagne's room, Fleming penetrated T.F. while they were on the couch. Fleming stopped (pre-ejaculation) when Champagne started to come out of the bedroom. 5RP 143-49.

T.F. did not think anything of the rapes until she was in 7th grade and saw "a lot of Lifetime movies and this happened a lot with girls and their dads." 5RP 150. T.F. identified with those movies. 5RP 150. T.F. tried to distance herself from Fleming and pretended that the sexual abuse never happened. 5RP 150. T.F. did not tell anyone about the rapes because she was scared. 5RP 113.

d. Renton.

Fleming raped T.F. repeatedly in the brown and the blue wall rooms. 5RP 154-55, 202. T.F. would awaken to find Fleming on

top of her, raping her. 5RP 124. The rapes occurred daily.

5RP 125-26.

One instance stood out in T.F.'s mind. 5RP 195. T.F. was asleep in the blue wall room; she awoke when Fleming put a big red pillow over her face. 5RP 108-09, 112. As Fleming vaginally raped T.F., he called her "Little Ree-Ree," which confused T.F. because "Little Ree-Ree" was Champagne's nickname. 5RP 108-11, 195. T.F. gasped for air and tried to push Fleming off. 5RP 108-10. She cried. 5RP 110. As Fleming ejaculated, he withdrew his penis and semen went all over T.F. and her tiger blanket. 5RP 111-12.

Another time, in the brown wall room, when T.F. was watching television (and Christie was sleeping), Fleming came in, turned off the television and raped T.F. 5RP 155-56. T.F. tried to push Fleming off, but he was much stronger than she. 5RP 113-14, 130, 156. T.F. cried. 5RP 156. Because of the Lifetime movies she had watched, T.F. was afraid to yell – she was afraid of what Fleming might do. 5RP 156.

T.F. did not remember Fleming ever ejaculating inside of her. 5RP 131.

e. T.F.'s Disclosures And The Investigation.

Once, at a Toys "R" Us, T.F. and her mother argued in Fleming's presence, T.F. told her mother, "He touches me." 4RP 150-52; 5RP 75-76, 189. Champagne asked Fleming if it was true and he said no. 4RP 150-52; 5RP 75-77, 189. Fleming cried and repeated that it was not true. 4RP 150-52; 5RP 75-77, 189. After Fleming denied T.F.'s allegation, Champagne punched T.F. in the face. 5RP 75-77, 189. T.F. was then too afraid to tell anyone else – she feared being put into foster care and what Fleming would do to Christie. 5RP 78-79.

Months later, on December 12, 2008, T.F. left class to see the school nurse.⁷ 4RP 150-51; 5RP 70-73. The nurse touched T.F.'s stomach, and asked if she was pregnant. 4RP 40-46. T.F. said that she did not know. 5RP 73-74. The nurse persisted. Finally, T.F. said, "My dad does things to me." 5RP 73. T.F. told the nurse that her father touched her in her "private area" and that

⁷ T.F. had previously seen her family doctor because she had stomachaches, headaches and she was "puking a lot." 5RP 71-72. The doctor thought that T.F. might have gallstones, but none showed up on an ultrasound test. 5RP 72. Although the doctor found nothing wrong with T.F., she continued to feel ill. 5RP 70-73. T.F. knew that her body was changing, but she thought that she was just getting fat. 5RP 74.

he had been doing so since she was twelve years old. 4RP 46; 5RP 75.

The nurse notified Child Protective Services and the school principal. 4RP 50; 5RP 75, 79. A short time later, a police officer (Detective Hansen) and a social worker arrived. 5RP 79. After they all spoke, Detective Hansen arranged to have Fleming arrested when he arrived at school to pick up T.F. 5RP 79, 184-87; 8RP 17-20.

Later that same day, Detectives Hansen and Morgan went to the Fleming home to talk to Champagne and collect evidence. 4RP 135; 8RP 21. T.F. showed the police officers clothing, sheets and her tiger blanket – all had possible evidence of the rapes. 5RP 81, 86; 6RP 62-67. The tiger blanket and a blue sheet appeared to have semen stains. 6RP 63-67. Although T.F. was uncertain when the staining occurred, she was positive it was Fleming's semen. 5RP 160-61. The police officers took DNA⁸ swabs from Fleming and T.F. 5RP 82; 6RP 68-73; 8RP 22.

Later that night, T.F. went to the hospital where a "rape kit," a pregnancy test and an ultrasound were done. 4RP 135-37;

⁸ Deoxyribonucleic acid.

5RP 190. The tests confirmed T.F.'s pregnancy. 4RP 137; 5RP 83-84, 192-93. T.F. and her mother decided that T.F. would terminate the pregnancy. 4RP 137.

On December 29 and 30, 2008, T.F. terminated her pregnancy; she was in her second trimester. 4RP 87-89, 100, 106, 118, 121. DNA tests established a 99.998229 per cent probability that Fleming had impregnated T.F.⁹ 6RP 20-37.

During one of Fleming's telephone calls from jail, Champagne confronted Fleming with the DNA test results; Fleming admitted that he had "made mistakes." Ex. 7 (April 3, 2009 call); Ex. 20 at 4; 6RP 115. Champagne reminded Fleming that he was in jail for "raping our daughter." Ex. 6 (April 29, 2009 call); Ex. 20 at 22; 6RP 115. Still, Fleming refused to accept responsibility for his actions. Fleming told Champagne that, "I didn't do nothing to us. [Y]our daughter did this to us." Ex. 7 (April 15, 2009); Ex. 20 at 11.

⁹ The defense challenged the statistical analysis, i.e., the paternity probability, because the formula used did not take into consideration another male family member: Corey. Defense expert, Dr. Riley, claimed that because Corey's DNA had not been typed, he could not be excluded as the father of the fetus. 9RP 18-33. Riley conceded that Fleming could have fathered the fetus. 9RP 18-19.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY ADMITTED FLEMING'S SEXUAL CONTACT WITH K.F. AS EVIDENCE OF A COMMON SCHEME OR PLAN.

Fleming contends that the trial court erred by admitting evidence, under ER 404(b), of his sexual contact with his daughter, K.F. Specifically, Fleming claims that the evidence (1) did not establish a common scheme or plan, and (2) was more prejudicial than probative. This Court should reject Fleming's argument. The trial court carefully analyzed the evidence and determined that the similarities between Fleming's conduct with K.F. and T.F. established a common scheme or plan by Fleming to isolate and abuse his daughters and that the probative value of the evidence outweighed the prejudicial impact. This Court should affirm the trial court's considered judgment.

Under ER 404(b), evidence of other crimes or acts is inadmissible to show action in conformity therewith.¹⁰ Such evidence may be admissible, however, as proof of a common scheme or plan. ER 404(b); State v. DeVincentis, 150 Wn.2d 11, 16-21, 74 P.3d 119 (2003) (prior acts admitted to show common

¹⁰ The trial court stated that its analysis began with the presumption that the prior bad act was inadmissible propensity evidence. 4RP 9.

plan to get to know prepubescent girls, create a trusting relationship, and desensitize them to nudity by wearing almost no clothing); State v. Lough, 125 Wn.2d 847, 853-56, 889 P.2d 487 (1995) (prior acts admitted to show common scheme or plan to drug and rape women); State v. Kennealy, 151 Wn. App. 861, 887-89, 214 P.3d 200 (2009) (prior acts admitted to show a common scheme or plan even though the defendant argued that the prior incidents differed from the charged incidents), review denied, 168 Wn.2d 1012 (2010); State v. Sexsmith, 138 Wn. App. 497, 157 P.3d 901 (2007) (prior acts admitted to show a common plan to molest children over whom he was in a position of trust as father or caretaker and who were isolated when abused), review denied, 163 Wn.2d 1014 (2008); State v. Baker, 89 Wn. App. 726, 732-35, 950 P.2d 486 (1997) (prior acts admitted to show common scheme or plan to sexually assault sleeping children); State v. Krause, 82 Wn. App. 688, 693-98, 919 P.2d 123 (1996) (prior acts admitted to show common scheme or plan of molesting young boys by befriending the parents, working to gain the boys' affections, and isolating them before molesting them), review denied, 131 Wn.2d 1007 (1997).

“[C]ommon scheme or plan is established by evidence that the defendant committed ‘markedly similar acts of misconduct against similar victims under similar circumstances.’” Lough, 125 Wn.2d at 856 (quoting People v. Ewoldt, 7 Cal.4th 380, 399, 27 Cal. Rptr. 2d 646, 867 P.2d 757 (1994)). It is evidence of a single plan that is used “repeatedly to commit separate, but very similar, crimes.” Kennealy, 151 Wn. App. 887. “[T]he similarity is not merely coincidental, but indicates that the conduct was directed by design.” Lough, 125 Wn.2d at 860. The similarity between the acts does not require uniqueness, and “courts generally admit evidence of prior sexual misconduct in child sexual abuse cases.” Kennealy, at 887.

Before admitting evidence under the common scheme or plan exception, the prior act must be: (1) proved by a preponderance of the evidence; (2) admitted for the purpose of proving a common scheme or plan; (3) relevant to prove an element of the crime charged or to rebut a defense;¹¹ and (4) more probative than prejudicial. Lough, 125 Wn.2d at 852. This Court reviews a trial court’s decision to admit prior crimes evidence for an

¹¹ The court said that the prior abuse of K.F. was relevant to rebut the defense claim that T.F. had fabricated her allegations against Fleming. 4RP 13. Fleming does not challenge this portion of the court’s ruling.

abuse of discretion. DeVincentis, 150 Wn.2d at 17. Judicial discretion is not abused unless the reviewing court determines that no reasonable person would take the same view adopted by the trial court. State v. Huelett, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979).

Fleming's argument involves factors two and four: that the evidence established a common scheme or plan and that the evidence was more probative than prejudicial.

a. Similarity Between T.F.'s And K.F.'s Allegations.

In analyzing whether Fleming's conduct with K.F. and T.F. established a common scheme or plan, the trial court relied in part on State v. Kennealy. See 4RP 11-12. In Kennealy, the court found a common scheme or plan despite differences in the severity and method between the uncharged and charged acts of sexual abuse; i.e., the prior misconduct involved fondling as opposed to the charged crime: Kennealy's rape of the victim by performing oral sex on him. 151 Wn. App. at 889. Additionally, the prior acts involved different locations and family members. Nonetheless, the court found that the prior incidents of sexual misconduct were

substantially similar to the charged crimes because Kennealy's design or pattern was to gain the trust of children between the ages of 5 and 12 to allow him access to the children in order to repeatedly sexually abuse them. Id.

The trial court here also looked to this Court's opinion in Doe v. Corporation of President of Church of Jesus Christ of Latter-Day Saints¹², to inform its analysis. In Doe, the trial court ruled that testimony by the stepfather's biological daughter – that he sexually abused her – was admissible in the stepdaughters' intentional infliction of emotional distress action against their stepfather (Taylor) to show a common plan or scheme. 141 Wn. App. 407, 433-36, 167 P.3d 1193 (2007), review denied, 164 Wn.2d 1009 (2008). In upholding the trial court's admission of the uncharged acts as a common scheme or plan, this Court observed that all three girls were under the age of ten when the abuse started, and all of the abuse occurred in the family home, where Taylor was the father figure and could isolate the girls from their mothers. Id. at 435.

¹² 141 Wn. App. 407, 167 P.3d 1193 (2007), review denied, 164 Wn.2d 1009 (2008).

In the instant case, the trial court acknowledged that Fleming's repeated rapes of T.F. were significantly more severe than the allegation involving K.F. 4RP 12. However, the court found that the similarities outweighed the differences: Fleming committed "markedly similar acts of misconduct against similar victims under similar circumstances." 4RP 11 (quoting Lough, 125 Wn.2d at 856). The initial touching – massages – were similar if not identical, the incidents occurred in the family homes, Fleming, the father figure, isolated the girls from their mother and the girls were roughly the same age when the abuse occurred. 4RP 12-13. The trial court here, as in Kennealy and Doe, properly found that the evidence of prior sexual abuse showed a common scheme or plan as the charged crimes.

b. Prejudice Versus Probative Value.

Fleming contends that even if the evidence did show a common scheme or plan, the prejudicial impact of the prior bad acts evidence outweighed its probative value in proving the charged crimes. This claim fails because the measure is whether

the evidence is *unfairly* prejudicial. ER 403.¹³ This Court reviews the trial court's balancing of probative value against prejudice for abuse of discretion. Sexsmith, 138 Wn. App. at 506.

Prior similar acts of sexual abuse are generally "very probative of a common scheme or plan," and the "need for such proof is unusually great in child sex abuse cases." Krause, 82 Wn. App. at 696. The evidence is strongly probative because of the secrecy surrounding the sexual abuse offenses, the victim's age and vulnerability, the absence of physical proof of the crime, and the general lack of confidence in the jury's ability to assess the child witness's credibility. DeVincentis, 150 Wn.2d at 23.

Here, the trial court noted that not all of the factors analyzed in DeVincentis applied because both K.F. and T.F. were in their mid to late teens, so the instant case did not present the same challenges associated with younger child victims, including the jury's inability to assess their credibility. 4RP 13-14. Also, there was physical evidence of the crime. 4RP 14. However, because the defense challenged the DNA evidence, there was no conclusive

¹³ "Although relevant, evidence may be excluded if its 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." ER 403.

physical evidence.¹⁴ 4RP 14. And, there were no witnesses to the acts. The trial court thus concluded that “the probative value of the evidence of prior bad acts is important in helping the jury to resolve [the DNA] issue, and the probative value outweighs its prejudicial impact.” 4RP 14.

Finally, the trial court gave a limiting instruction. CP 128.

The court instructed the jury that,

Certain evidence has been admitted in this case only for a limited purpose. This evidence includes any testimony regarding the defendant touching K.F. when they lived in Auburn....

This evidence may be considered by you only for the purpose of determining whether or not the defendant had a common scheme or plan to initiate sexual contact with his daughters....You may not consider it for any other purpose. Any discussion of

¹⁴ See CP 12-15, 17-31; 1RP 13-15 (defense sought a *Frye* hearing with regard to the DNA testing done on the fetus; defense gave notice of its intent to suggest that T.F.'s brother, Corey, fathered the fetus); 2RP 21-22 (defense sought permission from the court to cross-examine the State's DNA expert as to whether Corey could have contributed alleles to the fetus's DNA); 8RP 3-13 (defense moves for reconsideration of the court's ruling that prohibited the defense from presenting "other suspect" evidence; i.e., that Corey could have contributed DNA to the fetus); 9RP 3-4 (court rules that defense will be permitted to call into question the State's DNA evidence); 9RP 9-88 (defense expert opines that, because Corey's DNA was never tested, he was not excluded as the fetus's father and, in fact, could have fathered the fetus); 10RP 7-24 (discussion of permissible inferences that the defense would be permitted to draw in closing vis-à-vis defense expert's testimony); 10RP 60-62 (defense argues in closing that the State's DNA evidence created reasonable doubt because Corey was never excluded as the fetus's possible father).

the evidence during your deliberations must be consistent with this limitation.

CP 128.

This Court should hold that the trial court did not abuse its discretion in admitting the evidence to prove a common scheme or plan because the danger of unfair prejudice did not substantially outweigh the probative value of K.F.'s testimony of prior acts of child sexual abuse.

c. Error, If Any, Was Harmless.

Even if the trial court erred in admitting evidence of Fleming's sexual abuse of K.F., the error was harmless. An evidentiary error which is not of constitutional magnitude, such as erroneous admission of ER 404(b) evidence, requires reversal only if the error, within reasonable probability, materially affected the outcome." State v. Stenson, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997). Stated another way, the error is harmless if the evidence is of minor significance compared to the overall evidence as a whole. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

The evidence of Fleming's sexual abuse of K.F. was of minor significance compared to the overall evidence as a whole.

T.F. testified about acts of oral, anal and vaginal rapes that spanned three years and three family homes. 5RP 43-61, 65-116, 122-210. T.F. showed the police her tiger blanket, which appeared to have semen stains. The stains were consistent with T.F.'s testimony that Fleming had ejaculated on her tiger blanket. 5RP 82, 85, 153-54; 6RP 63-66.

Moreover, during a telephone call that Fleming had initiated from jail, Champagne confronted Fleming about the DNA test results, which established to a 99.998229 per cent probability that he had impregnated T.F. Fleming did not deny Champagne's accusation that he fathered her daughter's baby; rather, he admitted that he had "made mistakes." 6RP 37; Ex. 7 (April 3, 2009 call); Ex. 20 at 4. Given the overwhelming evidence of Fleming's repeated rapes of T.F., any error in admitting K.F.'s testimony about prior sexual abuse was harmless.

Any error was also harmless because the trial court determined that the evidence of Fleming's sexual abuse of K.F. was admissible under RCW 10.58.090. Accordingly, Fleming's claim fails.

2. THE TRIAL COURT PROPERLY ADMITTED THE PRIOR SEXUAL ABUSE OF K.F. PURSUANT TO RCW 10.58.090.

Fleming concedes that given the trial court's limiting instruction (CP 128), jurors could not consider K.F.'s abuse for any purpose other than evidence of a common scheme or plan. Br. of Appellant at 21. Still, Fleming assigns error to the trial court's statutory ruling to counter any ER 404(b) harmless error analysis. The Court should reject this assignment of error because the trial court properly admitted the evidence under RCW 10.58.090.

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).¹⁵

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

¹⁵ The Supreme Court heard oral argument in Scherner on March 17, 2011.

- (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, after the court found that the State had proved by a preponderance Fleming's prior bad act against K.F., the court expressly weighed the factors, as statutorily required. 4RP 10; 5RP 62-65. The court then admitted the evidence because the

probative value of the evidence outweighed any unfair prejudice. 5RP 62-63. The trial court's conclusion was a reasoned decision and not an abuse of discretion.

First, as the trial court noted in its ER 404(b) analysis, the evidence of Fleming's prior abuse of K.F. was significantly similar to the charged crimes. 4RP 11-13; 5RP 62-63. The court said that Fleming's actions with K.F. and T.F. were similar in a number of respects, "including the type of touching, the fact that the alleged abuse of both girls occurred in the family home when the mother was either out or somewhere else in the house." 5RP 62-63.

The court found the similarity of the girls' ages more significant than the intervening time between the alleged abuse of K.F. and T.F.¹⁶ 5RP 63. Further, the court said that in both cases, Fleming seemingly took advantage of his parental authority to "isolate and abuse the children." 5RP 63. The fact that Fleming's

¹⁶ Moreover, RCW 10.58.090, like the corresponding federal rules (Fed. R. Evid. 413, 414), contains no time limit beyond which prior sex offenses are inadmissible. The federal courts have repeatedly held that prior sex offenses committed decades earlier were admissible. See United States v. Kelly, 510 F.3d 433, 437 (4th Cir. 2007) (rejecting argument that prior sex offense was inadmissible because it occurred more than 20 years ago); United States v. Benally, 500 F.3d 1085 (10th Cir. 2007) (affirming admission of testimony of two victims sexually assaulted 40 years earlier and a third victim sexually assaulted 21 years earlier), cert. denied, 128 S. Ct. 1917 (2008); United States v. Gabe, 237 F.3d 954, 959-60 (8th Cir. 2001) (upholding district court's admission of evidence of sexual molestation committed 20 years earlier).

abuse of K.F. occurred only once did not diminish its relevance “given the substantial similarities between it and the allegations made by [T.F.]” 5RP 63. The court stated,

Moreover, the fact that there was only one incident may be attributed to the intervening act of [K.F.] removing herself from the home and moving across the country.

5RP 63.

With regard to the necessity of the evidence, the court said that as it found in its ER 404(b) analysis, the alleged abuse of K.F. was necessary to rebut the defense claim that T.F. fabricated her allegations of abuse. 5RP 63; see also 4RP 13.

The court thus concluded that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. 5RP 63. In reaching its conclusion, the court said that it was influenced by the inherent reliability in K.F.’s allegations, including the fact that she left the house immediately and that her description appeared to “very strongly” match those of T.F. 5RP 63-64.

Given the court’s careful analysis of RCW 10.58.090, the court acted well within its discretion in admitting evidence of Fleming’s prior acts with K.F. Moreover, Fleming fails to show that

the evidence was *unfairly* prejudicial. See Sexsmith, 138 Wn. App. at 506.

3. FLEMING HAS NOT ESTABLISHED THAT RCW 10.58.090 IS UNCONSTITUTIONAL.

Fleming argues that RCW 10.58.090 is unconstitutional. As a general principle applicable to all of Fleming'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). Fleming 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, Fleming 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 21-42. This Court has previously rejected these claims. Scherner, 153 Wn. App. 621; State v. Gresham, 153 Wn. App. 659, 223 P.3d 1194 (2009), review granted, 168 Wn.2d 1036 (2010).¹⁷ Fleming does not discuss either of these decisions beyond citing the cases in a footnote and questioning the validity of

¹⁷ The Washington Supreme Court heard oral argument in Gresham on March 17, 2011.

the decisions simply because the supreme court granted review. Br. of Appellant at 21 n.3. For the reasons set forth in Schnerer and Gresham, this Court should reject Fleming's claims and affirm his conviction.

4. THE TRIAL COURT DID NOT DENY FLEMING THE RIGHT TO PRESENT HIS DEFENSE.

Fleming claims that the trial court denied him the right to present a defense when it precluded him from questioning Champagne about whether she believed T.F. before the DNA results, after the State allegedly opened the door to such questioning. Fleming is mistaken; the State did not open the door to Champagne's opinion of T.F.'s credibility. Moreover, the trial court only precluded Fleming from asking Champagne to impermissibly comment directly on T.F.'s credibility. The court permitted Fleming to question Champagne about T.F.'s conduct, from which certain inferences about T.F.'s credibility could be drawn. Fleming was not denied the right to present a defense.

A defendant has a constitutional right to present a defense, but the right does not extend to irrelevant or inadmissible evidence. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010)

(irrelevant evidence); State v. Aguirre, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010) (inadmissible evidence); State v. Mee Hui Kim, 134 Wn. App. 27, 41, 139 P.3d 354 (2006) (defendant has the right to present a defense “consisting of relevant evidence that is not otherwise inadmissible” (quoting State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992))).

No witness may state an opinion about a victim's credibility because such testimony “invades the province of the jury to weigh the evidence and decide the credibility of the witness.” State v. Jones, 71 Wn. App. 798, 812, 863 P.2d 85 (1993) (citing State v. Alexander, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992)); ER 608(a).

A party may open the door during the questioning of a witness to otherwise inadmissible evidence. State v. Korum, 157 Wn.2d 614, 646, 141 P.3d 13 (2006). The open door doctrine is an equitable evidentiary principle whereby a party may open the door to the introduction of otherwise inadmissible evidence by the adverse party. 5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE § 103.14, AT 66–67 (5TH ED.2007). Under this doctrine, the trial court has the discretion to admit evidence that otherwise would have been inadmissible when a party raises a material issue

and the evidence in question bears directly on that issue. State v. Berg, 147 Wn. App. 923, 939, 198 P.3d 529 (2008).

a. The State Did Not Open The Door To Inadmissible Opinion Evidence.

At the outset, the State disagrees that the deputy prosecutor's questions about Champagne's contact with Fleming up until she knew the DNA results opened the door to whether Champagne previously believed T.F. The State did not put T.F.'s credibility at issue. Rather, the prosecutor's questions focused on Champagne's continued contact with Fleming despite the sexual assault protection order. See 4RP 137-49. These questions were asked to prove that Fleming was guilty of violating the sexual assault protection order – a charge on which the jury acquitted.

The prosecutor asked multiple questions about how often Champagne had contact with Fleming when he was out on bail or in jail, where they met, whether T.F. was at home during any of Fleming's telephone calls and whether the police had contacted Champagne about the fact that she was still contacting Fleming despite the protection order. 4RP 137-49. The prosecutor also asked Champagne when she decided to discontinue contact –

telephonic or in-person – with Fleming. 4RP 148. Champagne responded, “When the DNA results came back.” 4RP 148. It was then that Champagne decided to move to Michigan.¹⁸ 4RP 149.

The defense then sought to cross examine Champagne further about the impetus for her move to Michigan. Specifically, the defense proffered that the DNA results were the “proverbial straw that broke the camel’s back” because Champagne doubted T.F.’s veracity until the DNA results were known.¹⁹ 5RP 25. The State correctly objected because the proposed question called for Champagne to expressly comment on T.F.’s credibility, thereby violating ER 608(a). 5RP 26. The trial court agreed, “[I]t’s clear

¹⁸ The defense cross-examined Champagne about her on-going contact with Fleming. 5RP 8-9. Even though Champagne said that she stopped contacting Fleming after she learned of the DNA results, the taped jail telephone calls contradicted Champagne’s testimony. Compare 5RP 8 (Champagne said that she cut off all ties with Fleming after she learned about the DNA results) and 4RP 148 (same) with Ex. 6 (April 29, 2009 telephone call); Ex. 20 at 24 (Champagne reminds Fleming that, “The test came back positive”) and Ex. 7 (April 3, 2009 telephone call); Ex. 20 at 4 (Champagne tells Fleming that he needs to look at things from her point of view: “My husband the father of my daughter is alleged; is according to the test results is the father of my daughter’s baby”) and Ex. 7 (April 15, 2009 telephone call); Ex. 20 at 9 (Champagne states, “I mean I wouldn’t be having this got (*sic*) damn problem if you would have kept your damn hands to yourself.”). The defense argued in closing that the jail telephone calls provided the jury with a reason to doubt Champagne’s credibility; i.e., she was not truthful when she claimed to not have had any contact with Fleming after the DNA results were known. 10RP 49-50.

¹⁹ Fleming also wanted to argue that, until the DNA results were known, Champagne suspected that Corey could have impregnated T.F. 5RP 25-26. Because such questions would have violated a pre-trial ruling, the court said that it would not permit any inquiry into whether Corey had possibly fathered the fetus. 5RP 26.

that a witness cannot comment on the credibility of another witness's testimony. . . ." 5RP 20; see also 5RP 26 ("I think we all agree that you can't ask a witness whether she believes another witness or finds her credible or not credible."); 5RP 120 (court adhered to its initial ruling, that Champagne could not testify that she disbelieved T.F. until the DNA results were known, because such testimony would constitute an impermissible comment on T.F.'s credibility).

Contrary to Fleming's claim, the State had not opened the door to this otherwise inadmissible opinion evidence. Rather, the State had sought to provide the jury with some explanation for why Champagne continued to have contact with Fleming despite T.F.'s allegations, and that the contact continued despite the sexual assault protection order. The prosecutor asked Champagne, "Why were you still continuing to have contact with [Fleming] after you were aware of the allegations that [T.F.] was making?" Champagne replied, "I don't know." 4RP 140. Certainly if Champagne had continued to have contact with Fleming because she did not believe T.F., she could have said so.

It was painfully obvious to the jurors that Champagne did not initially accept T.F.'s allegations as true – not because T.F. had

given Champagne any specific reason to doubt her credibility – but because it was such a horrific accusation that Champagne simply did not want to believe it. T.F. said that after Fleming denied the accusation at Toys “R” Us, Champagne hit her in the face with a closed fist. 5RP 75-78. T.F. presumed Champagne struck her because she was mad; although Champagne never asked T.F. any follow-up questions or discussed the allegations. 4RP 151-53; 5RP 78, 189.

The defense argued in closing that a reasonable inference from Champagne striking T.F. was that Champagne did not believe T.F.’s accusations. 10RP 50. Counsel asked rhetorically, “[W]hy didn’t Champagne follow-up? What could be the reasons. Could it be that she didn’t believe her?” 10RP 50.

Although Fleming was not permitted to ask Champagne to expressly comment on T.F.’s credibility, the defense was able to argue reasonable inferences from admissible evidence. Hence, the trial court did not preclude Fleming from presenting his defense.

b. The Court Allowed Fleming To Inquire About A Specific Instance Of T.F.'s Conduct.

Moreover, the trial court permitted Fleming to ask Champagne about a specific instance of T.F.'s conduct from which inferences regarding T.F.'s credibility could be drawn. For this additional reason, Fleming was not precluded from presenting his defense.

Under ER 608(b),

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility . . . may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Champagne testified that when she and T.F. finally discussed the allegations, T.F. was sad and she sobbed. 4RP 156. The defense then sought permission from the court to inquire of Champagne about an instance when T.F. said that she was a "good actor" and cried at will. 5RP 17-22. Fleming argued that the alleged instance stood in stark contrast with T.F.'s "flat" affect when she disclosed the rapes to the school nurse. 5RP 18. The

inconsistency, Fleming said, was because T.F. was a “good actor” and could “fake cry.” 5RP 18, 22.

Initially, the State objected and the court reserved its ruling. 5RP 22-27, 117-18. The State later withdrew its objection. 5RP 119-20. The court then ruled that Fleming could inquire of both Champagne and T.F. about the alleged instance of “fake crying.” 5RP 120.

The defense recalled Champagne and asked her questions about the “fake crying” incident. 5RP 210-11. Although Champagne did not specifically recall the context, she did recall T.F. “fake crying” once. 5RP 211. Fleming then argued in closing that perhaps Champagne did not believe T.F.’s accusations because T.F. was an “actor” and could fake cry. 5RP 50.

Because the trial court permitted Fleming to elicit evidence about T.F.’s alleged fake crying, so that the defense could – and did – argue that T.F. was not credible, Fleming had a full opportunity to present his defense. This Court should reject Fleming’s contrary claim.

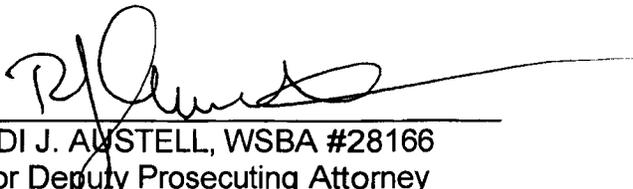
D. CONCLUSION

For the reasons stated above, this Court should affirm Fleming's convictions for two counts of rape of a child in the second degree and one count of rape of a child in the third degree.

DATED this 23 day of November, 2011.

Respectfully submitted,

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