IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 63736-3-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	UNPUBLISHED OPINION
	)	
KURT NORMAN SCHAUER,	)	
	)	
Appellant.	)	FILED: July 19, 2010

Grosse, J. — In a sex offense case, a trial court properly exercises its discretion by admitting evidence of the defendant's prior sex offense under RCW 10.58.090 where, as here, there were marked similarities between the prior offense and the charged offense, the defendant admitted to and was convicted of the prior offense, and the State's case rested primarily on the testimony of child victims. Accordingly, we affirm.

FACTS

In 1992, Kurt Schauer began dating Kristy Viner, when they were both working in Oregon. Schauer then moved to Washington and they had a long distance relationship for about two years. After their romantic relationship ended, they remained close friends.

In 1998, Viner had a son, T.V., but the biological father was not involved in their lives. During this time, Viner and Schauer maintained a platonic relationship and Schauer often came to Oregon to visit her and T.V. Schauer eventually took on the role of T.V.'s father and by the time he was 6 years old, T.V. was spending every other

weekend with Schauer. He also spent several holidays and weeks in the summer with Schauer.

In February 2007, T.V.'s aunt, uncle, and 8-year-old cousin, A.A., drove T.V. to Seattle to visit Schauer. During the car ride, A.A.'s parents overheard T.V. tell A.A., "My dad French-kisses me." In January 2008, during a birthday dinner for T.V., Viner heard T.V. say, "Daddy kisses me with his tongue." When Schauer denied this, T.V. insisted that he did.

A few weeks later, after Viner and T.V. attended a Boy Scout meeting in which the group discussed personal safety, including inappropriate touching, T.V. told Viner that he thought that was happening to him. The next day T.V. told A.A.'s mother, Jennifer Alexander, that Schauer had molested him. Alexander and her husband then spoke to A.A., because he had spent time at Schauer's house in the past. A.A. disclosed to them that Schauer had molested him when he stayed at Schauer's house in 2007.

Alexander contacted the police, who took a report from Viner. Physical examinations of T.V. and A.A. were then conducted and revealed some physical evidence of sexual abuse of T.V., but not of A.A. During the examinations, both boys disclosed that Schauer had molested them. After the physical examinations, both boys were separately interviewed and described how they had been molested.

The State charged Schauer with six counts of first degree child molestation, three counts involving T.V. and three counts involving A.A. On all six counts, the State also alleged as an aggravating circumstance that Schauer abused his position of trust

to facilitate the crime. Additionally, on the three counts involving T.V., the State alleged that the offense was part of an ongoing pattern of sexual abuse of the same victim.

At trial, the court admitted evidence of Schauer's prior conviction for molesting another young boy, T.P., in Wyoming in 1987. Schauer met T.P. through the Big Brothers program, befriended T.P.'s mother, a single parent, and babysat T.P. In July 1987, while babysitting, Schauer fondled T.P. T.P. told his mother and Schauer was arrested. He admitted to police that he had sexual contact with T.P. and ultimately pleaded guilty to the crime of "Immodest, Immoral or Indecent Acts with a Minor."

Schauer testified on his own behalf and denied the charges. He admitted to the prior conviction, but explained that his hand "slipped" while he was dressing the boy. The jury found him guilty of counts I through V, but acquitted him on count VI. The jury also found that there were aggravating circumstances on counts I through V. The trial court imposed an indeterminate sentence of a maximum term of life and an exceptional minimum term of 346 months. Schauer appeals.

ANALYSIS

I. Constitutionality of RCW 10.58.090

Schauer challenges the trial court's admission of his prior conviction under RCW 10.58.090, contending that the statute is unconstitutional because it violates (1) the ex post facto clauses of both the federal and state constitutions, (2) the doctrine of separation of powers, and (3) the Washington constitution's "fair trial" guarantee. We recently rejected similar arguments based on the ex post facto clause and separation of powers in State v. Scherner[1] and State v. Gresham,[2] and upheld the constitutionality of

[1] 153 Wn. App. 621, 225 P.3d 248 (2009).

RCW 10.58.090. Schauer offers no persuasive reason for departing from those decisions. Nor do we find persuasive his argument that the statute violates our state constitution's "fair trial" guarantee. As the State notes, this is essentially a due process challenge to the statute, which has also been rejected by this court.[3]

II. Admissibility of Prior Sex Offense

Schauer also contends that the trial court erred by admitting evidence of the prior sex offense because it was inadmissible under RCW 10.58.090 as unfairly prejudicial and too remote in time and inadmissible under ER 403.[4] The State contends that the trial court's admission of Schauer's prior sex offense was a proper exercise of discretion. We agree.

RCW 10.58.090 provides in relevant part:

> (1) In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403.
> . . .
>
> (6) 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;

[2] 153 Wn. App. 659, 223 P.3d 1194 (2009).

[3] See Scherner, 153 Wn. App. at 651 (rejecting argument that admitting prior sex offenses under RCW 10.58.090 "violates the constitutional right to due process by denying defendants a fair trial").

[4] Schauer also argues that the evidence was inadmissible under ER 404(b), anticipating that the State would argue to the contrary. But the State did not make this argument in its response and simply contended that the evidence was properly admitted under RCW 10.58.090. Accordingly, we need not address Schauer's ER 404(b) argument.

> (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.

We review a trial court's decision to admit evidence under RCW 10.58.090 for an abuse of discretion.[5] As noted above, the statute permits the trial court to admit evidence of a prior sex offense if, after considering a number of factors, the court determines that the evidence is admissible under ER 403.[6] ER 403 provides:

> 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.

Here, the trial court considered each of the statutory factors for evaluating whether evidence of Schauer's prior sexual offense should be excluded under ER 403 and concluded that the probative value of the evidence outweighed the prejudicial effect.

Schauer fails to show that the trial court's conclusion was an abuse of discretion. First, the prior molestation resulted in a criminal conviction, a factor favoring admission. Additionally, the evidence showed that there were marked similarities between his prior act of molesting T.P. and his molestation of T.V. and A.A. All the victims were young boys and in two instances, Schauer befriended a single mother, took on the role of a father figure to the victim, gained the mother's trust to be alone with the child and then molested him.

Nor did the relatively long passage of time require exclusion of the evidence. As

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[5] Scherner, 153 Wn. App. at 656.
[6] RCW 10.58.090(6).

the court concluded in State v. DeVincentis,[7] where 15 years had passed between the prior offense and the current rape charge, the evidence of the prior misconduct was relevant to show that the defendant had previously victimized another child in a markedly similar way.[8]

Additionally, there were no intervening circumstances between the prior and current molestation that undermined the probative value of the evidence. While Schauer points to his completion of probation and sexual deviancy treatment before he committed the current offenses, he does not point to anything in the record that shows the extent or success of the treatment. Rather, his testimony at trial demonstrated a denial that he even had any sexual deviancy issues; he denied this past behavior and was unwilling to admit that he ever had an attraction to young boys.

Finally, the trial court did not abuse its discretion by finding that the probative value of this evidence outweighed any prejudicial effect. Because the State's case rested primarily on the testimony of T.V. and A.A., credibility was the central issue. Thus, evidence of Schauer's prior molestation of another boy under very similar circumstances was highly probative. While it is admittedly prejudicial for the same reasons it is probative, i.e., it tended to prove Schauer's sexual desire for young boys, Schauer fails to show that its admission was *unfairly* prejudicial.[9]

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[7] 150 Wn.2d 11, 74 P.3d 119 (2003).
[8] DeVincentis, 150 Wn.2d at 13.
[9] See State v. Sexsmith, 138 Wn. App. 497, 506, 157 P.3d 901 (2007) ("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."). Because we conclude that there was no error in the admission of this evidence, we need not reach Schauer's argument that the error was not harmless.

III. Prosecutorial Misconduct

Schauer also contends that the prosecutor's comments in closing argument improperly invited the jury to penalize him for his exercising his right to confront witnesses at trial. Specifically, he challenges the prosecutor's references to the difficulty of testifying in front of one's abuser and to evidence that one of the victims attempted suicide to avoid testifying. While he did not object to them at trial, he contends that these comments were improper and prejudicial because they directly attributed the witnesses' hardships to Schauer's right to confront witnesses at trial. We disagree.

A defendant claiming prosecutorial misconduct bears the burden of establishing that the prosecutor's comments were both improper and prejudicial.[10] "The prejudicial effect of a prosecutor's improper comments is not determined by looking at the comments in isolation but by placing the remarks 'in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'"[11] The failure to object an improper comment deems the error waived "'unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.'"[12]

Schauer fails to show that the prosecutor's comments were improper, let alone "so flagrant and ill-intentioned" that prejudice necessarily resulted despite his failure to

[10] State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008).
[11] State v. McKenzie 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).
[12] McKenzie, 157 Wn.2d at 52 (quoting Brown, 132 Wn.2d at 561).

object. It is not improper for a prosecutor to discuss the obvious difficulties that a witness faces when testifying in court.[13] In State v. Gregory, the court rejected a similar argument that such argument chilled the defendant's constitutional right to confrontation.[14] As the court explained:

> [N]ot all arguments touching upon a defendant's constitutional rights are impermissible comments on the exercise of those rights. This court has characterized the relevant issue as "whether the prosecutor manifestly intended the remarks to be a comment on that right." These cases suggest that so long as the focus of the questioning or argument 'is not upon the exercise of the constitutional right itself," the inquiry or argument does not infringe upon a constitutional right.[15]

The court further noted that a general discussion of the emotional cost of a victim's testimony offered to support the victim's credibility has never been held to amount to an improper comment on the defendant's right to confrontation.[16] The court then concluded that the argument in that case was not improper because it focused on the credibility of the victim, not on the defendant's exercise of his constitutional right to confrontation.[17] Likewise here, the challenged comment occurred during the portion of the prosecutor's argument in which she addressed the credibility of the victims and offered reasons for some inconsistencies in their testimony and out of court statements. Thus, it did not infringe on Schauer's right to confrontation.

The case upon which Schauer relies, State v. Jones,[18] is distinguishable. In Jones, the prosecutor expressly criticized the defendant's exercise of his right to

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[13] State v. Gregory, 158 Wn.2d 759, 808, 147 P.3d 1201 (2006).
[14] 158 Wn.2d 759, 806-08, 147 P.3d 1201 (2006).
[15] Gregory, 158 Wn.2d at 806-07 (citations omitted).
[16] Gregory, 158 Wn.2d at 808.
[17] Gregory, 158 Wn.2d at 808.
[18] 71 Wn. App. 798, 863 P.2d 85 (1993).

confrontation, asking the defendant on cross-examination whether he was frustrated because his view of the victim was blocked during her testimony and commenting that the defendant's direct eye contact with the victim resulted in the victim breaking down and crying.[19] Thus, unlike here, the prosecutor's conduct invited the jury to draw a negative inference from the defendant's exercise of a constitutional right.[20] By contrast, here, the prosecutor made the comments about the difficulty of testifying in the context of discussing witness credibility; the prosecutor did not disparage Schauer's exercise of his right to confrontation or otherwise suggest any negative inferences to be drawn from his exercise of that right.

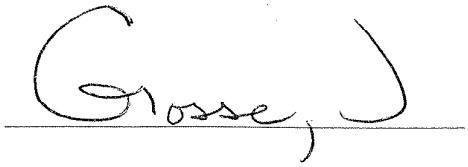
Even if Schauer could show that the comments were improper, he fails to establish that he suffered prejudice warranting a new trial. He failed to object at trial and cannot show that the comment was so flagrant and ill-intentioned that an objection and curative instructive would not have remedied any potential prejudice. The jury heard compelling testimony from both victims and the inadvertent nature of their disclosures only enhanced their credibility. The jury also heard testimony that Schauer engaged in similar behavior years before with someone unknown to the victims. The defense did not articulate any reasonable theory for why the victims would lie about the molestation and defense counsel's avoidance of any discussion of Schauer's testimony in closing argument suggested that it was not credible.

Nor is there merit to Schauer's alternative claim that his counsel's failure to object to the prosecutor's comments denied him effective assistance of counsel.

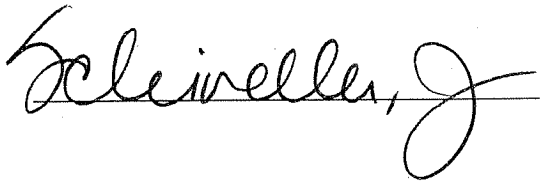
[19] Jones, 71 Wn. App. at 806.
[20] Jones, 71 Wn. App. at 811-12.

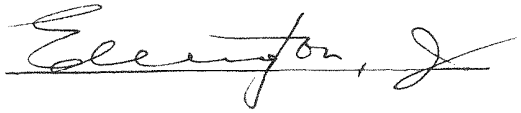
Schauer has failed to meet his burden of establishing that counsel's performance was deficient and that he was prejudiced by the deficiency.[21] As discussed above, the prosecutor's comments were not improper and an objection was therefore unwarranted.

We affirm.



WE CONCUR:





[21] State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).