

66926-5

66926-5

No. 66926-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

JERRY DEAN SHIRK,

Appellant.

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 OCT 28 AM 4:58

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

The Honorable John P. Erlick

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BRIEF OF APPELLANT

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THOMAS M. KUMMEROW  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

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A. ASSIGNMENTS OF ERROR

1. The trial court denied Mr. Shirk a fair trial and his right to be tried only on the charged offense by admitting unduly prejudicial propensity evidence regarding his prior sexual misconduct with his daughter 25 years ago, contrary to Article I, sections 3 and 22 of the Washington Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution.

2. The court misapplied the statutory criteria of RCW 10.58.090.

3. The trial court erred in finding good cause to excuse the State's failure to provide the required notice prior to seeking to admit evidence pursuant to RCW 10.58.090.

4. RCW 10.58.090 violates the separation of powers under the state and federal constitutions.

5. Admission of propensity evidence pursuant to the recently enacted RCW 10.58.090 violates the *ex post facto* prohibitions of the state and federal constitutions.

6. To the extent it is a Finding of Fact, in the absence of substantial evidence, the trial court erred in entering Conclusion of Law As To RCW 10.58.090 1, finding the prior evidence of sexual abuse admissible.

7. To the extent it is a Finding of Fact, in absence of substantial evidence, the trial court erred in entering Conclusion of Law As To RCW 10.58.090 5, finding the prior evidence “necessary.”

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. RCW 10.58.090 permits a court to admit, as propensity evidence, evidence of prior sexual misconduct based upon certain statutory criteria. Washington has long enforced the principle that a person may be tried only for the charged crime. Did the court’s admission of propensity evidence of prior sexual misconduct deny Mr. Shirk a fair trial and violate his right to be tried only for the offense charged?

2. Prior to admitting prior sexual acts evidence, RCW 10.58.090 requires the court to find the evidence is necessary beyond that testimony already offered at trial. The court here made a conclusory finding that the testimony of Mr. Shirk’s biological daughter about alleged acts which occurred over 25 years ago was necessary. Did the trial court’s error in failing to make a specific finding of necessity violate Mr. Shirk’s right to a fair trial?

3. RCW 10.58.090 requires the State to give the defendant 15 days notice prior to seeking to admit evidence of prior sexual

conduct unless the court makes a finding of good cause for the State's failure. Here the State gave the defense five days notice and sought a finding of good cause based upon the prosecutor's negligence in failing to find the witness. Was the court's finding of good cause based upon substantial evidence, excusing the State's failure to comply with the statute?

4. Under the constitutional principle of separation of powers, the Legislature may not impermissibly intrude into the realm of the judiciary. By enacting RCW 10.58.090, the Legislature created new procedural rules that conflict with existing rules created by the judiciary. Does RCW 10.58.090 violate the separation of powers?

5. A retrospective law violates the ex post facto provisions of the federal constitution if it is substantive and disadvantages the person affected by it. In enacting RCW 10.58.090 the Legislature stated it intended the statute to work a substantive change and that it applies retroactively. Where application of that law in Mr. Shirk's trial permitted the admission of propensity evidence which was previously inadmissible, is application of RCW 10.58.090 to Mr. Shirk unconstitutional?

6. The framers of the Washington Constitution copied the language of Article I, section 23, regarding ex post facto laws, from

the Indiana and Oregon constitutions. The Supreme Courts of both those States have interpreted those provisions to bar the retroactive application of evidentiary rules which operate in a one-sided fashion to make convictions easier to obtain. RCW 10.58.090 similarly alters the rules of evidence in a one-sided fashion to make convictions easier to obtain. Does application of RCW 10.58.090 to Mr. Shirk's case violate Article I, section 23?

C. STATEMENT OF THE CASE

Jerry Shirk was charged with molesting his step-granddaughter, K.M.D., on two occasions. CP 74-75. Five days before the first scheduled day of trial, the State gave the defense notice that it intended to present the testimony of Mr. Shirk's now adult biological daughter, S.S., that he had molested her on several occasions in Ohio when she was a child approximately 25 years ago. 4/15/2010RP 2-14. The sexual misconduct resulted in Mr. Shirk's *nolo contendere* plea in Ohio to sexual battery. 4/15/2010RP 4/15/2010RP 9. Mr. Shirk objected to the admission of this testimony, initially on the basis the State failed to give at least 15 days notice of its intent to admit the prior sexual misconduct evidence under RCW 10.58.090. 4/15/2010RP 8-14. The trial

court found “good cause” for the State’s failure to provide the required notice. 4/15/2010RP 31.

The defense also challenged the constitutionality of RCW 10.58.090. CP 7-9. In denying the defense challenge, the trial court felt it was bound by this Court’s decision in *State v. Scherner*, and denied the defense motion that RCW 10.58.090 was unconstitutional. 4/20/2010RP 7-8. The trial court found the prior incidents admissible under RCW 10.58.090 and ER 404(b). 4/20/2010RP 31-35.<sup>1</sup> Although the court noted that the necessity of the evidence was a critical factor, it made no finding whether the prior acts were necessary as required under RCW 10.58.090(6)(e). The court’s ruling seemed to conflate the necessity requirement with the question of whether the child was going to testify, which omitted the necessity requirement entirely:

COURT: No, we’re not. No, we’re not moving on to child hearsay but I am inquiring as to factor (e) under .090 which is the necessity of the evidence beyond the testimonies already offered at trial. So I’m simply inquiring to the offer of proof as to what the testimony or testimonies are going to be and wanted to confirm that it was the state’s intent on offering KMD in her testimony.

MR. SANTOS: She will be present. She will testify.

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<sup>1</sup> After allowing the prior sexual misconduct to be admitted, in light of the late notice the trial court continued the trial several months to allow the defense to investigate the prior misconduct and interview S.S. 4/20/2010RP 40-41.

4/20/2010RP 14.

Following a jury trial where S.S. was allowed to testify about Mr. Shirk's prior sexual misconduct, he was convicted as charged. CP 180-83.

D. ARGUMENT

1. MR. SHIRK WAS DENIED A FAIR TRIAL BY THE IMPROPER AND PREJUDICIAL ADMISSION OF PROPENSITY EVIDENCE

a. The right to a fair trial includes the right to be tried for the charged offense, without irrelevant accusations of other wrongful conduct years ago. An accused person's right to a fair trial is a fundamental part of due process of law. U.S. Const. Amend. XIV; Const. Art. I, §§ 3, 22; *United States v. Salerno*, 481 U.S. 739, 750, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). Erroneous evidentiary rulings may violate due process by depriving the defendant of a fundamentally fair trial. *Estelle v. McGuire*, 502 U.S. 62, 75, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *Dowling v. United States*, 493 U.S. 342, 352, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990) (the introduction of improper evidence deprives a defendant of due process where "the evidence 'is so extremely unfair that its admission violates fundamental conceptions of justice.'").

Compliance with state evidentiary and procedural rules does not guarantee compliance with the requirements of due process. *Jammal v. Van de Kamp*, 926 F.2d 918, 919-20 (9<sup>th</sup> Cir. 1991); *citing Perry v. Rushen*, 713 F.2d 1447, 1453 (9<sup>th</sup> Cir. 1983), *cert. denied*, 469 U.S. 838 (1984). Due process is violated where evidence was admitted that renders the trial fundamentally unfair. *Walters v. Maass*, 45 F.3d 1355, 1357 (9<sup>th</sup> Cir. 1995); *Colley v. Sumner*, 784 F.2d 984, 990 (9<sup>th</sup> Cir. 1986).

An accused person also has a fundamental right to be tried only for the offense charged. U.S. Const. Amend. V; Const. art. I, §22; *State v. Mack*, 80 Wn.2d 19, 21, 490 P.2d 1303 (1971). The “fundamental concept” that a “defendant must be tried for what he did, not who he is,” is violated by introducing evidence designed to show a propensity for committing sex offenses. *State v. Cox*, 781 N.W.2d 757, 769 (Iowa 2010).

In *Cox*, the Iowa Supreme Court held that an Iowa statute permitting admission of evidence of prior sex offenses as propensity evidence, similar to RCW 10.58.090, violated the state constitutional due process clause and fundamental notions of fairness, even though the trial court weighed the probative value of the evidence against the potential for prejudice. 781 N.W.2d at

769. Missouri's Supreme Court similarly held that the corollary Missouri statute unconstitutionally denied defendants the right to be tried only for the offense charged even though the statute required the trial court to balance the probative value of the evidence against the potential for prejudice. *State v. Ellison*, 239 S.W.3d 603, 605-06 (Mo. 2007).

Although this Court has upheld the constitutionality of RCW 10.58.090, the Supreme Court is presently reviewing these challenges.<sup>2</sup> Moreover, even if RCW 10.58.090 was constitutionally applied in those cases, in Mr. Shirk's trial, the court misunderstood and misapplied the critical components of RCW 10.58.090 and thereby denied him a fair trial.

b. The trial court erred in finding "good cause" for the State's failure to comply with the 15 day notice requirement. RCW 10.58.0909(2) states:

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.*

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<sup>2</sup> *State v. Scherner*, 153 Wn.App. 621, 225 P.3d 248 (2009), review granted, 168 Wn.2d 1036 (2010); *State v. Gresham*, 153 Wn.App. 659, 223 P.3d 1194 (2009), review granted, 168 Wn.2d 1036 (2010). These cases were argued on March 17, 2011. Decisions are still pending.

(Emphasis added).

To date, no appellate court has determined what constitutes “good cause” under the statute. Courts in other contexts have construed the term “good cause” to require a showing of some external impediment, that did not result from a self-created hardship, that would prevent a party from complying with statutory requirements. See *State v. Tomal*, 133 Wn.2d 985, 989, 948 P.2d 833 (1997) (regarding motion to dismiss appeal); *State v. Dearbone*, 125 Wn.2d 173, 883 P.2d 303 (1994) (regarding notice of intent to seek the death penalty); *State v. Crumpton*, 90 Wn.App. 297, 302, 952 P.2d 1100 (regarding inclusion of testimonial affidavits with motion for new trial), *review denied*, 136 Wn.2d 1016, 966 P.2d 1277 (1998). Inadvertence or attorney oversight is not “good cause.” *Tomal*, 133 Wn.2d at 989; *Dearbone*, 125 Wn.2d at 180.

Here, contrary to the trial court’s conclusion, the State did not meet its burden of establishing “good cause” for its failure to provide the required notice to the defense. The prosecutor conceded that the “previous prosecutor did not contact or did not locate that [prior] victim.” 4/15/2010RP 4. The State also

conceded it had given the defense five days notice prior to the scheduled trial date instead of the required 15 days. 4/15/2010RP 28. It was not until the current prosecutor was assigned the case that he began to investigate the prior incidents

Mr. Shirk was arraigned in December 2008 and it was between that first case scheduling and the case scheduling of February 19, 2009, that the defense provided to the State some information it was able to get from Lucas County, Ohio about Mr. Shirk's prior plea of *nolo contendere*, to the charge of sexual battery.<sup>3</sup> 4/15/2010RP 9. The present prosecutor had been assigned the case at least as early as August 2009. 4/15/2010RP 11.

The trial court ruled there was good cause for the State's failure to provide the mandatory 15 days notice:

I do find however that there is good cause for the late disclosure, and that is that this is a witness who apparently has changed her name. It's an old incident. It goes back a couple plus decades. It's an out-of-state witness and I don't find it rises to the level of the state mismanaging the case or not properly preparing or investigating the state's case.

4/15/2010RP 31.

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<sup>3</sup> The trial court refused to allow any evidence regarding the *nolo contendere* plea at trial. 2/7/2011RP 6.

The best that could be said about the State's inability to find S.S. until just prior to trial is that it was the result of inadvertence or the prosecutor's oversight, or simply negligence, none of which is sufficient to support the court's finding of "good cause." *Tomal*, 133 Wn.2d at 989. As noted in similar contexts, an external impediment that did not result from a self-created hardship will support a finding of "good cause," but this is simply lacking here where the State had over a year and a half to determine the existence of this witness. The trial court erred in finding good cause for the State's failure to provide the requisite notice under RCW 10.58.090.

c. The trial court erred in finding the evidence "necessary" under RCW 10.58.090. The trial court's "finding" on the necessity requirement is merely a conclusory statement that the evidence is "necessary." CP Supp \_\_\_\_, Sub. No. 132C at 3 ("The evidence of prior abuse against S.S. is necessary evidence beyond testimonies already offered at trial . . .").

RCW 10.58.090 permits the court to admit, 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 . . . notwithstanding Evidence Rule 404(b)." RCW 10.58.090(1). Over objection, and without making a finding on why

the prior acts evidence was necessary, the court admitted evidence that Mr. Shirk had engaged in similar conduct with his biological daughter approximately 25 years prior. CP Supp \_\_\_, Sub. No. 132C at 3.

Before admitting this sort of propensity evidence:

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).

The only purpose served by the evidence was as bald propensity evidence.

Although the statute does not define “necessity,” the term should be given its ordinary meaning. *State v. Argueta*, 107 Wn.2d 532, 536, 27 P.2d 242 (2001) (“rules of statutory construction require that we give undefined words their common and ordinary meaning,” which may be taken from the dictionary).

“Necessity” means:

1: the quality or state or fact of being necessary as: a: a condition arising out of circumstances that compels to a certain course of action . . . b: INEVITABLENESS, UNAVOIDABILITY . . . c: great or absolute need: INDISPENSABILITY . . . 3: something that is necessary: REQUIREMENT, REQUISITE

*Webster’s Third New International Dictionary*, p. 1511 (1993). The Legislature’s use of this specific requirement of necessity should not be interpreted as superfluous, or indicative of a lesser standard such as “helpful.” “If the plain language of the statute is unambiguous, then this court’s inquiry is at an end. The statute is to be enforced in accordance with its plain meaning.” *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007) (citations omitted). If “helpful” was what the Legislature intended when it said “necessary,” it would have said so. The court’s ruling does not comply with the specific, express statutory requirement of “necessity.” RCW 10.58.090(6)(e).

Traditionally in Washington, the State may not introduce evidence of a defendant’s prior bad acts, because “such evidence has a great capacity to arouse prejudice.” *State v. Kelly*, 102 Wn.2d 188, 199, 685 P.2d 564 (1984); *State v. Jones*, 101 Wn.2d 113, 120, 677 P.2d 131 (1984), *overruled on other grounds by*

*State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013 (1989) (“Statistical studies have shown that even with limiting instructions, a jury is more likely to convict a defendant with a criminal record”). This Court has recognized that the potential for unfair prejudice is particularly high in sex abuse cases: “Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, that he could not help be otherwise.” *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982) (citation omitted). This longstanding principle should not be disregarded simply because RCW 10.58.090 allows the admission of prior offenses in certain instances.

The fact that available sources for corroborative evidence do not fully support the allegations, and might cause jurors to discount the current accusation, should not justify the State’s reliance on past acts. This denies an accused person the right to be presumed innocent and to be tried on only the charges against him, and introduces an irreparable taint upon the character of the accused.

d. RCW 10.58.090 violates the separation of powers. The Washington Supreme Court is presently considering the constitutionality of RCW 10.58.090. This Court found these

statutes constitutional in *Scherner* and *Gresham*, both of which are being reviewed by the Supreme Court. In order to preserve these issues, Mr. Shirk joins in the constitutional challenges to the statute raised by the petitioners in those cases.

“If ‘the activity of one branch threatens the independence or integrity or invades the prerogatives of another,’ it violates the separation of powers.” *Waples v. Yi*, 169 Wn.2d 152, 158, 234 P.3d 187 (2010), quoting *City of Fircrest v. Jensen*, 158 Wn.2d 384, 394, 143 P.3d 776 (2006) and *State v. Moreno*, 147 Wn.2d 500, 505-06, 58 P.3d 265 (2002). This Court has inherent power to govern court procedures, stemming from Article IV of the state constitution. Const. art. IV, § 1; *Jensen*, 158 Wn.2d at 394; *State v. Fields*, 85 Wn.2d 126, 129, 530 P.2d 284 (1975). The Court’s authority over matters of procedure contrasts with the Legislature’s authority over matters of substance. *Fields*, 85 Wn.2d at 129; *State v. Smith*, 84 Wn.2d 498, 501, 527 P.2d 674 (1974). Rules of evidence are rules of procedure that fall under the Court’s inherent authority.<sup>4</sup>

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<sup>4</sup> The Court also has authority delegated by the Legislature to enact rules of evidence. RCW 2.04.190 (Supreme Court has power to prescribe procedures for “taking and obtaining evidence”).

The Court's authority to govern the admissibility of evidence in Washington trials is embodied in the Rules of Evidence. ER 101 makes clear that in the event of an irreconcilable conflict between a rule and a statute, the rule will govern. ER 101 ("These rules govern proceedings in the courts of the state of Washington"). Where the Rules of Evidence do not contemplate a particular statutory exception, an evidence statute that conflicts with the Rules violates the separation of powers doctrine. *See e.g., State v. Saldano*, 36 Wn.App. 344, 675 P.2d 1231, *review denied*, 102 Wn.2d 1018 (1984) (holding ER 609 supersedes conflicting statute allowing broader admission of an accused's prior convictions).

RCW 10.58.090 violates the separation of powers because it conflicts with ER 404 (b), which *precludes* a court from admitting evidence of a person's character "in order to show action in conformity therewith." Its purpose is to limit a court's discretion in admitting such prejudicial evidence without a legitimate purpose.

RCW 10.58.090 allows the State to rely upon inflammatory evidence of a defendant's past sexual misconduct, which would otherwise be inadmissible, in order to convict him of a current sexual offense. The statute permits courts to consider the "necessity" for the evidence in light of the other evidence of guilt,

presumably making the evidence admissible in the weakest cases. RCW 10.58.090(6)(e). The statute effectively alters the standard of proof required for conviction and it should be construed as violating the separation of powers.

For the above stated reasons, including the trial court's misapplication of the mandatory statutory criteria of RCW 10.58.090 and the unconstitutionality of RCW 10.58.090, all of which had a distinct and direct effect on the outcome of the trial, Mr. Shirk should receive a new trial.

2. ADMITTING PROPENSITY EVIDENCE IN MR. SHIRK'S TRIAL PURSUANT TO RCW 10.58.090 VIOLATED THE STATE AND FEDERAL CONSTITUTIONAL PROHIBITIONS OF EX POST FACTO LAWS.

a. The State and Federal Constitutions prohibit *ex post facto* laws. Article I, section 10 of the United States Constitution and article 1, section 23 of the Washington Constitution, the *ex post facto* clauses, forbid the State from enacting any law that imposes punishment for an act that was not punishable when committed, or increases the quantum of punishment annexed when the crime was committed. *Collins v.*

*Youngblood*, 497 U.S. 37, 42, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990); *State v. Ward*, 123 Wn.2d 488, 496, 870 P.2d 295 (1994).

b. RCW 10.58.090 violates the state and federal prohibitions on *ex post facto* laws.

A law violates the *ex post facto* clause if it: (1) is substantive, as opposed to merely procedural; (2) is retrospective (applies to events which occurred before its enactment); and (3) disadvantages the person affected by it.

*State v. Hennings*, 129 Wn.2d 512, 525, 919 P.2d 580 (1996), citing *Weaver v. Graham*, 450 U.S. 24, 29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 (1981); *Collins*, 497 U.S. at 45. RCW 10.58.090 violates the state and federal *ex post facto* prohibitions.

i. The Legislature has stated RCW 10.58.090 is substantive in nature. The legislative notes following RCW 10.58.090 state that as an evidentiary rule the rule is substantive in nature. Laws 2008, ch. 90, §1. The Legislature's characterization of a statute does not necessarily control the constitutional *ex post facto* analysis. *In re the Personal Restraint of Gronquist*, 139 Wn.2d 199, 208, 986 P.2d 131 (1999). However, the statute is substantive in nature as it does not fit within the understanding of a procedural statute.

While . . . cases do not explicitly define what they mean by the word "procedural," it is logical to think that the term refers to changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes.

*Collins*, 497 U.S. at 45, *citing Dobbert v. Florida*, 432 U.S. 282, 292, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977); *Beazell v. Ohio*, 269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216 (1925); *Mallett v. North Carolina*, 181 U.S. 589, 597, 21 S.Ct. 730, 45 L.Ed. 1015 (1901). RCW 10.58.090 does not merely define the procedure by which a case is adjudicated but rather redefines the bounds of relevancy for sex offenses. Thus, the Legislature appropriately recognized the substantive reach of the statute.

*ii. RCW 10.58.090 applies to events occurring prior to its enactment.* The statute also applies to events which occurred prior to its enactment. The Legislature specifically stated the statute should apply to any case tried after its enactment without concern for when the alleged offense may have occurred. Laws 2008, ch. 90 § 3. But more importantly, Mr. Shirk's offense, and first trial, occurred prior to the effective date of the statute. Thus the statute applies retrospectively.

*iii. RCW 10.58.090 substantially disadvantaged Mr. Shirk.* RCW 10.58.090 allows evidence which is not admissible for a more limited purpose under ER 404 (b) to be admitted for any purpose whatever. In this case, the State asked the jurors to use the evidence in this case as bald propensity evidence; evidence that because Mr. Shirk had molested children before he must have committed the rape in this case. Washington courts have long excluded this class of evidence precisely because that sort of conclusory logic was deemed unreliable, irrelevant, and overly prejudicial. *See State v. Bokien*, 14 Wash 403, 414, 44 P. 889 (1896). More specifically though, RCW 10.58.090 substantially disadvantaged Mr. Shirk. Under the test enunciated in *Hennings*, application of RCW 10.58.090 to offenses committed prior to its enactment, such as Mr. Shirk's, violates the ex post facto clause of the United States Constitution.

c. Even if application of RCW 10.58.090 to Mr. Shirk's case does not violate the federal Ex Post Facto Clause, it nonetheless violates the greater protections of Article I, section 23. Article I, section 10 of the United States Constitution provides, "No State shall . . . pass any Bill of Attainder, ex post facto law, or Law impairing the Obligation of Contracts." The Washington

Constitution provides: "[n]o bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed." Const. art. I, § 23.

The Supreme Court long ago held that the provisions of Article I, section 10 reach four classes of laws:

1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive.

*Calder v. Bull*, 3 Dall. 386, 390-91, 1 L.Ed. 648 (1798). While the fourth category identified in *Calder* seems to clearly bar retroactive changes in the type of evidence which is admissible, the Supreme Court has concluded "[o]rdinary" rules of evidence do not implicate ex post facto concerns because they do not alter the standard of proof. *Carmell v. Texas*, 529 U.S. 513, 533 n.23, 120 S.Ct. 1620, 146 L.Ed.2d 577 (1999). The Court previously held a law permitting the admission of a defendant's letters to his wife for the

purposes of comparing them to letters admitted into evidence was not an ex post facto violation because the change in law

did nothing more than remove an obstacle arising out of a rule of evidence that withdrew from the consideration of the jury testimony which, in the opinion of the legislature, tended to elucidate the ultimate, essential fact to be established, namely, the guilt of the accused. Nor did it give the prosecution any right that was denied to the accused. It placed the state and the accused upon an equality.

*Thompson v. Missouri*, 171 U.S. 380, 387-88, 18 S.Ct. 922, 43 L.Ed. 204 (1898).

The Washington clause is textually different from the federal clause and mirrors the provisions of the Oregon and Indiana Constitutions. Compare Const. Art. I, § 23; Or. Const. Art. I, § 21; Ind. Const. art. I, § 24. Indeed, the Declaration of Rights, of which Article I, section 23 is a part, “was largely based upon W. Lair Hill’s proposed constitution and its model, the Oregon Constitution.” R. Utter and H. Spitzer, *The Washington State Constitution, A Reference Guide*, p 9 (2002). Because it is borrowed from the Oregon Constitution, which in turn took its ex post facto language from the Indiana Constitution,<sup>5</sup> it is useful to look to how the courts of those states have interpreted the relevant provisions of their

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<sup>5</sup> *State v. Cookman*, 920 P.2d 1086, 1091 (Or. 1996).

constitutions. *Biggs v. Department of Retirement*, 28 Wn.App. 257, 259, 622 P.2d 1301 (1981) (turning to interpretations of the Indiana Constitution to interpret similar, although not identical, provisions of Washington Constitution).

Applying an analysis similar to that set forth in *State v. Gunwall*,<sup>6</sup> the Oregon Supreme Court has determined the ex post facto protections of the Oregon Constitution are broader than the protections which the United States Supreme Court has recognized in the federal constitution.<sup>7</sup> *State v. Fugate*, 26 P.3d 802, 813 (2001). Specifically, the Oregon court has interpreted the mirror provisions of the Oregon Constitution's ex post facto clause to prohibit the retroactive application of laws that alter the rules of evidence in a manner which favors only the prosecution. *Fugate* took pains to distinguish that result from changes in evidentiary rules which apply equally to both the defense and the prosecution,

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<sup>6</sup> *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).

<sup>7</sup> Specifically when determining whether a provision of the Oregon Constitution provides greater protection than does the federal constitution, Oregon courts consider the provision's "specific wording, the case law surrounding it, and the historical circumstances that led to its creation." *Priest v. Pearce*, 840 P.2d 65, 67-69 (Or. 1992). By comparison, *Gunwall* directs a court to consider six nonexclusive factors: the textual language of the state constitution; significant differences in the texts of parallel provisions of the federal and state constitutions; state constitutional and common law history; preexisting state law; differences in structure between the federal and state constitutions; and matters of particular state interest or local concern. *Gunwall*, 106 Wn.2d at 61-62.

finding that sort of law of general application was never viewed as resulting in the evil to which the ex post facto clause is addressed. 26 P.3d at 813.

In reaching its conclusion, the Oregon court looked to Indiana's interpretation of its ex post facto protections. Prior to adoption of the Oregon Constitution the Indiana Supreme Court determined

[t]he words *ex post facto* have a definite, technical signification. The plain and obvious meaning of this prohibition is, that the Legislature shall not pass any law, after a fact done by any citizen, which shall have relation to that fact, so as to punish that which was innocent when done; or to add to the punishment of that which was criminal; or to increase the malignity of a crime; or to retrench the rules of evidence, so as to make conviction more easy.

*Strong v. The State*, 1 Blackf. 193, 196 (1822). Because that interpretation of Indiana's constitution was available to the framers of the Oregon Constitution when they chose to adopt the language of Indiana's ex post facto clause, the Oregon court interpreted the Oregon provisions as "forbid[ding] *ex post facto* laws of the kind that fall within the fourth category in *Strong* and *Calder*, viz., laws that alter the rules of evidence in a one-sided way that makes conviction of the defendant more likely." *Fugate*, 26 P.3d at 813.

That interpretation of the Indiana Constitution was also available to the framers of Washington Constitution in 1889. Rather than simply adopt the language of Article I, section 10, the framers instead chose to adopt the language of the Oregon and Indiana constitutions. By adopting the different language of the Oregon and Indiana Constitutions, logically, the framers of the Washington Constitution did not intend Article I, section 23 to be interpreted identically to the federal Bill of Rights, since they used different language and the federal Bill of Rights did not then apply to the states. Utter, 7 U. Puget Sound L. Rev. 496-97; *State v. Silva*, 107 Wn.App. 605, 619, 27 P.3d 663 (2001) (“The decision to use other states’ constitutional language also indicates that the framers did not consider the language of the U.S. Constitution to adequately state the extent of the rights meant to be protected by the Washington Constitution.”).

In fact, two years after Washington became a state, the Supreme Court cited to *Calder* as providing “a comprehensive and correct definition” of what constitutes an ex post facto law. *Lybarger v. State*, 2 Wash. 552, 557, 27 P. 449 (1891). Applying an analysis that resembles that of *Strong*, *Lybarger* concluded the statute did not violate ex post facto provisions, in part, because

“[i]t does not change the rules of evidence to make conviction more easy.” 2 Wash. at 559. *Lybarger* applied precisely the analysis which the Oregon Supreme Court applied in *Fugate*.

Aside from the textual differences and differences in the common-law and constitutional history, the United States Constitution is a grant of limited power to the federal government, whereas the Washington constitution imposes limitations on the otherwise plenary power of the state. *Gunwall*, 106 Wn.2d at 61. That fundamental difference generally favors a more protective interpretation of the Washington provision. So too does the fact that regulation of criminal trials is a matter of particular state concern. *State v. Boland*, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990).

The framers of the Washington Constitution adopted language that differs from the language of the federal constitution - language that had been interpreted 67 years prior to its inclusion in the Washington Constitution to bar retroactive legislation which alters the rules of evidence in a one-sided fashion. The foregoing analysis demonstrates that by doing so, the framers intended to apply that same protection in Washington.

RCW 10.58.090 unquestionably alters the rules of evidence in a manner that makes convictions easier. RCW 10.58.090 violates Article I, section 23.

d. Mr. Shirk's conviction must be reversed. Where a constitutional error occurs during a trial, the error is presumed to be prejudicial unless the State can prove beyond a reasonable doubt the jury would have reached the same verdict had the error not occurred. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Thus, the State must convince this Court beyond a reasonable doubt that the guilty verdicts in this case were not attributable to the erroneously admitted evidence. *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). The State cannot meet that burden here. The jury heard an extensive amount of evidence regarding Mr. Shirk's prior sexual misconduct. That evidence was also woven into the thread of argument presented by the State in closing. It is impossible to now remove that improperly included evidence, or more importantly to guess at what the jury might have done without it.

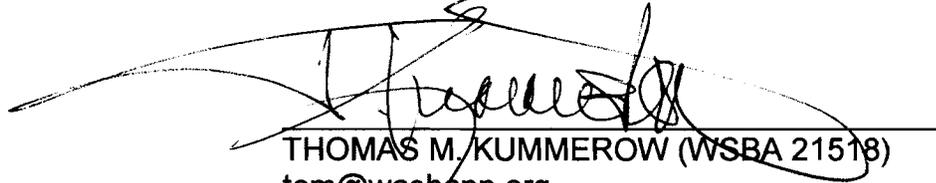
The State cannot prove beyond a reasonable doubt that the jury's verdict was not attributable to the erroneously admitted evidence. This Court must reverse Mr. Shirk's conviction.

E. CONCLUSION

For the reasons stated, Mr. Shirk requests this Court reverse his convictions and remand for a new trial.

DATED this 28th day of October 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tom Kummerow', is written over a horizontal line. The signature is stylized and somewhat cursive.

THOMAS M. KUMMEROW (WSBA 21518)  
tom@washapp.org  
Washington Appellate Project – 90152  
Attorneys for Appellant

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

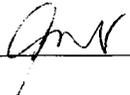
STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 66926-5-I
v.	)	
	)	
JERRY SHIRK,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28<sup>TH</sup> DAY OF OCTOBER, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] JERRY SHIRK 347093 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 28<sup>TH</sup> DAY OF OCTOBER, 2011.

X \_\_\_\_\_ 

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710