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COURT OF APPEALS

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STATE OF WASHINGTON

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**Court of Appeals No. 40116-9-II**

**COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

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**STATE OF WASHINGTON**

**Plaintiff/Respondent,**

**v.**

**MARK LEROY CHRISTENSEN,**

**Defendant/Appellant.**

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**BRIEF OF APPELLANT**

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**Appeal from the Superior Court of Pierce County,  
Cause No. 07-1-04299-9  
The Honorable Ronald E. Culpepper, Presiding Judge**

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**Sheri Arnold, WSBA No. 18760  
Attorney for Appellant  
P.O. Box 7718  
Tacoma, Washington 98417  
(253) 759-5940**

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## **I. ASSIGNMENTS OF ERROR**

1. RCW 10.58.090 is facially unconstitutional where it violates a defendant's fundamental right to be presumed innocent.
2. As applied in this case, RCW 10.58.090(5) violates Mr. Christensen's right to fair trial and the presumption of innocence.
3. The trial court erred in admitting evidence of the 1997 incident involving D.S. under RCW 10.58.090 where the State failed to present sufficient evidence to establish by a preponderance of the evidence that the incident was one of sexual misconduct on the part of Mr. Christensen.
4. The trial court erred in admitting the evidence of the 1997 incident involving D.S. under ER 404(b).
5. Introduction of the evidence of the 1997 incident deprived Mr. Christensen of a fair trial.
6. The Findings of Fact entered by the trial court improperly invaded the province of jury.
7. The Findings of Fact entered by the trial court violate the appearance of fairness doctrine.
8. Insufficient evidence was presented at the hearing regarding the admissibility of the 1997 incident to support findings of fact numbers 3, 4, and 5.
9. It was prosecutorial misconduct for the prosecutor to draft and submit findings to the court which were equal to a finding that Mr. Christensen was guilty as charged.
10. Error is assigned to Finding of Fact Regarding the Admission of "Other Sex Offense Evidence" under RCW 10.58.090 and ER 404(b) number 3 which reads,

The defendant began abusing [M.S.] when she was 10 years old.

11. Error is assigned to Finding of Fact Regarding the Admission of "Other Sex Offense Evidence" under RCW 10.58.090 and ER 404(b) number 4 which reads,

The abuse of [M.S.] started as the defendant would lay with her on the couch and would grind his body against [M.S.]'s. The defendant would lay behind [M.S.] and fondle her crotch area while pressing his body against hers. As the defendant would press his body against [M.S.], she could feel he had an erection.

12. Error is assigned to Finding of Fact Regarding the Admission of "Other Sex Offense Evidence" under RCW 10.58.090 and ER 404(b) number 5 which reads,

This behavior continued in the same manner on a daily basis until [M.S.] reached 13 years of age. At age 13 the defendant began having vaginal and oral intercourse with [M.S.].

## **II. ISSUES PRESENTED**

1. Is RCW 10.58.090 facially unconstitutional where it allows prior uncharged acts to be admitted as offenses? (Assignment of Error No. 1)
2. Mr. Christensen's right to a fair trial where the statute permits un-charged acts to be admitted as evidence of prior "sex offenses?" (Assignment No. 2)
3. Does RCW 10.58.090 violate Mr. Christensen's right to a right to a presumption of innocence where the statute permits un-charged acts to be admitted as evidence of prior "sex offenses?" (Assignment of Error No. 3)
4. Did the trial court err in admitting evidence of the 1997 incident involving D.S. under RCW 10.58.090 where the State failed to present sufficient evidence to establish by

a preponderance of the evidence that the incident was one of sexual misconduct on the part of Mr. Christensen? (Assignment of Error No. 3)

5. Did the trial court err in admitting the evidence of the 1997 incident involving D.S. under ER 404(b)? (Assignment of Error No. 4)
6. Did the introduction of irrelevant yet highly prejudicial evidence deprive Mr. Christensen of a fair trial? (Assignments of Error Nos. 1, 2, 3, 4, and 5)
7. Did the trial court invade the province of the jury to determine Mr. Christensen's guilt where the trial court's factual findings regarding the admission of the 1997 incident include findings that Mr. Christensen was guilty of all crimes charged? (Assignments of Error Nos. 6, 10, 11, and 12)
8. Did the trial court violate the appearance of fairness doctrine by entering findings regarding the admissibility of the 1997 incident which indicated that the trial court had prejudged Mr. Christensen's guilt and was therefore non-neutral? (Assignments of Error Nos. 7, 9, 10, 11, and 12)
9. Did the State present sufficient evidence at the hearing regarding the admissibility of the 1997 incident involving D.S. to support findings numbers 3, 4, and 5? (Assignments of Error Nos. 8, 10, 11, and 12)
10. Was is prosecutorial misconduct for the prosecutor to draft and submit findings of fact regarding the admission of evidence under ER 404(b) and RCW 10.58.090 where the findings included findings that Mr. Christensen was guilty of all crimes charged? (Assignments of Error Nos. 9, 10, 11, and 12)

### **III. STATEMENT OF THE CASE**

#### *Factual and Procedural Background*

M.S. is the sister of D.S. and the daughter of Gail Christensen. RP 58, 260.<sup>12</sup> M.S. was born in October of 1987 and D.S. was born in October of 1983. RP 58, 262. In the fall of 1995, the family was living in South Dakota when Gail<sup>3</sup> began dating Mr. Mark Christensen and Mr. Christensen moved into the family's home. RP 63.

In the winter of 1997, D.S., Gail, and Mr. Christensen were watching a movie while sitting on the couch in the living room. RP 265. At some point, Gail became tired and went to bed, leaving D.S. and Mr. Christensen alone on the couch. RP 266. D.S. got up and got a blanket then laid back down on the couch together with Mr. Christensen with her back to his front. RP 265-267.

At some point, Mr. Christensen's hand came over D.S.'s leg and massaged her crotch area. RP 267-268. D.S. could feel Mr. Christensen's erect penis against her back. RP 268-269. Mr. Christensen's hand unbuttoned D.S.'s pants and began to unzip her zipper. RP 268-269. D.S. moved Mr. Christensen's hand away and Mr. Christensen stood up, apologized, and went to his bedroom. RP

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<sup>1</sup> M.S. and D.S. are the alleged victims of sexual misconduct by Mr. Christensen occurring when both M.S. and D.S. were juveniles. Although both M.S. and D.S. were adults at the time of trial, in an abundance of caution, they will be referred to by their initials to protect their privacy.

<sup>2</sup> Mr. Christensen's first trial ended in a hung jury. References to the report of proceedings will be to the transcript of Mr. Christensen's second trial, unless otherwise noted. Where reference is made to the transcript of Mr. Christensen's first trial, the date of the proceeding will be given following the page number referenced.

<sup>3</sup> Gail Christensen did not marry Mr. Christensen until late 2008. For clarity's sake, she will be referred to as Gail. No disrespect is intended.

269.

At school the next day, D.S. told her friend, C.P., what had happened. RP 271. D.S. went to C.P.'s house after school and told C.P.'s mother what had happened. RP 271-272. D.S. called Gail at work and told her to pick D.S. up at C.P.'s house. RP 272. When Gail arrived, D.S. told her what had happened. RP 273. D.S. told Gail that she thought she heard Mr. Christensen snore. RP 369. Gail told D.S. that they needed to go and talk to Mr. Christensen and explained to D.S. that, while sleeping, Mr. Christensen sometimes pulled Gail close to him and would touch her. RP 370. D.S. acknowledged to Gail that there was a possibility that Mr. Christensen mistook D.S. for Gail since D.S. and Gail were about the same size. RP 370. D.S. acknowledged that it might have been an accident. RP 370-371.

Gail and D.S. returned home and spoke to Mr. Christensen about the incident. RP 274, 371. Mr. Christensen cried and apologized to D.S. RP 274, 371.

In 1997 or 1998, the family moved to Lakewood, Washington. RP 64-65. In 1999, D.S. moved to Kansas to live with her biological father. RP 68-69.

When M.S. was 14, she was sexually assaulted while attending Clover Park High School. RP 113-114. M.S. went to weekly counseling as a result of this incident. RP 115. M.S. was candid with

her counselor and told her counselor that, prior to the sexual assault at school, M.S. had never experienced anything like that before. RP 115. The counselor specifically asked M.S. if M.S. had ever been molested or seen a man's penis before and M.S. said she had not. RP 116. M.S.'s counselor and mother both asked M.S. if she was sexually active and M.S. told them both no. RP 117.

In 2003, when M.S. was 15, she moved out of the Lakewood home and moved in with D.S. and her biological father. RP 108-109. M.S. lived with her biological father until she was 18, when she moved out and got her own apartment. RP 118.

In December of 2006, M.S. was living in Missouri and attended a small party at her boyfriend's house with her sister, D.S. RP 120-121, 209-211, 283-284. There was nothing to eat at the party, but both M.S. and D.S. drank rum for several hours, despite M.S. being only 18 years old. RP 121, 210-212, 284. During the course of a discussion which involved "trashing" Mr. Christensen, M.S. told D.S. that Mr. Christensen had raped her. RP 121, 212-213, 284. D.S. did not ask M.S. what she meant by her comment and did not ask M.S. for any details. RP 284.

D.S. was upset about M.S.'s accusations, so M.S. and D.S. told their biological father about M.S.'s accusations. RP 122, 285-286. M.S., D.S., and their father decided to tell M.S.'s mother and then the

police. RP 123, 286. D.S.'s mother was living Utah at the time, and M.S. wanted to tell her in person, so M.S. and D.S. bought their mother, Ms. Gail Christensen, a plane ticket to Georgia so she could attend the birthday party of D.S.'s son. RP 123, 287.

After spending a night drinking with D.S. and D.S.'s husband at a night club, M.S. told Gail that Mr. Christensen had raped her. RP 232-235.

M.S. told Missouri police about her alleged rape as soon as she got back to Missouri from Georgia. RP 128. M.S. never told anyone the full details of the alleged rape until she was interviewed by police. RP 221.

Because the alleged rape occurred in Lakewood, Washington, the Missouri police advised M.S. to contact Lakewood police. CP 4-5.

On August 20, 2007, Mr. Christensen was charged with one count of child molestation in the first degree, two counts of rape of a child in the second degree, and two counts of rape of a child in the third degree, with M.S. as the alleged victim of all charges. CP 1-3.

On March 18, 2009, the State gave notice pursuant to RCW 10.58.090 that it was seeking to introduce evidence of the alleged sexual assault committed by Mr. Christensen against D.S. CP 12-13.

On March 27, 2009, trial counsel for Mr. Christensen moved to exclude reference to any prior alleged bad acts of Mr. Christensen

under ER 404(b), and specifically moved to exclude evidence regarding the prior alleged assault against D.S. CP 19-25.

On April 3, 2009, the State filed a “Memorandum of Authorities in Support of the Admission of ‘Other Sex Offense Evidence’ Under RCW 10.58.090 and ER 404(b).” CP 33-52.

On April 8, 2009, trial counsel for Mr. Christensen filed a memorandum titled “Defendant’s Opposition to State’s Memorandum RE: ‘Other Sex Offense Evidence’.” CP 54-58.

On April 13, 2009, a hearing was held to determine the admissibility of evidence of the alleged sexual assault against D.S. RP 94-132, 4-13-09. D.S. testified at this hearing and recounted her recollection of the 1997 event. RP 94-111, 4-13-09.

The State argued that evidence of this prior incident was admissible under RCW 10.58.090 as evidence of a prior sex offense committed by Mr. Christensen. RP 112, 4-13-09. The State also argued that this evidence was admissible under ER 404(b) and ER 403 as evidence of a common scheme or plan “or some other exception to the rule under 404(b),” as relevant for proving an element of the crimes charged, and that it was admissible to rebut Mr. Christensen’s defense of denial. RP 112-117, 122-123, 4-13-09. Citing *State v. Sexsmith*, 138 Wn.App. 497, 157 P.3d 901 (2007) and *State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003), the State argued that evidence of the

incident with D.S. was admissible under ER 403 since such evidence was not more prejudicial towards Mr. Christensen than it was probative of any issue before the jury. RP 117, 4-13-09.

Trial counsel for Mr. Christensen argued that the evidence was not evidence of a common scheme or plan, that the evidence was not evidence of a lustful disposition on the part of Mr. Christensen towards M.S., that it was not relevant to prove any element of the crime charged or to rebut the defense. RP 118-122, 4-13-09. Trial counsel for Mr. Christensen informed the court that she believed RCW 10.58.090 was constitutional, but argued that the statute incorporated the rules of evidence and that the evidence of the incident involving D.S. was inadmissible under the rules of evidence. RP 120-121, 4-13-09.

The trial court held that the State had proven, by a preponderance of the evidence, that the 1997 incident involving D.S. occurred and constituted a sex offense under RCW 10.58.090(4). RP 127-128, 4-13-09. The court also found that the evidence was not barred by ER 403. RP 131, 4-13-09. The trial court acknowledged that the State was asking the court to find that the evidence was also admissible under ER 404(b), but did not rule on that issue at the time of the April 13, 2009 hearing. RP 131-132, 4-13-09.

On April 15, 2009, trial counsel for Mr. Christensen filed a motion for reconsideration of the trial court's ruling admitting evidence

of the incident involving D.S. CP 98-122. In this motion, counsel argued that RCW 10.58.090 was an unconstitutional violation of the separation of powers doctrine and the due process clauses of the United States and Washington constitutions. CP 98-122. Trial counsel also argued that the evidence was inadmissible under ERs 401, 403, and 404(b). CP 98-122.

On April 15, 2009, a hearing was held during which the trial court ruled on whether or not the evidence of the incident involving D.S. was admissible under ER 404(b). RP 137-152, 4-15-09. The trial court held that the evidence was admissible under ER 404(b) as evidence of a common scheme or plan. RP 137-142, 4-15-09. Trial counsel for Mr. Christensen requested the trial court to conduct an on the record balancing of the probative value of the evidence against the prejudicial nature of the evidence but the trial court declined to do so and said the analysis was the same under ER 404(b) as it had been when he conducted the analysis on April 13, 2009 in determining that the evidence was admissible under RCW 10.58.090. RP 142-143, 4-15-09.

Following its ruling that the evidence was admissible under ER 404(b) as evidence of a common scheme or plan, the trial court indicated it would be willing to give a limiting instruction if Mr. Christensen proposed one. RP 151-152, 4-15-09. Trial counsel for Mr.

Christensen informed the court that it would be impossible to draft a limiting instruction regarding considering the evidence as part of a common scheme or plan since such an instruction would be an improper judicial comment on the evidence. RP 150, 4-15-09. Despite this, trial counsel for Mr. Christensen did propose two limiting instructions. CP 123-125.

Trial on the charges began on April 15, 2009. RP 167, 4-15-09. However, the trial ended with a hung jury and the trial court declared a mistrial. RP 712, 4-23-09, CP 128.

On August 20, 2009, the State filed a Memorandum of Authorities in Support of the Admission of 404(b) evidence. CP 159-166. This was apparently error since the matter referenced in this pleading is an entirely different case.

On November 16, 2009, Findings of Fact and Conclusions of Law regarding the admission of the incident involving D.S. under RCW 10.58.090 and ER 404(b) were filed. CP 167-171.

On November 18, 2009, trial counsel again submitted proposed limiting instruction regarding the D.S. incident. CP 201-203.

Trial counsel for Mr. Christensen renewed the motions in limine filed in the first trial. RP 26. The trial judge in Mr. Christensen's second trial adopted the rulings and analysis of the first trial judge with regard to the constitutionality of RCW 10.58.090 and with regards to

the admissibility of the incident involving D.S. under ER 404(b). RP 46-47.

At trial, M.S. testified and asserted that when she was ten years old, Mr. Christensen laid down on the couch behind her with his front to her back, reached over her, and began massaging her vagina through her jeans. RP 72-76. M.S. testified that Mr. Christensen turned her around so she was facing him. RP 77-78. M.S. testified that both she and Mr. Christensen were wearing jeans, but that Mr. Christensen's penis was erect and that he ground his erect penis against her vagina for 30 to 45 minutes before Gail came out and asked what was going on, to which Mr. Christensen responded that he was just saying good night to M.S. RP 75, 77-78, 80-81.

On cross-examination, M.S. admitted that the initial incident of grinding between her and Mr. Christensen had not been interrupted by Gail, and that M.S. had gotten up from the couch on her own to go to bed. RP 160-161.

M.S. testified that several days after this first incident Mr. Christensen was alone on the couch with M.S. and engaged in the same conduct as the first incident. RP 81-82.

M.S. testified that several months later Mr. Christensen began coming into her bedroom, massaging her, taking her clothes off, taking his clothes off, and grinding his penis against her vagina without

penetrating it. RP 83-86. M.S. testified that the grinding would continue for 30-45 minutes until Mr. Christensen would ejaculate onto her stomach. RP 86-87. M.S. testified that she would go into the bathroom and clean herself up, but that Mr. Christensen would remain in her bed for several hours each time it happened. RP 87.

M.S. testified that eventually Mr. Christensen had M.S. manipulate his penis with her hands until he ejaculated. RP 87. M.S. testified that beginning when she was 12 years old and continuing until she was 14 years old Mr. Christensen would penetrate her vagina with his fingers. RP 87-88. M.S. testified that Mr. Christensen would do this several times per week. RP 88. M.S. also testified that several times per week Mr. Christensen would have M.S. perform oral sex on him and that he would ejaculate in her mouth. RP 89-90.

M.S. testified that when she turned 14 Mr. Christensen began penetrating her vagina with his penis and that this continued for several years. RP 88-89. M.S. testified that the penile-vaginal intercourse occurred almost every night. RP 92-93.

M.S. testified that, prior to her turning 14, she performed oral sex on Mr. Christensen more than 10 times. RP 95-96. M.S. testified that after she turned 14 she did not perform oral sex as much. RP 96. M.S. testified that when she was younger than 14 Mr. Christensen digitally penetrated her vagina more than ten times and that this

conduct continued after she was 14. RP 96. M.S. testified that after she turned 14 she and Mr. Christensen engaged in a lot of penile-vaginal intercourse, including on Christmas morning in 2000 or 2001. RP 96-103. M.S. testified that during the summer she was 15 years old she spent time at her biological father's home and stayed there to live. RP 109-111.

M.S. also testified about being sexually assaulted at Clover Park High School and how she did not tell her counselor about the alleged sexual misconduct of Mr. Christensen towards her. RP 114-117.

D.S. testified at trial regarding the alleged sexual misconduct that occurred in 1997 between she and Mr. Christensen. RP 264-275.

The jury found Mr. Christensen guilty of all charges. RP 581-582, CP 235-239.

Notice of appeal was timely filed on December 28, 2009. CP 285-310.

#### **IV. ARGUMENT**

- 1. RCW 10.58.090 is facially unconstitutional where it violates a defendant's fundamental right to be presumed innocent.**

Constitutional questions and issues of statutory construction are both reviewed de novo. *City of Redmond v. Moore*, 151 Wn.2d 664,

668, 91 P.3d 875 (2004). “[A] successful facial challenge is one where no set of circumstances exists in which the statute, as currently written, can be constitutionally applied.” *Moore*, 151 Wn.2d 664, 669, 91 P.3d 875.

*a. RCW 10.58.090 only permits admission of evidence of prior crimes of sexual misconduct.*

In a criminal action where the defendant is accused of a sex offense, RCW 10.58.090 permits, ER 404(b) notwithstanding, the introduction of evidence of the defendant’s commission of another sex offense provided that the evidence of the other sex offense is not barred by ER 403. For purposes of this statute, RCW 10.58.090(4) defines “sex offense” as: any offense defined as a sex offense by RWC 9.94A.030; a violation of RCW 9A.44.096 (sexual misconduct with a minor in the second degree); and a violation of RCW 9.68A.090 (communication with a minor for immoral purposes).

RCW 9.94A.030 defines “sex offense” as:

(a)(i) A felony that is a violation of chapter 9A.44 RCW other than section 3 of this act

(ii) A violation of RCW 9A.64.020;

(iii) A felony that is a violation of chapter 9.68A RCW other than RCW 9.68A.080;

(iv) A felony that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes; or

(v) A felony violation of section 3(1) of this act (failure to register) if the person has been convicted of violating section 3(1) of this act (failure to register) on at least one prior occasion;

(b) Any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a sex offense in (a) of this subsection;

(c) A felony with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135; or

(d) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a sex offense under (a) of this subsection.

RCW 10.58.090 does not include a definition of the word “offense.” Where a term in a statute is not defined by that statute, courts may resort to a dictionary definition of that term. *State v. Watson*, 146 Wn.2d 947, 956, 51 P.3d 66 (2002).

An “offense” is defined as “the act of breaking the law.” Webster’s New College Dictionary, 1001 (2005). *Accord*, Black’s Law Dictionary (7<sup>th</sup> ed., 1999) p. 1108 (“offense” is defined as “a violation of the law”).

A close review of the various definitions of “sex offense” adopted under RCW 10.58.090(4) reveals that only acts which are felonies or violations of various statutes are considered to be “sex offenses” for purposes of RCW 10.58.090. Thus, for an act to be admissible as a sex offense under RCW 10.58.090(4), the act must be an “offense,” or, in other words, an act which has been determined to

be a crime.

This interpretation of RCW 10.58.090(4) as allowing admission only of acts which have previously been determined to be crimes is supported by the definition of the word “offense” as outlined above.

- b. *RCW 10.58.090(5) violates the right to a fair trial and the presumption of innocence where it permits admission of uncharged conduct as a prior “offense.”*

The fundamental right to a fair trial is guaranteed by the United States and Washington Constitutions. U.S. Const. amends. VI and XIV; Const. art. I, § 22. Importantly, the presumption of innocence is considered a “basic component” of a fair and impartial trial under our system of criminal justice. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976).

The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice. Long ago this Court stated:

“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.” *Coffin v. United States*, 156 U.S. 432, 453, 15 S.Ct. 394, 403, 39 L.Ed. 481, 491 (1895).

To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative

evidence and beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368, 375 (1970).

*Estelle*, 425 U.S. at 503, 96 S.Ct. 1691 48 L.Ed.2d 126.

“A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial.” *State v. Miles*, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). The prejudice potential of prior acts is at its highest in sex cases. *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982).

Under RCW 10.58.090(5), “uncharged conduct is included in the definition of ‘sex offense.’” It is this section of the statute which renders RWC 10.58.090 unconstitutional.

As stated above, an act is not an “offense” unless that act has been determined to be a violation of some law. However, as cited above, it is a fundamental principle of American jurisprudence that a defendant is innocent until the State has proven the defendant guilty beyond a reasonable doubt. To establish that a defendant has committed an act that constitutes a breach of the law, the State bears the burden of proving that the defendant’s act meets each element of a crime beyond a reasonable doubt. *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). Thus, where an act is “uncharged conduct,” i.e. has not been the basis of any criminal charge, that act cannot be said to

be an “offense.”

Mr. Christensen acknowledges that in *State v. Scherner*, 153 Wn.App. 621, 225 P.3d 248 (2009), Division I of the Court of Appeals rejected Scherner’s challenge to RCW 10.58.090 as permitting the admission of unproven misconduct evidence:

We begin our analysis by making some preliminary observations. First, contrary to Scherner’s characterization, nothing in the text of RCW 10.58.090 permits admission of “unproven misconduct evidence.” The language of the statute does not indicate that the proponent of admission of sexual offense evidence is relieved of the common law burden of proving by a preponderance of the evidence that the misconduct occurred. To the contrary, the legislative history states: in a criminal action charging a sex offense, evidence of the defendant’s commission of other sex offenses is admissible, notwithstanding Washington’s ER 404(b), if relevant to any fact in issue.

*Scherner*, 153 Wn.App. at 634, 225 P.3d 248. However, Division I’s analysis is flawed. The glaring flaw in the *Scherner* court’s logic is that ER 404(b) was concerned only with prior bad acts, but RCW 10.58.090 is explicitly concerned with prior offenses. Not all acts are criminal offenses. Mr. Christensen’s case is a perfect example of the flaw in Division I’s reasoning.

In the instant case, it was undisputed that Mr. Christensen was laying on the couch with D.S. and that Mr. Christensen’s hand touched D.S.’s crotch area. However, it was highly disputed at the pretrial hearing on the admissibility of this evidence, at both trials, and is still

disputed on appeal that this act was anything other than an accidental unconscious act performed by Mr. Christensen while he was asleep. In order to have evidence of this act admitted under RCW 10.58.090, the State had the burden of establishing not only that the act occurred, but that the act that occurred was an offense. Under American jurisprudence, a defendant is presumed innocent until proven guilty, therefore the State has the burden of proving beyond a reasonable doubt to a jury that an act the State wishes to have considered to be an offense was, in fact, a criminal act.

Indeed, ER 402's mandate that irrelevant evidence is inadmissible supports the argument that RCW 10.58.090 only allows admission of acts which have already been proven to be sexual crimes. The stated legislative purpose of RCW 10.58.090 is as follows: "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." RCW 10.58.090 Historical and Statutory Notes. This is simply another way of saying that the Legislature wanted juries to have evidence of a defendant's alleged prior acts of sexual misconduct to permit juries to make the propensity inference that would otherwise be forbidden by ER 404(b). However, evidence of a defendant's prior acts only becomes relevant in this context if the State can demonstrate that the prior act was an act of sexual misconduct. For example, evidence that a man

gave his toddler-aged daughter a bath, without more, would be irrelevant in a later prosecution of that man for molesting or raping his daughter. Giving his child a bath is completely innocent and non-criminal conduct and would not be admissible as a prior “offense” under RCW 10.58.090 and would be barred by ER 402 as irrelevant. Evidence of acts which have not been proven to be sex offenses is simply irrelevant on the question of whether or not a defendant committed the crime for which he is currently charged. Unless the State can establish that the conduct sought to be introduced is, in fact, a sex crime, such evidence would be inadmissible under both ER 402 and RCW 10.58.090.

By permitting introduction of evidence of *uncharged* alleged sexual misconduct, RCW 10.58.090 relieves the State of its burden to demonstrate that the act was an offense. This violates a defendant’s right to a presumption of innocence because a defendant is presumed innocent of a criminal charge until the State has proven he or she is guilty beyond a reasonable doubt. If an act has not been the basis of a criminal charge, it is not a criminal act. If an act is not a criminal act, it is not an “offense,” and, therefore, would be inadmissible under RCW 10.58.090. Allowing the State to introduce evidence of uncharged alleged sexual offenses violates a defendant’s rights to be presumed innocent and to a fair trial.

2. **As applied in this case, RCW 10.58.090(5) violates Mr. Christensen's right to fair trial and the presumption of innocence by permitting introduction of prior conduct of Mr. Christensen without requiring that such prior conduct be proved to be a sex offense beyond a reasonable doubt.**

Alleging a statute is unconstitutional as-applied requires showing only that application of the statute to the party's specific actions is unconstitutional. *Moore*, 151 Wn.2d at 668-69, 91 P.3d 875. Statutes are presumed constitutional; the challenger has the burden of proving a statute unconstitutional beyond a reasonable doubt. *State v. Maciolek*, 101 Wn.2d 259, 676 P.2d 996 (1984); *State v. Dixon*, 78 Wn.2d 796, 479 P.2d 931 (1971). A decision that a statute is unconstitutional as applied prohibits future application of the statute in a similar context, but it does not totally invalidate the statute. *Moore*, 151 Wn.2d at 669, 91 P.3d 875.

As applied in this case, RCW 10.58.090(5) violated Mr. Christensen's right to a presumption of innocence in that the State was permitted to introduce evidence of the 1997 incident after establishing only that the 1997 incident *occurred* by a preponderance of the evidence, but ***not*** that Mr. Christensen's actions were an ***offense***. The introduction of this evidence greatly prejudiced Mr. Christensen since he was charged with a sex crime and the evidence was of a prior alleged sex crime "committed" in what could be argued was a manner

similar to the current allegations. Therefore, as discussed above, RCW 10.58.090(5) violated Mr. Christensen's right to a presumption of innocence and deprived Mr. Christensen of the right to a fair trial.

**3. The trial court erred in admitting evidence of the 1997 incident involving D.S. under RCW 10.58.090 where the State failed to present sufficient evidence to establish that the incident was one of sexual misconduct on the part of Mr. Christensen.**

As stated above, RCW 10.58.090 only permits admission of evidence of prior sex offenses or acts which have already been determined to be sex crimes. Prior to the admission of the evidence of the 1997 incident involving D.S., the State established only that Mr. Christensen's hand touched D.S.'s crotch area. However, as discussed above, The State never established that Mr. Christensen's conduct in 1997 was criminal conduct.

At the evidentiary hearing regarding the 1997 incident with D.S., Mr. Christensen did not dispute the incident occurred. D.S.'s testimony was that when D.S. confronted Mr. Christensen about what had happened he told her he had fallen asleep and thought D.S. was Gail. RP 106-107, 4-13-09. D.S. also testified that Gail believed Mr. Christensen and accepted his explanation. RP 107, 4-13-09. Thus, at best, the State's evidence presented at the evidentiary hearing established only that the conduct occurred, but not that the conduct was an "offense" as required by RWC 10.58.090(5). Thus, the State

presented insufficient evidence to establish that the 1997 incident was admissible under RCW 10.58.090 and the admission of this highly prejudicial evidence deprived Mr. Christensen of a fair trial.

**4. The trial court abused its discretion in admitting the evidence of the 1997 incident involving D.S. under ER 404(b).**

ER 404(b) provides,

(b) Other Crimes, Wrongs, or Acts. 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.

“A trial court must always begin with the presumption that evidence of prior bad acts is inadmissible.” *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

A trial court’s ruling under ER 404(b) will not be disturbed absent a manifest abuse of discretion such that no reasonable judge would have ruled as the trial court did. *State v. Mason*, 160 Wn.2d 910, 933-934, 162 P.3d 396 (2007) , *cert. denied* 128 S.Ct. 2430, 171 L.Ed.2d 235 (2008). A trial court’s balancing of whether or not a piece of evidence is more prejudicial than probative under ER 403 is reviewed for abuse of discretion. *In re Detention of Halgren*, 156 Wn.2d 795, 802, 132 P.3d 714 (2006).

A trial court abuses its discretion when its decision is

“manifestly unreasonable or based on untenable grounds.”

*Grandmaster Sheng-Yen Lu v. King County*, 110 Wn.App. 92, 99, 38

P.3d 1040 (2002). A court’s decision is manifestly unreasonable

if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

*Grandmaster Sheng-Yen Lu*, 110 Wn.App. at 99, 38 P.3d 1040.

“[E]vidence of a defendant’s prior misconduct is inadmissible to demonstrate the accused’s propensity to commit the crime charged.”

*State v. Fisher*, 165 Wn.2d 727, 744, 202 P.3d 937 (2009), *citing* ER

404(b); *State v. Holmes*, 43 Wn.App. 397, 400, 717 P.2d 766, *review denied* 106 Wn.2d 1003 (1986) (rejecting the “once a thief, always a thief” rationale for admitting evidence).

“If the only relevancy is to show propensity to commit similar acts, admission of prior acts may be reversible error.” For example, in *State v. Wade*, 98 Wn.App. 328, 989 P.2d 576 (1999), in Wade’s trial for possession with intent to deliver, the court allowed the State to introduce evidence of two prior instances of drug dealing to show Wade’s intent. The conviction was reversed. The appellate court held that the prior instances of drug dealing demonstrated intent only through an inference of propensity: because the defendant had the intent in the past, he therefore had the same intent when committing the crime charged. *Wade*, 98 Wn.App. at 336, 989 P.2d 576.

*State v. Pogue*, 104 Wn.App. 981, 985, 17 P.3d 1272 (2001).

The State must meet a substantial burden when attempting to bring in evidence of prior bad acts under one of the exceptions to this general prohibition: 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.” *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

Substantial prejudicial effect is inherent in ER 404(b) evidence. *State v. Lough*, 125 Wn.2d 847, 863, 889 P.2d 487 (1995). Therefore, prior bad acts are admissible only if their probative value is substantial. *Lough*, 125 Wn.2d at 863, 889 P.2d 487.

“In weighing the admissibility of the evidence to determine whether the danger of unfair prejudice substantially outweighs probative value, a court considers (1) the importance of the fact that the evidence intends to prove, (2) the strength of inferences necessary to establish the fact, (3) whether the fact is disputed, (4) the availability of alternative means of proof, and (5) the potential effectiveness of a limiting instruction.” *State v. Kendrick*, 47 Wn.App. 620, 628, 736 P.2d 1079, *review denied* 108 Wn.2d 1024 (1987).

- a. *Evidence of the 1997 incident was inadmissible as part of a common scheme or plan.*

The trial court held that the evidence was admissible under ER 404(b) as evidence of a common scheme or plan. RP 137-142, 4-15-09.

There are two different situations wherein the “plan” exception to the general ban on prior bad acts evidence may arise. One is where several crimes constitute constituent parts of a plan in which each crime is but a piece of the larger plan. There is no question that evidence of a prior crime or act would be admissible in such a case to prove the doing of the crime charged. A simple example would be a prior theft to acquire a tool or weapon to perpetrate a subsequently executed crime. The other situation arises when an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes.

*State v. Lough*, 125 Wn.2d 847, 854-855, 889 P.2d 487 (1995).

The issue in *Lough* was the admissibility of evidence of the second type of common scheme or plan, which involves prior acts as evidence of a single plan used repeatedly to commit separate, but very similar, crimes. The *Lough* court held that evidence of this second type of plan may be admissible if the State establishes a sufficiently high level of similarity:

To establish common design or plan, for the purposes of ER 404(b), the evidence of prior conduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations.

*Lough*, 125 Wn.2d at 860, 889 P.2d 487.

Like *Lough*, this case involves the second type of common scheme or plan. However, as argued above, the State failed to ever establish that the 1997 incident was one of sexual misconduct. If the 1997 incident was not an incident of sexual misconduct, then it cannot be said to be part of a common scheme or plan to commit more sexual misconduct. It was manifestly unreasonable for the trial court to admit evidence of the 1997 incident where that incident was not demonstrated to be one of sexual misconduct.<sup>4</sup>

*b. ER 403 barred admission of the 1997 incident.*

Under ER 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. As discussed above, the State failed to establish that the 1997 incident was an incident of sexual misconduct. As a result, evidence of the 1997 incident has **no** probative value with regards to whether or not Mr. Christensen committed the alleged crimes against M.S. At the same time, as recognized in *Lough* and *Saltarelli*, substantial prejudicial effect is inherent in ER 404(b) evidence (*Lough*, 125 Wn.2d 847, 863, 889 P.2d 487) and the prejudice potential of prior acts is at its highest in sex cases. *Saltarelli*, 98 Wn.2d 358, 363, 655

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<sup>4</sup> Mr. Christensen acknowledges the holding of *State v. Ellis*, 21 Wn.App. 123, 124, 584 P.2d 428 (1978) that “if the judgment of a trial court can be sustained on any grounds, whether those stated by the trial court or not, it is [the] duty [of the court of appeals] to do so.” However, since the 1997 incident has never been established to be an incident of sexual misconduct, it is irrelevant and inadmissible under any of the exceptions to ER 404(b).

P.2d 697 (1982).

Evidence of the 1997 incident was irrelevant yet highly prejudicial to Mr. Christensen, therefore it was inadmissible under ER 403.

**5. Admission of evidence of the 1997 incident involving D.S. violated Mr. Christensen's right to a fair trial.**

An error in admitting evidence is grounds for reversal when it prejudices the defendant's right to a fair trial. *State v. Howard*, 127 Wn.App. 862, 871, 113 P.3d 511 (2005) (citing *Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983)), review denied, 156 Wn.2d 1014 (2006). In the context of evidentiary violations, error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. *Nghiem v. State*, 73 Wn.App. 405, 413, 869 P.2d 1086 (1994).

As stated above, evidence relating to the 1997 incident involving D.S. was never established to be an act of misconduct and was therefore irrelevant and inadmissible under ER 402, ER 404(b) and RCW 10.58.090. Further, due to the similarities of the 1997 incident

and the alleged instance of molestation in this case, introduction of evidence of the 1997 incident was highly prejudicial since the jury would be highly likely to use the evidence as propensity evidence and draw the inference that Mr. Christensen did it before to D.S., therefore he probably did it again to M.S.

The evidence presented at trial consisted of the testimony of D.S. and M.S. for the State and the testimony of Gail for Mr. Christensen. The main issue for the jury was credibility. If the jury believed D.S. and M.S., then Mr. Christensen was guilty. If the jury believed Gail, then Mr. Christensen was not guilty. The State even acknowledged that the main issue before the jury was a credibility determination. RP 433.

Absent evidence of the 1997 incident, the only evidence of Mr. Christensen's guilt would have been M.S.'s in court testimony. The evidence introduced at trial was that M.S. had never disclosed to anyone that Mr. Christensen was abusing her despite having the opportunity to tell her mother, the police, or even the counselor she saw following her rape at Clover Park High School. RP 111, 115-117. Without evidence of the 1997 incident, the jury would have had no evidence to corroborate M.S.'s testimony that Mr. Christensen molested her on a near daily basis in her bedroom for over four years undetected. The evidence of the 1997 incident with D.S., while not corroborating

any of M.S.' testimony regarding the alleged molestation, served to bolster M.S.'s credibility by giving the jury evidence from which it could infer Mr. Christensen's propensity to molest young girls. Absent this evidence, M.S.' testimony would have been far less credible.

The overwhelming body of evidence was not such that introduction of the evidence of the 1997 incident did not materially affect the outcome of Mr. Christensen's trial. The evidence both bolstered M.S.'s credibility and prejudiced the jury against Mr. Christensen by providing the jury a basis to make the inference that Mr. Christensen had a propensity to molest young girls. The erroneous introduction of this evidence violated Mr. Christensen's right to a fair trial.

**6. The Findings of Fact entered by the trial court improperly invaded the province of jury.**

It is the province of the jury in criminal cases to pass on the weight and sufficiency of the evidence; and when the court finds there is substantial evidence of a fact it must be left for the jury to say whether its probative force meets the standard required for a conviction, whether it convinces them beyond a reasonable doubt of the defendant's guilt.

*State v. Frye*, 53 Wn.2d 632, 633, 335 P.2d 594 (1959).

Findings of fact regarding the admission of the 1997 incident under RCW 10.58.090 and ER 404(b) numbers 3, 4, and 5 go far beyond the issue the trial court was required to rule on and invade the

province of the jury. Mr. Christensen was charged with four counts of child rape of M.S. and one count of child molestation of M.S. CP 1-3. Findings of fact numbers 3, 4, and 5 on the admissibility of the evidence do not involve factual findings about the 1997 incidents at all. CP 167-171. Instead, findings 3, 4, and 5 find that Mr. Christensen “began abusing [M.S.] when she as 10 years old” (Finding of Fact number 3), detail the “facts” of the alleged incidents of abuse (Finding of Fact number 4), and find that “this behavior continued in the same manner on a daily basis until [M.S.] reached 13 years of age. At age 13 the defendant began having vaginal and oral intercourse with [M.S.]” Finding of Fact number 5, CP 167-171. These findings have nothing to do with the admissibility of the evidence regarding the 1997 incident involving D.S., but deal entirely with the current allegations against Mr. Christensen.

As stated above, the determination of a defendant’s guilt rests with the finder of fact, in this case, the jury. The trial court’s findings that Mr. Christensen abused M.S. daily from age 10 to age 13 and beyond invaded the province of the jury to determine whether or not Mr. Christensen was guilty of the crimes charged. Either through design or scrivener’s error, the trial court invaded the province of the jury and erred when it entered findings of fact which were, in effect, findings that Mr. Christensen was guilty of the crimes charged.

**7. The Findings of Fact entered by the trial court violate the appearance of fairness doctrine.**

The appearance of fairness doctrine requires that judges not only actually be unbiased, but that they also appear to be unbiased. *State v. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973 (2010).

Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial and neutral hearing. *State v. Bilal*, 77 Wn.App. 720, 722, 893 P.2d 674, *review denied* 127 Wn.2d 1013, 902 P.2d 163 (1995). “The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial.” *State v. Madry*, 8 Wn.App. 61, 70, 504 P.2d 1156 (1972), *quoted in State v. Post*, 118 Wn.2d 596, 618, 826 P.2d 172 (1992). “Evidence of a judge’s actual or potential bias must be shown before an appearance of fairness claim will succeed.” *State v. Chamberlin*, 161 Wn.2d 30, 37, 162 P.3d 389 (2007).

Here, the findings of fact on the pre-trial hearing regarding the admissibility of the 1997 incidents reveal that the trial court had pre-judged Mr. Christensen’s guilt before any evidence of the current crimes had been presented. This is strong evidence of the trial court’s prejudice and a reasonably prudent, disinterested observer would readily observe that the trial judge was no longer fair, impartial, and

neutral.

**8. Insufficient evidence was presented at the hearing regarding the admissibility of the 1997 incident to support findings of fact numbers 3, 4, and 5.**

On appeal, the court reviews solely whether the trial court's findings of fact are supported by substantial evidence and, if so, whether the findings support the trial court's conclusions of law. The party challenging a finding of fact bears the burden of demonstrating the finding is not supported by substantial evidence.

*State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002).

No evidence regarding M.S. was presented at the pretrial hearing regarding evidence of the 1997 incident involving D.S. Despite this, the trial court entered findings of fact numbers 3, 4, and 5 which, as detailed above, deal exclusively with whether or not Mr. Christensen committed the crimes against M.S. as alleged in the current case.

No evidence was presented regarding the alleged sexual assaults against M.S., thus, there was insufficient evidence presented at the evidentiary hearing to support findings of fact numbers 3, 4, and 5.

**9. It was misconduct for the prosecutor to draft and submit findings to the court which were equal to a finding that Mr. Christensen was guilty as charged.**

A prosecuting attorney is a quasi-judicial officer. *See State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), *cert. denied*, 393 U.S. 1096, 89 S.Ct. 886, 21 L.Ed.2d 787 (1969). “[I]t is the duty of a prosecutor, as a quasi judicial officer, to see that one accused of a crime

is given a fair trial.” *State v. Gibson*, 75 Wn.2d 174, 176, 449 P.2d 692 (1969), *cert. denied*, 396 U.S. 1019, 90 S.Ct. 587, 254 L.Ed.2d 511 (1970).

The Findings of Fact and Conclusions of Law Regarding the Admission of “Other Sex Offense Evidence” under RCW 10.58.090 and ER 404(b) were drafted by the prosecuting attorney. This is clearly the case since the findings are printed on stationary from the prosecuting attorney’s office. CP 167-171.

As stated above, the findings of fact far exceeded the findings necessary for the trial court to rule on the issue of the admissibility of the evidence and invaded the fact-finding province of the jury. Further, findings 3, 4, and 5 were not supported by any evidence introduced in the hearing on the admissibility of the evidence. Having attended the hearing and performed the bulk of the examination of the sole witness called at the hearing, the prosecutor was fully aware of what evidence was introduced at the hearing and what issues were before the court at the hearing. That the prosecutor would draft these findings being aware that they were not supported in any manner by the facts introduced at the hearing and that the findings invaded the province of the jury is highly disturbing.

The prosecutor’s actions in this case are similar to, if not worse than the prosecutor’s actions in *State v. Reeder*, 46 Wn.2d 888, 285

P.2d 884 (1955). Reeder was charged with second-degree murder for the shooting death of Reeder's second wife's suspected lover. During the cross-examination of Reeder, the prosecutor held a complaint in a divorce action filed by Reeder's first wife, which action was never brought to trial. The prosecutor asked Reeder:

Q. Now, isn't it a fact, Mr. Reeder, that in this divorce action your wife, Josephine Epps-is that what you said?

A. Josephine Epps Taulbee, yes.

Q. That she stated that the defendant has struck this plaintiff on numerous occasions, and has threatened her with a gun?

A. I never threatened her with a gun.

The trial court allowed this question in view of Reeder's insanity defense. However, the court did not permit the divorce complaint to be read and refused to admit it in evidence.

During closing argument, the prosecutor three times alleged that Reeder had threatened his first wife with a gun. Reeder was convicted of second-degree murder and appealed arguing, inter alia, that the argument of the prosecutor was improper. Despite no objection to this argument being made at trial, the Washington Supreme Court vacated Reeder's conviction and remanded his case for a new trial. *Reeder*, 46 Wn.2d at 894, 285 P.2d 884. In reaching its decision that the prosecutor's comments were improper, the *Reeder* court reasoned as follows:

There is not one word of testimony in the record that the defendant threatened his first wife with a gun. The only testimony concerning that question is that he did not do so. Yet the deputy prosecutor in his closing argument said three different times, in arguing three different points, that he did. We do not believe that these misstatements of fact were made inadvertently. They were made deliberately. Furthermore, reference was made to the divorce complaint when the deputy prosecutor knew that the complaint was not in evidence. He knew that the court did not permit it to be placed in evidence. We realize that attorneys, in the heat of a trial, are apt to become a little over-enthusiastic in their remembrance of the testimony. However, they have no right to mislead the jury. This is especially true of a prosecutor, who is a quasi-judicial officer whose duty it is to see that a defendant in a criminal prosecution is given a fair trial. In *State v. Carr*, 160 Wn. 83, 294 P. 1016, 1019, we said:

‘The entire record discloses that the deputy prosecutor was overzealous in his studied attempt to parade before the jury incompetent and irrelevant matters. Vigorous counsel need vigorous discipline, at times, at the hands of the trial court. The prosecuting attorney is a quasi judicial officer and it is his duty to see that one accused of a public offense is given a fair trial. This court has frequently stated the rule as to what constitutes misconduct on the part of counsel. The following cases are decisive on the question. In *State v. Devlin*, 145 Wn. 44, 258 P. 826, 829, the prosecutor put the fact before the jury that the defendant's picture was in the rogue's gallery.’ The case was reversed. We said:

“The question is that of a fair and impartial trial.” In *State v. Pryor*, 67 Wn. 216, 121 P. 56, this court said: “A fair trial consists not alone in an observation of the naked forms of law, but in a recognition and a just application of its

principles.”

“It is the law of the land, a right vouchsafed by the direct written law of the people of the state. It partakes of the character of fair play which pervades all the activities of the American people whether in their sports, business, society, religion, or the law. In the maintenance of government to the extent it is committed to the courts and lawyers in the administration of the criminal law it is just as essential that one accused of crime shall have a fair trial as it is that he be tried at all, whether he be guilty or not, has his picture in the rouge's gallery or not. In the Pryor Case just referred to it was said that it must be remembered, as stated in *Hurd v. People*, 25 Mich. 405, that: ‘Unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained is unjust and dangerous to the whole community.’”

‘In the case of *State v. Montgomery*, 56 Wn. 443, 105 P. 1035, 1037, 134 Am.St.Rep. 1119, we said: ‘\* \* \* The safeguards which the wisdom of ages has thrown around persons accused of crime cannot be disregarded, and such officers are reminded that a fearless, impartial discharge of public duty, accompanied by a spirit of fairness toward the accused, is the highest commendation they can hope for. Their devotion to duty is not measured, like the prowess of the savage, by the number of their victims.’

*Reeder*, 46 Wn.2d at 892-893 285 P.2d 884.

Thus, like the prosecutor's knowingly false closing arguments in *Reeder*, the findings of fact drafted by the prosecutor in this case contain findings that the prosecutor was fully aware were not supported by the evidence introduced at the evidentiary hearing. However, the

prosecutor's actions in this case are even worse misconduct since the baseless assertions of the prosecutor in this case were not mere closing arguments to the jury but were the findings of fact of the trial court.

A perhaps even more troubling aspect of the prosecutor's intentional drafting of factual findings both unsupported by the record made during the evidentiary hearing and which invaded the province of the jury is the fact that the intentional inclusion of such flawed findings would not impact Mr. Christensen's case until it reached the appellate level. It is anticipated that the State will respond that any error in the drafting of findings of fact 3, 4, and 5 did not prejudice Mr. Christensen because the jury would never have been aware of the findings entered by the trial court and the trial court's ruling would have no impact on the juror's deliberations. However, the impact of findings of fact entered in the trial court is far more profound during the appellate phase of a criminal proceeding than at the trial level.

On appeal, findings of fact to which error is not assigned are treated as verities. *State v. Bliss*, 153 Wn.App. 197, 203, 222 P.3d 107 (2009). It is doubtless that the prosecutor who drafted these findings was well aware of this principle. Thus, the only possible motivation for the prosecutor to draft three separate findings of fact on the admissibility of the 1997 incident which include findings unsupported by evidence introduced at the hearing and findings that the defendant

is guilty as charged would be to have those findings be part of the record in an attempt to “sneak them by” unwary appellate counsel who might fail to challenge them. Had Mr. Christensen’s appellate counsel failed to challenge findings of fact numbers 3, 4, and 5, the prosecutor could have argued that those findings represented the trial court’s factual findings that Mr. Christensen had committed the crimes charged and, since those findings hadn’t been challenged, they were verities on appeal.

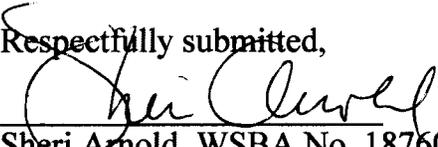
The actions of the prosecutor in attempting to bury this potential hazard in the trial record in an attempt to combat appellate arguments is contrary to the prosecutor’s role as an officer of the court to ensure that Mr. Christensen received a fair trial.<sup>5</sup>

## VI. CONCLUSION

For the reasons stated above, this court should vacate Mr. Christensen’s convictions and remand his case for a new trial.

DATED this 26<sup>th</sup> day of July, 2010.

Respectfully submitted,

  
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Sheri Arnold, WSBA No. 18760  
Attorney for Appellant

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<sup>5</sup> Additionally, the knowing drafting of findings of fact not supported by the trial record and the submission of those findings to the trial court for entry into the record violated the prosecutor’s ethical obligation under RPC 3.3(a)(1) that “A lawyer shall not knowingly make a false statement of fact or law to a tribunal.”

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on July 26, 2010, she delivered in person to the: Pierce County Prosecutor's Office, County-City Building, 910 Tacoma Avenue South, Tacoma, Washington 98402, and by United States Mail to: appellant, Mark L. Christensen, c/o Gail Christensen, 5375 Colter Drive, Kearns, Utah 84118, true and correct copies of this Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on July 26, 2010.

STATE OF WASHINGTON  
BY ca  
Clerk

Norma Kinter  
Norma Kinter