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

STATE OF WASHINGTON,	)	No. 64234-1-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
SCOTT SOLLESVIK,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: August 1, 2011
	)	

Ellington, J. — A jury convicted Scott Sollesvik of rape of a child in the first degree. At trial, the court admitted evidence of Sollesvik's prior sex offenses under RCW 10.58.090. We have previously rejected the arguments Sollesvik raises regarding the constitutionality of the statutory provision and decline to revisit our rulings. Considering that prior offenses were similar to the charged offense, the defendant admitted to and was convicted for the prior crimes, and the State's case rested primarily on the testimony of the child victim, we conclude that the trial court did not abuse its discretion in admitting the evidence of the prior offenses. We further conclude that neither of Sollesvik's remaining challenges to his conviction is meritorious, and affirm.

BACKGROUND

N.B. was born on August 20, 1998. Her parents, Roxanne Atkins and Ed

Brookman, separated when she was about a year old and later divorced. Shortly thereafter, Atkins entered into a relationship with John Sollesvik.[1] As a result of this relationship, N.B. was involved with the Sollesvik family, including John's brother, Scott Sollesvik, whom N.B. called Uncle Scott.

In December 2007, when N.B. was 9 years old, she disclosed sexual abuse by writing on a piece of paper that she "had sex with Scott."[2] N.B. later explained that the abuse happened more than once, but she described only one instance in detail that occurred when she was about 7 years old. She said the incident occurred when she spent the night at the house Sollesvik shared with his elderly father. N.B. told a child interview specialist that Sollesvik kissed her with his tongue, molested her, sucked on her nipples, touched her vagina with his finger, performed oral sex on her, and had her perform oral sex on him.

The State charged Sollesvik with one count of rape of a child in the first degree. At trial, the court admitted evidence of Sollesvik's 1989 convictions for statutory rape for having sexual intercourse with J.W., who met Sollesvik when her family moved across the street after she completed the fifth grade. J.W. became close friends with Sollesvik's younger sister and Sollesvik lived with J.W.'s family for a period of time. Sollesvik is five years older than J.W.

Sollesvik molested J.W. for the first time when she was 11. When J.W. was 12 and Sollesvik was 17, he had sexual intercourse with her over her protests. This

[1] This relationship lasted until John Sollesvik's death in 2006.

[2] Ex. 21.

recurred multiple times over the course of the following few years. Sollesvik pleaded guilty to one count of statutory rape in the second degree and one count of statutory rape in the third degree.

Sollesvik testified at trial. He denied he had ever touched N.B.'s body inappropriately. He said N.B. had never slept at his house and he was never alone with her except for a few short car trips and one afternoon when he took her fishing.

The defense argued that N.B.'s testimony was uncorroborated and inconsistent; that N.B.'s descriptions suggested the perpetrator was uncircumcised, whereas Sollesvik is in fact circumcised; and that N.B.'s statements about the abuse were "consistent with someone who is being coached,"[3] allegedly by Atkins' boyfriend, who had fallen out with Sollesvik.

The trial court imposed an indeterminate sentence with a minimum term of 216 months and a maximum term of life. Sollesvik appeals.

DISCUSSION

Constitutionality of RCW 10.58.090

Sollesvik contends that RCW 10.58.090, under which his prior crimes were admitted at trial, is unconstitutional because it violates the ex post facto clauses of both the federal and state constitutions and the separation of powers doctrine. In State v. Scherner[4] and State v. Gresham,[5] we recently rejected these arguments and

[3] Report of Proceedings (RP) (Aug. 25, 2009) at 976.

[4] 153 Wn. App. 621, 225 P.3d 248 (2009), review granted, 168 Wn.2d 1036, 233 P.3d 888 (2010).

[5] 153 Wn. App. 659, 223 P.3d 1194 (2009), review granted, 168 Wn.2d 1036, 233 P.3d 888 (2010).

upheld the constitutionality of RCW 10.58.090. We also rejected the contention that

the Washington Constitution provides broader protection than the federal constitution against ex post facto laws.[6] Sollesvik offers no persuasive reason for departing from our recent decisions and we decline to do so.[7] Sollesvik also asserts that the statute violates our state constitutional "fair trial guarantee."[8] Sollesvik cites no state authority that supports his position. Moreover, his claim is essentially a due process challenge, which we have previously rejected.[9]

Admissibility of Prior Sex Offenses

Even if the provision is constitutional, Sollesvik contends that the prior sex offenses involving J.W. were not admissible under the circumstances presented. 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 Evidence Rule (ER) 403.[10] As he argued below, Sollesvik claims that the prior offenses were not probative in this case because they were remote in time and

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[6] See Gresham, 153 Wn. App. at 670 ("Since Washington courts have applied the federal ex post facto analysis to the state analogue, the two provisions are coextensive, and we look to federal constitutional law for guidance when we evaluate Gresham's claim."); Scherner, 153 Wn. App. at 635 (the United States and Washington constitutions contain "nearly identical" ex post facto clauses and the United States and Washington Supreme courts apply the same analytical framework to ex post facto challenges).

[7] We note that the Washington Supreme Court accepted review of Scherner and Gresham and will ultimately rule on the constitutionality of RCW 10.58.090. Until and unless that court says otherwise, we adhere to our precedent.

[8] App. Br. at 44.

[9] Schermer, 153 Wn. App. 651-53; see also United States v. LeMay, 260 F.3d 1018, 1024-26 (9th Cir. 2001) (due process challenge to federal rule counterpart, Rule 414 of the Federal Rules of Evidence).

[10] RCW 10.58.090(6).

factually dissimilar from the charged offense. He further contends that the prejudice outweighed any probative value of the evidence under ER 403.

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.

When evaluating whether to admit evidence of the defendant's commission of another sexual offense or exclude it under ER 403, the statute directs the court to consider the following factors:

> (a) The similarity of the prior acts to the acts charged;
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> (b) The closeness in time of the prior acts to the acts charged;
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> (c) The frequency of the prior acts;
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> (d) The presence or lack of intervening circumstances;
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> (e) The necessity of the evidence beyond the testimonies already offered at trial;
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> (f) Whether the prior act was a criminal conviction;
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> (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
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> (h) Other facts and circumstances.[11]

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

[11] RCW 10.58.090(6)(a)-(h).

evidence.

We review a trial court's decision to admit evidence under RCW 10.58.090 for an abuse of discretion.[12]

Here, the parties presented argument regarding the weight and applicability of the statutory factors. The court specifically noted that the crimes were more similar than dissimilar, the primary difference being Sollesvik's age. The court also determined that while the evidence was undoubtedly prejudicial, the prejudice did not outweigh its probative value under ER 403. The trial court ruled that the evidence of Sollesvik's prior offenses was admissible.[13]

Sollesvik fails to show that the trial court's ruling was an abuse of discretion. The evidence showed that there were significant similarities between his prior offenses against J.W. and the charged crime. Sollesvik makes much of the fact that J.W. was a postpubescent preteen and N.B. was prepubescent. But as the trial court observed, we do not know the maturation status of either girl. The fact remains that both victims were young girls, and in both instances, Sollesvik took advantage of a position of trust within a family to abuse them.

The relatively long passage of time did not require exclusion of the evidence. RCW 10.58.090 prescribes no time limitation. Indeed, under the corresponding federal rules, courts have consistently allowed the admission of prior sex offenses

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[12] Scherner, 153 Wn. App. at 656.

[13] Sollesvik notes that in making its ruling, the trial court did not discuss all of the considerations set forth in the statute. He does not, however, argue that the trial court failed to consider the relevant statutory factors.

committed decades earlier where sufficient similarity exists.[14] In State v. DeVincentis,[15] our Supreme Court held that a sex offense committed by defendant 15 years earlier was admissible under ER 404(b) in defendant's rape trial. The court reasoned that the prior sex offense was relevant to show the defendant had previously abused another girl under similar circumstances.[16] Accordingly, although this factor may weigh in Sollesvik's favor, it is not dispositive.

The record discloses no intervening circumstances, such as treatment or counseling, between the prior and current offenses that undermined the probative value of the evidence. Sollesvik argues that this factor weighs in favor of exclusion because he took responsibility for his prior crime by pleading guilty and there were no charges against him in the interim. But in his trial testimony, Sollesvik did not appear to accept responsibility for his prior crime. Instead, he generally minimized his conduct, explaining that he was young, in a "different frame of mind," and was "doing a lot of drugs" at the time.[17]

The frequency of the prior sex acts weighed in favor of admission. The abuse of both victims, N.B. and J.W., allegedly occurred on multiple occasions, although not

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[14] 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 earlier); United States v. Benally, 500 F.3d 1085, 1092 (10th Cir. 2007) (affirming admission of testimony of two victims sexually assaulted 40 years earlier and a third victim sexually assaulted 21 years earlier); 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).

[15] 150 Wn.2d 11, 74 P.3d 119 (2003).

[16] Id. at 13.

[17] RP (Aug. 25, 2009) at 918, 920.

on a regular or daily basis, consistent with the fact that Sollesvik did not have daily access to them. In addition, his conduct with J.W. resulted in criminal convictions, a factor favoring admission.

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 almost exclusively on the testimony of N.B. and her statements to others, credibility was the central issue. Thus, evidence of Sollesvik's prior sex offenses against a young girl under comparable circumstances was highly probative. While the evidence is also admittedly prejudicial for the same reasons it is probative, i.e., it tended to show Sollesvik's sexual attraction to young girls, Sollesvik fails to show that its admission was unfairly prejudicial. We have recognized that there is substantial need for prior sex abuse evidence where, as here, there is no physical evidence, delay in reporting, and the case rests entirely on the testimony of a child witness.[18] Further, the trial court gave an appropriate limiting instruction.[19]

We have little trouble concluding that under these circumstances, the trial court

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[18] See State v. Sexsmith, 138 Wn. App. 497, 506, 157 P.3d 901 (2007) (probative value of evidence of prior sex offenses is substantial in cases where there is little proof that sexual abuse has occurred, especially where the only other evidence is the testimony of the child victim); see also State v. Krause, 82 Wn. App. 688, 696, 919 P.2d 123 (1996) (observing that the need for the evidence of prior similar offenses is especially high in child sex abuse cases because of numerous factors, including the secrecy in which such acts take place, the absence of physical proof of the crime, and a general lack of confidence in the ability of the jury to assess the credibility of child witnesses).

[19] The trial court informed the jury that "evidence of a prior offense on its own is not sufficient to prove the defendant guilty of the crime charged in the Information" and reminded the jury of the State's burden to prove each element of the crime. Clerk's Papers at 160.

did not abuse its discretion in admitting the evidence of Sollesvik's prior offenses.

Sufficiency of the Evidence

Sollesvik contends the State failed to prove all elements of the crime as required by the to convict jury instruction. To convict Sollesvik, the jury had to find 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.];
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> (2) That [N.B.] was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;
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> (3) That [N.B.] was at least twenty four months younger than the defendant; and
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> (4) That this act occurred in the [s]tate of Washington.[20]

Sollesvik contends that under this instruction, the State was required to prove not merely a single act of intercourse, but that "the act of intercourse occurred through the entire time intervening between the two dates."[21] While he acknowledges that the jury's finding of a single act of intercourse on a date within the charging period would satisfy the statute, Sollesvik claims that through this to convict instruction, the State assumed the burden of proving that he committed rape throughout the three-year charging period.[22] Because there was no evidence establishing such a continuous act of intercourse throughout the duration of the charging period, he argues that his conviction must be reversed.

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[20] Clerk's Papers at 156.

[21] App. Br. at 16.

[22] See State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998) (in criminal cases, the State may assume the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the to convict instruction).

We reject Sollesvik's interpretation of the elements the State was required to prove. Even if the language "on or about the time intervening" is somewhat inartful, the instruction as a whole makes it clear that the jury had to find that intercourse occurred at some time between the two identified dates. Reading the instruction in a commonsense manner, an average juror would not interpret this instruction to require a finding that intercourse occurred continuously throughout the charging period. The instruction required the State to prove that Sollesvik had sexual intercourse with N.B. and that this "act" occurred in Washington between August 20, 2004 and December 11, 2007, at a time when N.B. was less than 12 years old and Sollesvik was at least 24 months older than N.B.[23] The evidence was sufficient to support Sollesvik's conviction.

Exclusion of Prior Sexual Contact

Sollesvik challenges the court's ruling excluding evidence about an incident of sexual contact between N.B., when she was about 5 years old, and Z.K., a boy who is a year or two older than N.B. Sollesvik claims the court's ruling deprived him of his constitutional right to present a defense. Sollesvik argued that the evidence was relevant primarily because it provided an alternative explanation for N.B.'s knowledge of the "male anatomy."[24] Secondly, because Z.K. remembered the incident differently from N.B., the evidence was relevant to N.B.'s "reliability."[25] The trial court excluded

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[23] See State v. Foster, 91 Wn.2d 466, 480, 589 P.2d 789 (1979) (instructions sufficient if "readily understood and not misleading to the ordinary mind").

[24] RP (Aug. 10, 2009) at 162.

[25] Id.

the evidence, finding it too dissimilar, like comparing "apples and oranges," to be relevant to the current charge.[26] In addition to the questionable relevance, the court also determined that the "confusion and possible misuse" of the evidence "overwhelms the probative value."[27]

Whether the trial court has violated the confrontation clause is a question of law we review de novo.[28] We review a trial court's ruling on the admissibility of evidence for abuse of discretion, and will not disturb a court's limitation on the scope of cross-examination absent a manifest abuse of discretion.[29] Abuse occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons.[30]

A defendant has a constitutional right to present a defense, but the right does not extend to irrelevant or inadmissible evidence.[31] And the right to cross-examine adverse witnesses is not absolute.[32] Evidence is relevant if it tends to make the existence of any fact of consequence more probable or less probable.[33] Even relevant evidence may be excluded without offending the defendant's confrontation right if the State has a compelling interest in precluding evidence so prejudicial as to

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[26] Id. at 160.

[27] Id. at 166.

[28] State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

[29] State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002).

[30] Id.

[31] Jones, 168 Wn.2d at 720.

[32] Darden, 145 Wn.2d at 620; see also ER 611(b) (court has discretion to determine scope of cross-examination).

[33] ER 401.

disrupt the fairness of the trial.[34]

While in some instances evidence of sexual history may be relevant to rebut an inference of precocious sexual knowledge,[35] in this case, we are not persuaded that the evidence of the incident between N.B. and Z.K. was relevant to any issue at trial. While N.B. first told the child interview specialist that the incident with Z.K. involved the "[s]ame thing pretty much" as the incident with Sollesvik, when she specifically described what happened, she said "kissing" while touching places on her body.[36] She did not state, nor imply, that she was unclothed during this kissing. Z.K. said that he and N.B. kissed and that he touched N.B.'s private areas. He did not say N.B. touched him or even saw his body underneath his clothes. Neither child described penetration or oral sex. This proffered evidence did not provide a likely explanation for N.B.'s knowledge of male anatomy. Moreover, having reviewed N.B.'s statements, we are not convinced that she demonstrated sexual knowledge that was not commensurate with her age.

Nor did the evidence appear to have any bearing on N.B.'s reliability with respect to her allegations against Sollesvik. Sollesvik pointed out a difference in the children's accounts of the how the incident between them ended. N.B. said another child saw what they were doing, kicked Z.K., and Z.K. hit his head. That did not

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[34] State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

[35] See State v. Kilgore, 107 Wn. App. 160, 180, 26 P.3d 308 (2001) (establishing framework for analyzing admissibility of evidence of prior sexual abuse of the victim).

[36] Pretrial Ex. 4 at 38, 44.

happen, according to Z.K. But even assuming the children would testify differently on this point, refusing to allow impeachment of the victim on this irrelevant collateral matter was not an abuse of discretion.[37]

Because the evidence was not relevant, its exclusion did not deprive Sollesvik of his right to present a defense or to confront adverse witnesses.[38]

Affirmed.

WE CONCUR:

[37] See State v. Oswalt, 62 Wn.2d 118, 120, 381 P.2d 617 (1963) (a witness cannot be impeached on matters collateral to the principle issue being tried).

[38] See Hudlow, 99 Wn.2d at 15-16.