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63062-8

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NO. 63062-8-1

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT KAIL,

Appellant.

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2009 JUL 16 PM 4:00

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Kenneth Cowser, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant Robert Kail's constitutional right to present a defense by excluding relevant exculpatory evidence.

2. The trial court erred by admitting evidence of Kail's alleged prior sexual contact with a third party under ER 404(b).

3. The trial court erred by admitting evidence of Kail's alleged prior sexual contact with a third party under RCW 10.58.090.

4. RCW 10.58.090 is an unconstitutional intrusion by the legislature upon the Courts' rule-making authority.

5. RCW 10.58.090 violates the Washington Constitution's fair trial guarantees.

Issues Pertaining to Assignments of Error

1. In the state's prosecution against Kail for child molestation allegedly committed against S.D., did the trial court violate Kail's constitutional right to present a defense by excluding evidence S.D. was planning an attention-getting scheme in the weeks prior to making allegations against Kail?

2. Should the trial court have excluded testimony by Kail's step-daughter alleging Kail had sexual contact with her 15 years prior to the current allegations under ER 404(b), as such evidence was more unfairly prejudicial than probative?

3. Should the trial court have excluded testimony by Kail's stepdaughter alleging Kail had sexual contact with her 15 years prior to the current allegations under RCW 10.58.090?

4. Is RCW 10.58.090 an unconstitutional intrusion by the Legislature upon the courts' rule-making authority?

5. Is RCW 10.58.090 an unconstitutional violation of the Washington Constitution's fair trial guarantees?

B. STATEMENT OF THE CASE

Following a jury trial in Snohomish County Superior Court, Robert Kail was convicted of four counts of child molestation. Kail appeals.

1. Underlying Allegations

The charges stemmed from allegations by S.D. (DOB: 8/27/92), Kail's step-granddaughter,<sup>1</sup> that he had sexual contact with her on at least four occasions between September 1, 2007, and May 24, 2008. CP 44-45. Investigating police officers found no physical evidence Kail committed the alleged acts, and did not even attempt to recover DNA evidence from the locations where the offenses allegedly occurred. See, RP 212. However, S.D. claimed she had manual sexual contact with Kail on several occasions, and he allegedly touched her "backside" on two occasions. RP 74-77, 79-84. She alleged that she received "payment" in the form of prescription drugs, a nose ring, permission to drive a car, and candy. RP 77, 81, 88.

The defense theory of the case was that S.D. fabricated the allegations in order to get out of living with her father and stepmother, Mark and Jennifer Deisher. RP 299. At trial, S.D. admitted she was not happy living with them and did not get along with her stepmother, with whom she fought "quite a bit." RP 67-68. S.D. also admitted that she asked her father and stepmother to allow her live with her paternal grandparents. RP 105. S.D.'s

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<sup>1</sup> Kail's daughter is married to S.D.'s father. See, e.g., RP 163.

paternal grandmother was aware that S.D. wanted to live with them. RP 256. However, S.D.'s father and stepmother would not allow it. RP 105-106. S.D. admitted that she was planning to run away from home before she made the sexual abuse allegations. RP 105-106. She had been storing clothes and personal belongings at the paternal grandparents' house. RP 105-106.

Indeed, the day before S.D. reported her allegations against Kail to police, she ran away from home and called her paternal grandparents from a neighbor's house to pick her up. RP 90-91, 256. Her grandparents took her to the police station to report that she had run away from home, and that she was with them. RP 90, 248.

Meanwhile, S.D.'s stepmother called the police. S.D. previously told her stepmother that Kail offered her money for manual or oral sex and wanted to have manual sexual contact with her. RP 272. S.D.'s stepmother testified that, two weeks before S.D. ran away, she expressly asked S.D. four times if Kail ever touched her, and S.D. "said no." RP 265-66. Once S.D. ran away, her stepmother decided to call police, however, because she feared S.D.'s allegations could be used in a custody fight between her and her husband and S.D.'s paternal grandparents. RP 272-73. She

also didn't want her failure to report the allegations to be used against her in any ensuing custody battle. RP 274.

The day after S.D. ran away, Jennifer Deisher called S.D. at her grandparents' house. RP 91. Deisher had a police officer at her home, and put him on the phone with S.D. RP 91. S.D. testified she was mad at her stepmother for calling police, because "it was none of her business." RP 91. The officer asked S.D. if Kail had ever touched her. RP 91. S.D. refused to speak with the officer over the phone, but said she would talk to the officer in person. RP 91. When the police arrived at S.D.'s grandparents' house, S.D. made the allegations previously outlined. RP 92.

The defense presented additional evidence that S.D. wanted out of the house and may have fabricated allegations against Kail to achieve that objective. For example, S.D. filed a CHINS petition in order to facilitate her removal from her father and stepmother's house. RP 114-15. In the CHINS petition, S.D. falsely stated that her grandfather was a registered sex offender, because she believed it would hasten her removal. RP 110-112, 115.

In addition, S.D. admitted that while she lived with her father and stepmother, she engaged in bad behavior to get attention. RP 103. For example, S.D. stole her stepmother's cigarettes, snuck

out of the house, did poorly in school, and stole her stepmother's makeup and clothes. RP 101-104. S.D. admitted that she tried to start arguments between her father and stepmother to undermine their relationship. RP 100-101.

S.D.'s allegations against Kail were also inconsistent with her own earlier statements, and contained inaccurate observations regarding Kail's anatomy. In addition to denying Kail touched her in response to questioning by her stepmother after she initially made the allegations, S.D. also failed to note any sexual abuse allegations in the CHINS petition. RP 118-19. S.D. also testified that she knew the difference between a circumcised and uncircumcised penis, and that Kail was circumcised. RP 155. However, Deborah Kent, Kail's former wife of five years, testified he was not. RP 261.

## 2. Trial Court's Exclusion of S.D.'s Diary

During trial, Kail sought to admit portions of S.D.'s diary, which revealed she was desperate to leave her parent's home, and contemplated trickery to achieve that objective. RP 125-133. Specifically, her April 27 diary entry indicated S.D. felt neglected and had a plan to get her parents' attention, but was concerned that she might get in trouble for doing something "stupid." RP 125. She

nonetheless concluded, "if that's what [I've] got to do, then I will."

RP 125. The defense argued this journal entry was highly relevant to the defense theory that S.D.'s plan was to fabricate allegations against Kail:

I think it's extremely relevant that a week or two before she tells her [stepmother], ["My grandfather offered me money for a hand job or a blow job,"] that she's writing in a diary, ["I have a plan to get my parents' attention, and I might get in trouble, but I'm going to do what I have to do."]

RP 126.

The trial court's solution was to ask S.D., outside the jury's presence, what the diary entry referred to. RP 127, 130-132. Kail's counsel objected to this approach, arguing that the trial court was essentially making a credibility determination that should be made by the jury:

Your Honor, I think the defense's whole case is that she is not being truthful about these allegations. So I think it is kind of a – I don't think we should be basing [the decision of] whether or not this comes in based on [what] she tells the Court her plan [was].

RP 127.

The trial court stuck to its original solution and inquired of S.D as follows:

The Court: Can you tell me what your plan was?

[S.D.]: I don't remember my plan.

The Court: Okay. You say you have a plan, and you may have to do something stupid; is that what that says?

[S.D.]: Yeah.

The Court: What was it that you thought you might have to do that was stupid?

[S.D.]: I don't remember what my plan was, but my intention was that I wrote this, and then I left it out so my parents would read it, and then – in hopes that they would pay attention to me so I wouldn't have to do something stupid.

The Court: Okay. So what you're telling me is, you don't remember having a specific plan, but you wanted them to think you did?

[S.D.]: Yeah.

RP 132.

The trial court ruled that the diary entry was not relevant, based on S.D.'s responses to the court's questions:

The issue arose when there was reference to a passage in [S.D.'s] journal that was what I just read in reference to her having some sort of plan. The objection was made that it's not relevant. I had a question about whether it was relevant.

Now that I've heard the answer from the witness that basically she had no plan but this was simply a ploy to get her parents to do something and maybe lighten up on her, I see no relevance, and I'm going to sustain the objection.

RP 133.

### 3. Trial Court's Admission of Prior Allegations

Prior to trial, the state moved to admit the testimony of Terrie Gorena, Kail's stepdaughter, who claimed Kail touched her inappropriately approximately 15 years earlier. RP 1-9; Supp. CP \_\_\_ (Sub. No. 42, State's Trial Memorandum, 12/12/2008). Over defense counsel's objection, the trial court ruled Gorena's testimony was admissible under both ER 404(b) and RCW 10.58.090. RP 9-22.

Gorena testified she lived with her mother and Kail until she was 13 years old, and that Kail sexually abused her since she was 10 years old. RP 169-70. She alleged instances of oral, digital, and manual sex, for which Kail paid her five dollars. RP 170-74. Gorena acknowledged her testimony differed from her statements to police when she was 13 years old. RP 189. At that time, she did not report any instance of oral sex or forced manual sexual contact. RP 189. Kail was never charged with abusing Gorena. RP 190.

#### a. Parties' Arguments Under ER 404(b).

The state argued the evidence was admissible under ER 404(b) as evidence of a common scheme or plan. RP 4. Specifically, the state argued that the following factors demonstrated the existence of a relevant plan or scheme: (1) Kail

was related to both girls; (2) the purported similarity of the girls' age, as Gorena was 10-13 years old, while S.D. was 15-16; (3) the girls were both frequently home alone when their parents were absent; (4) Kail lived in the same house as each girl; (5) S.D. claimed Kail wanted to touch her genitals, while Gorena claimed Kail touched hers; (6) both girls claimed Kail took their hands and demonstrated how to touch him; (7) both girls claimed Kail wore sweatpants during the contacts, which he would pull down in front; (8) both girls reported Kail ejaculated; (9) both girls reported Kail offered them something in exchange; (10) both girls reported Kail attempted to escalate the contact, with Gorena claiming Kail threatened to have sexual intercourse with her, and S.D. claiming Kail asked for oral sex. RP 4-6.

Defense counsel, on the other hand, argued that Gorena's testimony was not admissible under ER 404(b), because the girls' allegations were not sufficiently similar to warrant admission as a common scheme or plan. First, defense counsel argued that Gorena claimed Kail touched her genitals, while there was no allegation he touched S.D.'s. RP 9-10. Second, S.D. claimed Kail used lubricant, while Gorena alleged he did not. RP 10. Third, S.D. claimed Kail provided her with Percocet, while Gorena made

no such allegations. RP 10. Fourth, Gorena was pre-adolescent, while S.D. was adolescent. RP 10. Defense counsel also argued the state could not demonstrate Kail committed any of the alleged acts against Gorena by a preponderance of the evidence. RP 11. Finally, defense counsel argued that Gorena's testimony was far more prejudicial than probative. RP 12.

The trial court sided with the state. First, the trial court found the earlier allegations proven by a preponderance of the evidence. RP 14-15. Second, the trial court found the evidence relevant to demonstrate a common scheme or plan. RP 15-17.

b. Parties' Arguments Under RCW 10.58.090.<sup>2</sup>

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<sup>2</sup> RCW 10.58.090 provides as follows:

(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.

(2) In a case in which the state intends to offer evidence under this rule, the attorney for the state shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(3) This section shall not be construed to limit the admission or consideration of evidence under any other evidence rule.

(4) For purposes of this section, "sex offense" means:

[continued next page]

The state argued the evidence was also admissible under RCW 10.58.090. RP 7-9. The state conceded that the 15-year gap between the girls' allegations was not in its favor, but argued the gap was not "determinative." RP 7. The state also conceded Goren's testimony was not "per se" admissible, because it did not

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(a) Any offense defined as a sex offense by RCW 9.94A.030;

(b) Any violation under RCW 9A.44.096 (sexual misconduct with a minor in the second degree); and

(c) Any violation under RCW 9.68A.090 (communication with a minor for immoral purposes).

(5) For purposes of this section, uncharged conduct is included in the definition of "sex offense."

(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;

(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.

result in a conviction. RP 7-8. The state argued in favor of admissibility on the following grounds, however: (1) the allegations were similar; (2) the instances of alleged abuse were frequent; (3) there were no relevant intervening circumstances; and (4) the evidence was necessary because the case depended primarily on S.D.'s testimony, which Gorena's bolstered. RP 7-8. The state asserted the evidence was more probative than prejudicial, because S.D. would testify Kail told her about abusing Gorena in order to convince S.D. to allow him to abuse her. RP 9.

Defense counsel responded by asserting the evidence was not admissible under the statute and challenged the validity of the statute. RP 13. Specifically, the defense argued the statute: (1) violated constitutional principles of separation of powers by unconstitutionally intruding upon the courts' rule-making authority; (2) violated constitutional prohibitions on ex post facto laws; (3) violated constitutional equal protection guarantees; and (4) violated the "subject and title rule." RP 13.

The trial court disagreed with the defense and ruled the evidence met the statutory requirements for admissibility under RCW 10.58.090. RP 17-18. The court also found that the statute did not violate separation-of-powers principles and did not violate

the courts' rule-making authority. RP 17. The court purported to reserve ruling on issues of whether the statute was an ex post facto law or violated the "subject and title" rule. RP 17.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED KAIL'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE BY EXCLUDING EVIDENCE THAT S.D. WAS PLANNING AN ATTENTION-GETTING SCHEME IN THE WEEKS PRIOR TO MAKING ALLEGATIONS AGAINST KAIL.

Kail was denied his right to present a defense and his right to confront witnesses by the trial court's rulings that S.D.'s diary entry and testimony about the diary entry were inadmissible. The evidence was relevant to the issue of S.D.'s bias, credibility and motive to fabricate the allegations.

The Sixth Amendment to the United States Constitution<sup>3</sup> and Const. art. 1, § 22<sup>4</sup> grant criminal defendants two rights: (1) the

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<sup>3</sup> The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

right to present evidence in one's defense and (2) the right to confront witnesses. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983).

Although these rights are of constitutional magnitude, they are subject to the following limits: (1) the evidence sought to be admitted must be relevant; and (2) the defendant's right to introduce relevant evidence must be balanced against the state's interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process. See Washington v. Texas, 388 U.S. 14, 16, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002); State v. Hudlow, 99 Wn.2d at 15; State v. Reed, 101 Wn. App. 704, 709, 6 P.3d 43 (2000); State v. McDaniel, 83 Wn. App. 179, 185, 920 P.2d 1218 (1996); State v. Gallegos, 65 Wn. App. 230, 236-37, 828 P.2d 37 (1992).

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<sup>4</sup> Const. art. 1, § 22 provides in relevant part:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases[.]

Under these criteria, a defendant must be permitted to present even minimally relevant evidence unless the state can demonstrate a compelling interest for its exclusion. Moreover, no state interest can be compelling enough to preclude evidence with high probative value. Hudlow, 99 Wn.2d at 16; State v. Reed, 101 Wn. App. 704, 715, 6 P.3d 43 (2000).

Evidence of bias and interest is relevant to a witness' credibility. State v. Whyde, 30 Wn. App. 162, 632 P.2d 913 (1981). However, extrinsic evidence cannot be used to impeach a witness on a collateral issue. State v. Carlson, 61 Wn. App. 865, 812 P.2d 536 (1991). Where the credibility of the complaining witness is crucial, her possible motive to lie is not a collateral issue. See Whyde, 30 Wn. App. at 166; State v. Roberts, 25 Wn. App. 830, 834-35, 611 P.2d 1297 (1980).

A witness' bias and, by extension, credibility, are proper subjects for cross-examination. See Whyde, 30 Wn. App. at 166. This Court's opinion in Whyde is particularly instructive. Whyde was convicted of raping S., a tenant in the apartment building Whyde and his wife managed. At trial, Whyde offered to prove that after moving from the building, S. threatened to sue the owner, Byce, as a result of the rape, when he declined to refund her

security deposit. The trial court did not allow the testimony of Byce regarding S.'s threat to sue him and did not permit cross-examination of S. regarding her intentions to sue Byce. Whyde, 30 Wn. App. at 164.

On appeal, this Court reversed Whyde's conviction, reasoning:

The question of a possible lawsuit related directly to the bias, prejudice and interest of S; the trial court's ruling prevented the defense from making a factual record on which to base its contention that S fabricated the rape story for her own financial benefit, and was erroneous. It was also error to exclude this issue from S's cross-examination. To call these errors harmless would inevitably presume the truth of S's testimony and thereby beg the question. The court in Davis v. Alaska, 415 U.S. 308, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974), observed that an appellate court cannot speculate whether the jury would have weighed the witness' testimony differently had proper cross-examination as well as extrinsic impeaching evidence been allowed.

Whyde, 30 Wn. App. at 167.

Here, the question of S.D.'s plan to do something "stupid" to get her parents' attention despite knowing it could get her in trouble – a week or two before making the allegations against Kail – related directly to the bias, prejudice and interest of S.D. The trial courts ruling prevented the defense from making a factual record on which to base its argument S.D. fabricated the allegations to get out of her living situation. Regardless of S.D.'s explanation to the court, the

diary entry was undeniably relevant,<sup>5</sup> as it supported the defense theory of the case. Considering the centrality of S.D.'s credibility to the case, it should have been up to the jury to determine what weight to attach to her diary entry, not the judge. As in Whyde, the court's ruling excluding the evidence was erroneous.

There was no valid reason for excluding the relevant evidence. First, ER 403, which permits exclusion of relevant evidence, was not implicated, as there was no risk that the probative value of the diary entry was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury," or that it would cause "undue delay, waste of time, or needless presentation of cumulative evidence." ER 403. Second, unlike the facts in Hudlow, in which the defendant was precluded from cross-examining a prosecution witness on subject matter precluded by the rape-shield statute, here, there was no compelling state interest to justify contravening Kail's right to present relevant evidence. 99 Wn.2d at 18-19.

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<sup>5</sup> According to ER 401, "relevant evidence" means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

The trial court's decision to exclude the diary entry violated the rules of evidence and Kail's right to present a defense. To call the court's error harmless – as this Court noted in Whyde – would inevitably presume the truth of S.D.'s testimony and thereby beg the question. An appellate court cannot speculate whether the jury would have weighed the witness' testimony differently had proper cross-examination as well as extrinsic impeaching evidence been allowed. Davis v. Alaska, 415 U.S. 308. This Court should reverse Kail's convictions.

2. THE TRIAL COURT ERRED IN ADMITTING PRIOR BAD ACTS EVIDENCE THAT WAS MORE UNFAIRLY PREJUDICIAL THAN PROBATIVE.

The trial court erred in admitting testimony by Kail's stepdaughter alleging Kail had sexual contact with her 15 years prior to the current allegations. Contrary to the trial court's ruling, the evidence was not admissible under ER 404(b), as such evidence was more unfairly prejudicial than probative. Nor was it admissible under the statutory criteria of RCW 10.58.090. Moreover, the statute is unconstitutional because it violates separation of powers principles.

a. The Evidence Was Not Admissible Under ER 404(b) and ER 403.

The trial court erred in admitting Gorena's testimony under ER 404(b), because the evidence was too remote and distinct from the charged crime to be relevant. In the alternative, even if the evidence was relevant, its probative value was outweighed by the potential for unfair prejudice.

Where the state seeks to offer evidence of the defendant's alleged sexual contacts with a person other than the alleged victim, Washington courts determine the admissibility of the evidence under ER 404(b). Evidence Rule 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Thus, evidence of prior sexual assaults on others may be admissible to establish a common scheme or plan. A trial court's decision to admit or exclude prior bad acts evidence is reviewed for abuse of discretion. Lough, 125 Wn.2d at 864-65.

For evidence of prior bad acts to be admissible to prove a common scheme or plan, the prior acts must be: (1) proved by a preponderance of the evidence; (2) admitted for the purpose of

proving a common plan or scheme; (3) relevant to prove an element of the crime charged or to rebut a defense; and (4), more probative than prejudicial. Lough, 125 Wn.2d at 852. Admission of evidence of a common scheme or plan requires substantial similarity between the prior bad acts and the charged crime. State v. DeVincentis, 150 Wn.2d 11, 21, 74 P.3d 119 (2003). “Sufficient similarity is reached only when the trial court determines that the ‘various acts are naturally to be explained as caused by a general plan.’” Doe v. Corporation of President of Church of Jesus Christ of Latter-Day Saints, 141 Wn. App. 407, 167 P.3d 1193 (2007); DeVincentis, 150 Wn.2d at 21.

The admissibility of evidence of previous sexual misconduct must be determined very carefully in light of its great potential for prejudice. State v. Saltarelli, 98 Wn.2d 358, 655 P.2d 697 (1982). Prior cases illustrate the standard the court must apply in finding “that the prior bad acts show a pattern or plan with marked similarities to the facts in the case before it.” DeVincentis, 150 Wn.2d at 13; Lough, 125 Wn.2d 847 (prior acts admitted to show scheme or plan to drug and rape women); State v. Baker, 89 Wn. App. 726, 950 P.2d 486, 490-91 (1997) (prior acts admitted to show common scheme or plan to sexually assault sleeping children);

State v. Krause, 82 Wn. App. 688, 919 P.2d 123 (1996) (scheme or plan to molest boys shown by prior incidents where defendant gained access to young boys by befriending parents, worked to gain the boys' affections by playing games and taking them on outings, and eventually placed himself in position where sexual contact would occur).

In this case, Gorena's allegations were not sufficiently similar to S.D.'s to demonstrate a common scheme or plan. First, Gorena's testimony concerned events alleged to have occurred fifteen years previously, militating against a finding that the alleged conduct was part of a single plan, rather than two completely separate occurrences. Second, the girls were of different ages at the time of the alleged contacts. Third, the nature of alleged acts were different, in that Gorena alleged manual sexual contact by Kail, while S.D. did not, and Gorena claimed Kail stated he intended to have sexual intercourse with her, while S.D. did not. Gorena's allegations did not contain sufficient specific similarities to S.D.'s allegations to be relevant to show a "common plan."

Furthermore, even assuming, arguendo, the evidence was relevant, it nevertheless have been excluded as unfairly prejudicial under ER 403, which 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.

Substantial prejudicial effect is inherent in ER 404(b) evidence. Lough, 125 Wn.2d at 863. Evidence that a defendant previously committed crimes ostensibly similar to those for which he stands trial are particularly likely to unfairly prejudice a defendant:

There is no more insidious and dangerous testimony than that which attempts to convict a defendant by producing evidence of crimes other than the one for which he is on trial, and such testimony should only be admitted when clearly necessary to establish the essential elements of the charge which is being prosecuted.

State v. Smith, 103 Wash. 267, 268 (1918); see, e.g., Government of Virgin Islands v. Pinney, 967 F.2d 912 (3d Cir. 1992) (in prosecution for rape, trial court should not have admitted evidence that the defendant had also raped the victim's sister). In Pinney, the appellate court stated:

The obvious reason the government wanted [the] testimony before the jury was because of the substantial likelihood that one or more members of the jury would use this highly inflammatory evidence for exactly the purpose Rule 404(b) declared to be improper -- i.e., drawing the inference that [defendant] was the kind of person who raped young girls and that, accordingly, he must have raped [the complaining witness].

967 F.2d at 917.

Whether Gorena's allegations were sufficiently similar to S.D.'s to be relevant, they were sufficiently inflammatory to generate unfair prejudice to Kail's defense. The irrelevant evidence painting Kail as a serial child abuser likely improperly influenced the jury to believe that Kail committed the charged acts, contrary to the proscription against propensity evidence in ER 404(b). Gorena's testimony had little probative value on the issue of a common scheme or plan, and carried a high risk of unfair prejudice to Kail. The trial court erred in admitting Gorena's testimony under ER 404(b).

b. The Evidence Was Not Admissible Under RCW 10.58.090.

The trial court also erred in admitting Gorena's testimony under RCW 10.58.090, because that statute likewise prohibits admission of evidence that fails to satisfy the requirements of ER 403.

RCW 10.58.090, enacted as a new statute in 2008, allows the state to present evidence concerning a criminal defendant's prior sex offenses. The statute provides, in pertinent 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.

Under RCW 10.58.090, in evaluating whether evidence of the defendant's commission of another sexual offense or offenses should be excluded pursuant to ER 403, the trial judge shall consider the following factors:

- (a) The similarity of the prior acts to the acts charged;
- (b) The closeness in time of the prior acts to the acts charged;
- (c) The frequency of the prior acts;
- (d) The presence or lack of intervening circumstances;
- (e) The necessity of the evidence beyond the testimonies already offered at trial;
- (f) Whether the prior act was a criminal conviction;
- (g) Whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; and
- (h) Other facts and circumstances.

RCW 10.58.090(6).

These factors militate against the trial court's decision to admit Gorena's testimony. First, there were significant differences between Gorena's and S.D.'s allegations. Second, Gorena and S.D.'s allegations were remote in time, fifteen years apart, plainly diminishing any relevance of Gorena's testimony. Third, the relevance of the alleged frequency of the prior acts is similarly diminished by the passage of time. Fourth, there were no relevant intervening circumstances that made Gorena's allegations relevant.

Significantly, Gorena's testimony was not necessary. S.D. was 16 years old, and was able to convey the substance of her allegations against Kail on the witness stand. She was able to testify in detail and remained on the witness stand for the majority of the day on which she testified. She did not require any special assistance on the witness stand, and responded directly to the questions posed to her. Gorena's testimony was in no way necessary to allow the jury to weigh S.D.'s credibility.

Finally, the prior acts did not result in a criminal conviction, although the allegations were reported to police and investigated.

Because of all of these factors, the probative value of Gorena's testimony was not sufficient to outweigh the dangers of

unfair prejudice inherent to her testimony. Gorena's testimony should not have been admitted under RCW 10.58.090.

c. The Error In Admitting Gorena's Testimony Was Not Harmless.

S.D.'s testimony was central to the state's case. There was no physical evidence-implicating Kail. Kail denied S.D.'s allegations, presented evidence she had a motive to fabricate the allegations, and revealed inconsistencies in her testimony. Given this context, Gorena's testimony unfairly prejudiced Kail both by bolstering S.D.'s credibility and by painting Kail as a serial abuser. This undoubtedly influenced the jury's verdict. The error was not harmless.

3. RCW 10.58.090 IS AN UNCONSTITUTIONAL INTRUSION UPON THE COURTS' RULE-MAKING AUTHORITY BY THE LEGISLATURE.

Assuming arguendo, this Court finds Gorena's testimony was admissible under the statutory criteria of RCW 10.58.090, it should nevertheless reverse Kail's convictions, because the statute is an unconstitutional intrusion upon the Courts' rule-making authority by the legislature. The statute changes the very nature of a trial for a defendant charged with a sex offense, when the state can generate otherwise inadmissible evidence of prior sex

offenses. This amounts to a violation of the Court's inherent authority to govern court procedures.

In Washington, separation of powers principles are violated when "the activity of one branch threatens the independence or integrity or invades the prerogatives of another." State v. Moreno, 147 Wn.2d 500, 505-06, 58 P.3d 265 (2002) (internal quotation marks omitted). This separation ensures "the fundamental functions of each branch remain inviolate." Carrick v. Locke, 125 Wn.2d 129, 135, 882 P.2d 173 (1994); In the Matter of the Salary of the Juvenile Director, 87 Wn.2d 232, 239-40, 552 P.2d 163 (1976).

In passing RCW 10.58.090, the legislature included an introductory statement of purpose, citing Washington cases suggesting the legislature has the authority to regulate the admissibility of evidence:

In Washington, the legislature and the courts share the responsibility for enacting rules of evidence. The court's authority for enacting rules of evidence arises from a statutory delegation of that responsibility to the court and from Article IV, section 1 of the state Constitution. State v. Fields, 85 Wn.2d 126, 129, 530 P.2d 284 (1975).

The legislature's authority for enacting rules of evidence arises from the Washington supreme court's prior classification of such rules as substantive law. See State v. Sears, 4 Wn.2d 200, 215, 103 P.2d 337 (1940) (the legislature has the power to enact laws which create rules of (evidence); State v. Pavelich, 153 Wash. 379, 279 P. 1102 (1929) ("rules of evidence are substantive law").

The legislature adopts this exception to Evidence Rule 404(b) to ensure that juries receive the necessary evidence to reach a just and fair verdict.

However, cases not cited by the legislature suggest that the Supreme Court has the ultimate authority to regulate the admissibility of evidence, and that, in the event of a conflict between a statute and a rule, the rule controls. See, e.g., City of Fircrest v. Jensen, 158 Wn.2d 384, 143 P.3d 776 (2006) (4-3-2 decision). In Jensen, the plurality held:

This court is vested with judicial power from article IV of our state constitution and from the legislature under RCW 2.04.190. The inherent power of article IV includes the power to govern court procedures. The delegated power of RCW 2.04.190 includes the power to adopt rules of procedure. In general, the judiciary's province is procedural and the legislature's is substantive. Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated. The adoption of the rules of evidence is a legislatively delegated power of the judiciary. Therefore, rules of evidence may be promulgated by both the legislative

and judicial branches. When a court rule and a statute conflict, the court will attempt to harmonize them, giving effect to both. ***Whenever there is an irreconcilable conflict between a court rule and a statute concerning a matter related to the court's inherent power, the court rule will prevail.***

158 Wn.2d at 394 (internal citations and quotations omitted) (emphasis added).

The legislature does not have the authority to mandate the admissibility of evidence that is otherwise barred by a rule of evidence. The inherent power of article IV includes the power to govern court procedures. Jensen, 158 Wn.2d at 394. RCW 10.58.090 is not a court rule. Yet, it allows the admission of “evidence of the defendant’s commission of another sex offense or sex offenses [. . .] notwithstanding Evidence Rule 404(b).” The statute, therefore, creates an irreconcilable conflict in cases where such evidence is inadmissible under ER 404(b). In such a case, the court rule “will prevail.” Jensen, 158 Wn.2d at 394.

Although the state may argue that the trial court’s instruction to the jury to use the evidence only to determine the issue of common scheme or plan harmonizes the court rule and the statute, this Court should reject such an argument. As argued in the previous section, the evidence was not admissible under ER

404(b). Its admission under the statute, thus, creates an irreconcilable conflict between the court rule and the statute.

4. RCW 10.58.090 IS AN UNCONSTITUTIONAL VIOLATION OF THE WASHINGTON CONSTITUTION'S FAIR TRIAL GUARANTEES.

The Washington right to jury trial incorporates broader protection than its federal counterpart, because it codifies the understanding of state rights at the time.

The Washington Constitution's jury trial right is comprised of two provisions. Article I, section 21 provides that “[t]he right of trial by jury shall remain inviolate.” Article I, section 22 provides that “[i]n criminal prosecutions the accused shall have the right to ... trial by an impartial jury.” “[T]he right to trial by jury which was kept ‘inviolat[e]’ by our state constitution [is] more extensive than that which was protected by the federal constitution when it was adopted in 1789. The state jury trial right ‘preserves the right as it existed at common law in the territory at the time of [our constitution’s] adoption.’”

State v. Recuenco, 163 Wn.2d 428, 444, n. 11, 180 P.3d 1276 (2008) (internal citations omitted). The understanding of the right to a fair trial as one that would be free from propensity evidence predates the federal constitution: “The rule against using

character evidence to show behavior in conformance therewith, or propensity, is one such historically grounded rule of evidence. It has persisted since at least 1684 to the present.” McKinney v. Rees, 993 F.2d 1378, 1381 (9th Cir. 1993).

By transgressing this fundamental aspect of a constitutionally guaranteed fair trial, RCW 10.58.090 violates Kail’s state constitutional fair trial protections.

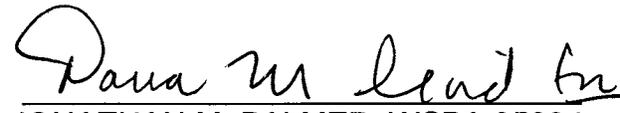
D. CONCLUSION

For the reasons stated above, this Court should reverse  
Kail's convictions.

Dated this 16<sup>th</sup> day of July, 2009.

Respectfully submitted

NIELSEN, BROMAN & KOCH

  
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I**

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 63062-8-I
	)	
ROBERT KAIL,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 16<sup>TH</sup> DAY OF JULY 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE  
3000 ROCKEFELLER AVENUE  
EVERETT, WA 98201
  
- [X] ROBERT KAIL  
DOC NO. 326380  
STAFFORD CREEK CORRECTIONS CENTER  
191 CONSTANTINE WAY  
ABERDEEN, WA 98502

**SIGNED** IN SEATTLE WASHINGTON, THIS 16<sup>TH</sup> DAY OF JULY 2009.

x *Patrick Mayovsky*