NO. 102588-2

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

BROGAN BARTCH,

Respondent.

RESPONDENT'S ANSWER TO MEMORANDUM OF AMICI CURIAE

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I. ARGUMENT

A. Lower courts are correctly interpreting *Crossguns*.

Amici argues that this Court should accept review of the decision in *State v. Bartch*, No. 83386-3-I (Wash. Ct. App. Div. I, October 30, 2023)[1] because "lower courts are now misinterpreting" *State v. Crossguns*, 199 Wn.2d 282, 505 P.3d 529 (2022) and "reversing jury verdicts for mere use of [the lustful disposition] label." Memorandum of Amici Curiae at 3.[2]

Not so.

A review of numerous post-*Crossguns* decisions demonstrates that courts are correctly interpreting *Crossguns*.

For example, in *Dixon v. State*, No. 84639-6-I, 2023 Wash. App. LEXIS 158 (Wash. Ct. App., Div. I, Jan. 30, 2023)

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[1] *See* Respondent's Answer to Petition for Review, Appendix A (cited as "A_XX").

[2] Consistent with RAP 13.4(h) and this Court's February 6, 2024, letter, Respondent considers the "Brief of Amici Curiae" as the "Memorandum of Amici Curiae" (cited hereafter as "MOAC_XX").

(unpublished), the Court of Appeals affirmed a rape of a child conviction, concluding that *Crossguns* did not warrant reversal because three uncharged touching incidents were properly admitted "to establish that Dixon had motive and intent, as well as a plan to normalize the touching of the victim, i.e. to groom M.M. These were proper non-propensity purposes under ER 404(b)." *Id.* at *8 (citing *Crossguns*, 199 Wn.2d at 294).

Other decisions also carefully apply *Crossguns*. *See, e.g.*, *State v. Ownby*, No. 38523-0-III, 2023 Wash. App. LEXIS 489, at *13 (Wash. Ct. App., Div. III, Mar. 14, 2023) (unpublished) (affirming child rape and molestation convictions; citing *Crossguns* and concluding the defendant's prior sexual relationship with the victim's mother was relevant to show motive, access, and opportunity); *In re Dallas*, No. 84765-1-I, 2024 Wash. App. LEXIS 128, at *8-9 (Wash. Ct. App., Div. III, Jan. 29, 2024) (unpublished) (denying relief from child rape and molestation convictions; considering whether prior act was "admissible for other permissible purposes, including Dallas' motive and intent to

molest and rape A.L.M.," and to prove "identity"; concluding the evidence was inadmissible, but the error was harmless); *State v. Griffin,* No. 84354-1-I, 2023 Wash. App. LEXIS 2250 at *20-42 (Wash. Ct. App., Div. I, Feb. 21, 2023) (unpublished) (extensively analyzing other potential bases for admitting prior act, including sexual motivation/intent, common scheme or plan, and to establish timing of the charged conduct).

These decisions confirm that courts are correctly following *Crossguns*'s mandate to consider whether other permissible purposes support admitting other sexual misconduct.

B. The Court of Appeals is not reversing convictions based solely on the lustful disposition "label."

The only cases cited by Amici for the claim that courts are "misinterpreting" *Crossguns* and reversing verdicts based solely on a "label," MOAC_3, are *Bartch* and *State v. Wilson*, No. 81404-4-I, 2023 Wash. App. LEXIS 345 (Wash. Ct. App., Div. I, Feb. 21, 2023) (unpublished).

Amici fail to analyze either opinion.

A review of both demonstrates that *Crossguns* was correctly applied.

Bartch correctly cited *Crossguns*'s holding that lustful disposition "may no longer be cited as a distinct purpose for admitting evidence under ER 404(b)." A_6 (quoting *Crossguns*, 199 Wn.2d at 290). The *Bartch* court recognized that "*Crossguns* did not 'disturb our precedent' permitting evidence of 'collateral misconduct relating to a specific victim for appropriate purposes' under the rule." A_7 (quoting *Crossguns*, 199 Wn.2d at 290). Consistent with *Crossguns*, the *Bartch* court noted that it "may consider 'other proper bases on which the trial court's admission of evidence may be sustained.'" A_6 (quoting *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995)).

The *Bartch* court then analyzed whether any other, permissible purposes supported admitting the prior acts. A_7-9. Regarding the State's claim, raised for the first time on appeal, that the prior acts were admissible to prove motive, the *Bartch* court observed this Court's precedent that courts "should 'refuse to

allow [such] evidence…to be admitted without a careful consideration of [its] relevance.'" A_9 (quoting *State v. Saltarelli*, 98 Wn. App. 358, 364-65, 655 P.2d 697 (1982)). The *Bartch* court explained the prior acts were "minimally probative" of motive, and "in the best case only cumulatively so." A_9.

Finally, the *Bartch* court observed that the evidence "only ever amounted to impermissible propensity," A_9, heeding *Crossguns*'s critique that the lustful disposition doctrine impermissibly allowed propensity evidence. 199 Wn.2d at 420 ("[t]o the extent that it appears to allow propensity evidence, it is clearly harmful because 'ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character'") (quoting *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012)).

Wilson also carefully applied *Crossguns*:

> the *Crossguns* court further stated that even when courts have erroneously purported to rely on this doctrine, the evidence in question may still be

> admissible for some other, proper purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. [199 Wn.2d] at 285-86. Thus, the proper inquiry is whether the testimony regarding the two subsequent, uncharged incidents was otherwise admissible under ER 404(b).

2023 Wash. App. LEXIS 345 at *6. Following extensive analysis, and weighing the probative value and prejudice, *id.* at 6-13, the *Wilson* court concluded that the uncharged acts were not admissible for any proper purposes. *Id.* 12-13 (incidents were "minimally probative of motive" and "the danger of unfair prejudice here was high").

Amici's argument that courts are "misinterpreting" *Crossguns* and reversing verdicts for merely using a label—citing only *Bartch* and *Wilson*—is inaccurate. Both cases correctly interpreted *Crossguns* and analyzed whether any other permissible purpose supported admitting the evidence.

C. The prosecutor's use of the prior act to demonstrate Mr. Bartch's purported "sexual urges" is squarely within *Crossguns*'s rejection of the "uncontrollable sexual urge" rape myth.

Amici ask this Court to accept review "to refine *Crossguns*." MOAC_1.

Crossguns does not need refinement. Courts are correctly applying it. But if any future "refinement" is justified, *Bartch* is not the appropriate case.

The trial prosecutor used the prior acts to argue Mr. Bartch was compelled to commit the crime by an uncontrollable sexual attraction to S.P.—precisely *Crossguns*'s rationale for disavowing the lustful disposition doctrine. 199 Wn.2d at 291 ("[t]he term 'lustful disposition' perpetuates outdated rape myths that sexual assault, including child sex abuse, results from an uncontrollable sexual urge or a sexual need that is not met"); *id.* at 292 (rejecting "outdated language that paints a picture that the offender has an overpowering sexual desire for or attraction to their victim"); *id.* (disavowing "incorrect, anachronistic beliefs that sexual assault is

a crime primarily of sexual attraction"); *id.* at 293 (highlighting the "erroneous[] focus[] on sexual desire" and "the misconception that people commit sex crimes based on sexual desire").

The prosecutor told the jury in opening that Mr. Bartch committed the crime to fulfill his "sexual urges" for S.P. VRP_493 ("Mr. Bartch should have let [S.P.] sleep, but instead he followed his sexual urges when he went into that room, locked Ashlyn out, did to [S.P.] what he had long fantasized about").

During closing, the prosecutor re-emphasized the sexual attraction theme, insisting that Mr. Bartch's insatiable sexual desire for S.P. caused him to commit the crime. VRP_1629 ("[h]e wanted sex with [S.P.] so bad"); VRP_1630 (he "had not stopped thinking about [S.P.] sexually. And he still felt entitled to her body and that she owed him sex. ***And that's why he forced [S.P.] to have sexual contact with him***") (emphasis supplied); VRP_1689

(asserting the alleged crime was "exactly what he had long fantasized about").[3]

Crossguns recognized that "[t]he problem with the [lustful disposition] doctrine is not whether it demonstrates 'general sexual proclivities'…***but that it evokes sexual desire at all***." 199 Wn.2d at 292 (emphasis supplied). Here, the prosecutor used the prior acts for precisely the forbidden purpose: to prove Mr. Bartch's purported "overpowering sexual desire for or attraction to [S.P.]" *Id.*

D. The record contradicts Amici's suggestion that the prior act was admissible to prove "sexual gratification."

Amici notes that prior acts <u>*can*</u> be relevant to prove sexual motivation, MOAC_3, citing only *State v. Vars*, 157 Wn. App. 482, 237 P.3d 378 (2010), which was also cited by the State. Petition for Review at 13.

[3] There was no evidence that Mr. Bartch ever "fantasized" about S.P. Rather, this was part of the prosecutor's manufactured "sexual urge" theme.

Vars is nothing like *Bartch*.

Mr. Vars was charged with indecent exposure with sexual motivation for walking nude through a neighborhood. *Id.* at 486-87. After being arrested, he claimed he was merely looking for a place to defecate. *Id.* at 488. The Court of Appeals concluded that the defendant's prior convictions for similar behavior—exposing himself; hiding while watching his victims; and "when apprehended," "claim[ing] to be looking for a place to defecate," *id.* at 495-96—were properly admitted under ER 404(b) to prove sexual motivation. *Id.* at 499. There was a "pattern of prior behavior," from which "a trier of fact could reasonably infer sexual motivation," *id.*, which was material due to Vars's actual defense.

In *Bartch*, the prior acts were *not* admitted or argued to prove that Mr. Bartch and S.P.'s contact was "sexual"; they were admitted solely to prove lustful disposition. *See, e.g.,* CP_328 ("The Defendant's prior bad acts are relevant to show his lustful disposition for S.P.").

That Mr. Bartch had "sexual contact" with S.P. was never disputed. Ashlyn Johnson testified that Mr. Bartch *told* Ms. Johnson he and S.P. "had sex." VRP_848. Mr. Bartch testified he and S.P. had sexual contact. *See* VRP_1476 ("[Prosecutor]: You and [S.P.] had sexual contact on June 27, 2018, correct? [Mr. Bartch]: Yes."). The first sentence of defense counsel's opening statement was: "This is a case about two friends, Brogan Bartch and [S.P.], who had consensual sex three summers ago in 2018 when they were both 20 years old." VRP_506.

In *Saltarelli*, *supra*, this Court explained that "an intelligent weighing of potential prejudice against probative value is particularly important in sex cases, where the prejudice potential of prior acts is at its highest." 98 Wn.2d at 363. Similarly, "[w]hen the State offers evidence of prior acts to demonstrate intent, there must be a logical theory, other than propensity, demonstrating how the prior acts connect to the intent required to commit the charged offense." *State v. Wade*, 98 Wn. App. 328, 334, 989 P.2d 576

(1998). "In doubtful cases, the evidence should be excluded." *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)

There was never any question about whether Mr. Bartch and S.P.'s contact was "sexual." An "intelligent weighing" should have resulted in exclusion. Any minute probative value was clearly outweighed by the significant prejudice.

E. Amici's emphasis on 1950s and 1960s cases is misplaced.

Amici cite *State v. Thorne*, 43 Wn.2d 47, 260 P.2d 331 (1953). *Thorne* exudes the misogynistic, paternalistic language of the 1950s, and should not be this Court's beacon. *See, e.g., id.* at 60 ("in the trial of cases involving carnal intercourse between the sexes it is permissible to show prior acts of sexual misconduct with the offended female").

Moreover, *Thorne*'s commentary is fundamentally rooted in a propensity theory. *See id.* ("[s]uch evidence is admitted for the purpose of showing the lustful inclination of the defendant toward the offended female, which in turn makes it ***more probable that***

the defendant committed the offense"); *id.* at 61 ("lustful disposition" toward the prosecuting witness "***mak[es] it more probable that the offense charged was committed***") (emphasis supplied in both). *Crossguns* found this propensity purpose "clearly harmful." 199 Wn.2d at 420.

Amici cite *State v. Leohner*, 69 Wn.2d 131, 417 P.2d 368 (1966), arguing that prior acts can be admissible to prove a common scheme. MOAC_3. But the State never argued—at trial, nor on appeal— that the prior acts in *Bartch* were admissible under a "common scheme" theory. And in *Leohner*, the jury received a limiting instruction that the "other incidents may be considered by you only in determining motive, intent and the absence of accident or mistake." *Id.* at 133. Accordingly, there was no risk that the prior acts were impermissibly used as evidence of an uncontrollable sexual urge.

Thorne and *Leohner* are child sexual assault cases that are factually distinct from *Bartch*. In neither case were the prior acts

used to prove an uncontrollable "sexual attraction" for the alleged victim.

F. Contrary to Amici's argument, Mr. Bartch offered S.P.'s false statement to the police to prove her motive to fabricate her incapacity—*not* to impeach her general credibility.

Amici argue that S.P.'s false statement to the police was a "collateral issue" which was "indistinguishable from general credibility," contravening RCW 9A.44.020(2). MOAC_4-5. Amici assert that the "impeachment [was] offered *only* to undermine S.P.'s credibility using facts about her sexual practices." MOAC_5 (quoting A_39) (Díaz, J., dissenting) (emphasis in dissent).

The record does not support Amici and the dissent's assertion.

Mr. Bartch explicitly offered the evidence to prove S.P.'s ***motive to fabricate***:

> …she had a ***motive to fabricate*** the claims here. [S.P.] asserts that she had a boyfriend at the time of this incident. And it is the defense theory that these claims ultimately arose because she had a boyfriend

> and she was confronted by her friend Ashlyn Johnson who barged into the room, convinced that something untoward was happening…

VRP_95 (emphasis supplied). *See also* VRP_125 (emphasizing "her ***motive to fabricate*** this when she's confronted by her friend" "who then drives her to the police station where her boyfriend shows up") (emphasis supplied).

This was not an "irrelevant stray inconsistency," MOAC_5, offered to impeach S.P.'s general credibility. Rather, it was offered to prove S.P.'s "specific bias or motive to lie," *State v. Lee*, 188 Wn.2d 473, 488, 396 P.3d 316 (2017), about what happened with Mr. Bartch and about her own level of intoxication, the critical issue in this case. This was a legally correct, fact-specific evidentiary ruling applying this Court's established precedent.

II. CONCLUSION

Amici's claim that *Bartch* is "quickly becoming a basis for overturning jury verdicts that rely on permissible ER 404(b) evidence," MOAC_5, is unnecessarily alarmist and inaccurate.

Courts are carefully following *Crossguns*'s mandate to evaluate whether other, permissible purposes support admitting prior sexual misconduct.

Crossguns recognized that the lustful disposition doctrine was "often incorrectly used to admit evidence of behavior that is prominent in crimes of sexual abuse, such as grooming, victim identification, and planning, which has nothing to do with general sexual attraction." 199 Wn.2d at 294. *Crossguns* and *Dixon, supra*, are examples where evidence was admitted under the "lustful disposition" label, but it actually "ha[d] nothing to do with general sexual attraction."

Here, the evidence was admitted and argued solely to prove Mr. Bartch's "overpowering sexual desire for [S.P.]," *Crossguns*, 199 Wn.2d at 292, precisely the impermissible purpose. This case is squarely within *Crossguns*'s holding. If any future refinement is needed, this is not the appropriate case.

Finally, the record is clear that S.P.'s false statement was offered to prove her bias and specific motive to lie, not to impeach her general credibility.

Respectfully, this Court should decline review.

Respondent certifies this document contains 2,498 words, excluding those portions exempt under RAP 18.17.

Dated this 20th day of February, 2024.

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PROOF OF SERVICE

Sarah Conger swears the following is true under penalty of perjury under the laws of the State of Washington:

On the 20th day of February, 2024, I filed the above Respondent's Answer to Memorandum of AMICI CURIAE via the Appellate Court E-File Portal through which Petitioner's counsel and counsel for all interested parties will be served.

/s/ Sarah Conger

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