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A. ASSIGNMENTS OF ERROR.

1. The trial court denied Michael Lopez a fair trial and his right to be tried on the charged offense by admitting unduly prejudicial propensity evidence regarding a 16 year-old conviction, 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. RCW 10.58.090 violates the separation of powers under the state and federal constitutions.

4. In the absence of evidence to support it, the court erred in entering Finding of Fact 6e.

5. In the absence of evidence to support it, the court erred in entering Finding of Fact 6g.

6. To the extent it is a finding fact and in the absence of evidence to support it, the court erred in entering Conclusion of Law 1.

7. The trial court exceeded its sentencing authority in imposing certain costs as a part of its judgment.

8. The court's order that Mr. Lopez pay the costs of incarceration violates RCW 9.94A.760.

9. Finding 2.5 in the Judgment and Sentence is unsupported by substantial evidence in the record.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. RCW 10.58.090 permits a court to admit as propensity evidence prior convictions of sexual offenses 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 a prior crime deny Mr. Lopez a fair trial and violate his right to be tried only for the offense charged?

2. The court admitted the propensity evidence without meaningfully weighing the factors mandated by RCW 10.58.090 and by ignoring the factors that weighed against admissibility. Did the court misunderstand or disregard the mandatory statutory criteria of RCW 10.58.090?

3. Under the constitutionally required 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?

4. The trial court imposed costs for court-appointed counsel and a sheriff's fee. The State did not present any evidence from which the court could find any of these costs or amounts were actually incurred. In the absence of proof of the actual costs incurred, did the trial court err in imposing these costs?

5. The Due Process and Equal Protection Clauses of the Fourteenth Amendment prevent the imposition of costs on a defendant following a criminal trial where the defendant lacks the present and/or future ability to pay those costs. More specifically, RCW 10.01.160(3) requires a court make such a determination prior to imposing costs. In the absence of any evidence of his ability to pay, the trial court made such a finding and imposed costs as a part of its judgment. Does the imposition of court costs deprive Mr. Lopez his rights to equal protection and due process?

C. STATEMENT OF THE CASE.

In June 2009, Mr. Lopez, along with his wife, Cindy, and twelve year-old stepdaughter, L.M., moved to Mason County from California. RP 207. That fall, L.M. told one of her new classmates that she was having a problem with her stepfather. RP 153. L.M.

alleged that on two occasions Mr. Lopez had touched her inappropriately.

Specifically, L.M. alleged that shortly after their move, she had asked Mr. Lopez if she could go to McDonalds. RP 219. According to L.M., Mr. Lopez responded “you know what to do.” Id. In response, L.M. rubbed his penis for a short period. RP 219-20. On a second occasion, L.M. alleged she asked Mr. Lopez if she could have ice cream. RP 225. According to L.M., Mr. Lopez responded by telling her to take off her shirt, touched her breast, and said she was beautiful. RP 225-28.

Ms. Lopez, who was unemployed in the months following the family’s move, testified that she did not notice any suspicious activity between her husband and daughter. RP 277, 281. Ms. Lopez also testified her daughter did not tell her of any problems. RP 281

The State charged Mr. Lopez with two counts of second degree child molestation. CP 63-64. At trial, the court ruled that under RCW 10.58.090, the State could offer as propensity evidence that in 1994 Mr. Lopez was convicted of the offense of communicating with a minor for immoral purposes. CP 58-62; RP 263. A jury convicted Mr. Lopez of both counts. CP 34-35.

D. ARGUMENT.

1. MR. LOPEZ 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. United States v. Salerno, 481 U.S. 739, 750, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987); U.S. Const. Amend. XIV; Const. Art. I, §§ 3, 22. Erroneous evidentiary rulings 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 has a fundamental right to be tried only for the offense charged. State v. Mack, 80 Wn.2d 19, 21, 490 P.2d 1303 (1971); Const. Art. I, §22; U.S. Const. Amend. V. 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 state constitutional due process clause and fundamental notions of fairness, even though the trial court weighed the probative value of 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 allowed the trial court to balance the probative value of evidence against the

potential for prejudice. State v. Ellison, 239 S.W.3d 603, 605-06 (Mo. 2007).

Although the Court of Appeals has upheld the constitutionality of RCW 10.58.090, the Supreme Court is presently reviewing these challenges.<sup>1</sup> Moreover, even if RCW 10.58.090 was constitutionally applied in those cases, in Mr. Lopez'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 misapplied RCW 10.58.090. 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, the court admitted evidence that Mr. Lopez had pleaded guilty to the charge of Communication with a Minor for Immoral Purposes in 1994. CP 58-62.

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;

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<sup>1</sup> State v. Scherner, 153 Wn.App. 621, 225 P.3d 248 (2009), rev. granted, 168 Wn.2d 1036 (2010); State v. Gresham, 153 Wn.App. 659, 223 P.3d 1194 (2009), rev. granted, 168 Wn.2d 1036 (2010).

- (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).

In its ruling, the court addressed each of the factors but effectively disregarded those which did not support admission. For example, the court noted there was but a single prior offense and noted there had been a significant lapse of time with no intervening events. But after acknowledging this, the court did not in any meaningful way weigh the impact of those three facts on its decision to admit the evidence. The court essentially disregarded the factors weighing against admission to focus instead upon the factors supporting admission.

In the final balance the court found the evidence necessary because the State's "case rests on the testimony of the alleged victim, and no other scientific, forensic, medical, or psychological witnesses are available." CP 61. But that is not a unique

circumstance in a prosecution of child molestation. While the court speculated the evidence was necessary to assist the jury weighing the victim's credibility, nowhere in that analysis did the court explain how an isolated and unrelated event 16 years earlier made the victim in this case more or less credible. Indeed, there is no logical relevance to such evidence - its existence does not logically make L.M. more or less credible. The only purpose served by the evidence was as bald propensity evidence.

The court deemed the evidence "necessary" because it would be "helpful" in proving the State's case. CP 60. 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 equating "helpful" with "necessary" does not comply with the specific, express statutory requirement of "necessity." RCW 10.58.090(6)(e).

Beyond its erroneous balancing, the court refused to permit Mr. Lopez to offer evidence that the prior offense was merely a gross misdemeanor. RP 263. Defense counsel argued that evidence was relevant to the jury's assessment of what weight to give the propensity evidence. RP 264. Indeed, if the jury is going to be tasked with assessing the relevance of the prior offense, then the jury must be provided evidence of what the prior offense entailed, and part of that assessment is the degree of punishment which the law attaches to the behavior. Instead, the jury was presented with evidence of a prior conviction of "Communication

with a Minor for Immoral Purposes,” but was not informed that despite the ominous title, the offense is not so serious under the law -- merely a gross misdemeanor. If the classification of the prior offense is not relevant to the jury’s assessment, then the same is true of the name of the prior offense. If the only relevance is the existence of a prior offense then that is all the jury should have heard.

In addition, having failed to properly identify either the probative value or the prejudice, the trial court could not properly weigh those two considerations as required by RCW 10.58.090(6)(g).

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 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, causing jurors to discount the accusation, should not justify the State’s reliance on past acts. It 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.

c. 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. Lopez 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. Jensen, 158 Wn.2d at 394; State v. Fields, 85 Wn.2d 126, 129, 530 P.2d 284 (1975); Const. art. IV, § 1. 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>2</sup>

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”).

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<sup>2</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

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, rev. 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

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for "taking and obtaining evidence").

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 the trial, Mr. Lopez should receive a new trial.

2. THE TRIAL COURT ERRED IN IMPOSING LEGAL FINANCIAL OBLIGATIONS IN EXCESS OF THOSE PERMITTED BY STATUTE AND WHICH WERE NOT SUPPORTED BY THE RECORD.

“A trial court only possesses the power to impose sentences provided by law.” In re the Personal Restraint Petition of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). RCW 10.01.160(1) permits the imposition of costs on a person convicted of a crime. A trial court errs when it imposes costs beyond those allowed by statute. State v. Hathaway, \_\_ Wn.App. \_\_, 251 P.3d 253, 264 (2011).

RCW 10.01.160 only permits the imposition of costs on a criminal defendant for those “expenses specially incurred by the state in prosecuting” and convicting the defendant. RCW 10.01.160(2). The judgment and sentence requires Mr. Lopez to pay \$744 for the “Sheriff's service fee.” CP 13. But there is no

evidence in the record of what this fee entails or what amount was actually incurred. Similarly, the judgment imposes a fee of \$1375 for appointed counsel, CP 13, but there is no evidence in the record of the actual cost of appointed counsel. Because there is no evidence in the record to establish the actual costs, the trial court erred in imposing these fees.

3. THE COURT'S FINDINGS IN THE JUDGMENT AND SENTENCE SUPPORTING THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS ARE UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

Courts may require an indigent defendant to reimburse the state for the costs only if the defendant has the financial ability to do so. Fuller v. Oregon, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992). To do otherwise would violate equal protection by imposing extra punishment on a defendant due to his poverty.

Curry concluded that while the ability to pay was a necessary threshold to the imposition of costs, a court need not make a specific finding of ability to pay; “[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs.” 118 Wn.2d at 916. Curry recognized, however, that both RCW

10.01.160 and the federal constitution “direct [a court] to consider ability to pay.” Id. at 915-16. In fact RCW 10.61.160(3) specifically states, “The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.”

Here, the court made an express and formal finding that Mr. Lopez had the ability to pay. CP 10 (Finding 2.5). A trial court’s findings of fact must be supported by substantial evidence. State v. Brockob, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing Nordstrom Credit, Inc. v. Dep’t of Revenue, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). Here, there is no evidence in the record to support a finding that Mr. Lopez had the ability to pay the \$3169 in costs imposed.

The court did not inquire into Mr. Lopez’s present financial ability. The trial court’s finding that Mr. Lopez had the ability to pay legal financial obligations is unsupported by the record and should be stricken. Moreover, because the record does not support a finding that Mr. Lopez has the present or future ability to pay costs, legal financial obligations may not be imposed. RCW 10.01.160(3); see also Fuller, 417 U.S. at 47-48; Curry, 118 Wn.2d at 915-16.

E. CONCLUSION.

For the foregoing reasons, Mr. Lopez respectfully requests this Court find he was denied a fair trial as well as a fair sentencing hearing due to the allegations of uncharged conduct, and order his cases remanded for further proceedings.

Respectfully submitted, this 27th day of June, 2011.

  
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