

FILED

FEB 26 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

28327-5-III

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION III

State of Washington
Respondent

v.

Rodolfo Ramirez Tinajero
Appellant

28327-5-III

On Appeal from the Yakima County Superior Court

Cause No. 07-1-01904-4

The Honorable Michael Schwab

BRIEF OF APPELLANT

Law Office of Jordan McCabe
P.O. Box 7212, Bellevue, WA 98008
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II. ASSIGNMENTS OF ERROR AND ISSUES

A. Assignments of Error

1. The trial court erroneously admitted accusations of prior sexual misconduct under ER 404(b).¹
2. The trial court erroneously admitted accusations of prior sexual misconduct under RCW 10.58.090.²
 - (a) RCW 10.58.090 is unconstitutional on its face, regardless of whether it is procedural or substantive.
 - (i) If RCW 10.58.090 is procedural, it violates the constitutional separation of powers doctrine.
 - (ii) If RCW 10.58.090 is substantive, it violates the constitutional prohibition against ex post facto laws.
 - (b) The trial court applied RCW 10.58.090 in violation of the savings clause of RCW 10.01.040,³ because RCW 10.58.090 went into effect after the relevant dates.

¹ 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. ER 404(b).

² “In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant’s commission of another sex offense or sex offenses is admissible, notwithstanding ER 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403.” RCW 10.58.090(1). The pertinent part of ER 403 provides, “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury[.]”

³ No offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, ***whether such repeal be express or implied***, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act, and no prosecution for any offense, or for the recovery of any penalty or forfeiture, pending at the time any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, but the same shall proceed in all respects, as if such provision had not been repealed, unless a contrary intention is expressly declared in the repealing act. Whenever any criminal or penal statute shall be

(c) RCW 10.58.090 is unconstitutional as applied to Appellant.

(i) The other accusation evidence enabled the State to present to the jury evidence obtained in an earlier investigation free of scrutiny in light of the Fourth Amendment and the rest of the Bill of Rights.

(ii) Using the prior accusation evidence, the State forced Appellant to choose between his Sixth Amendment right to testify in his own defense and his Fifth Amendment right to remain silent in the pending parallel prosecution.

(A) This is a structural error for which prejudice is presumed.

(B) If the error is not structural, Appellant was prejudiced because his testimony was essential to establish his credibility versus that of the alleged victim.

(d) The prior accusation evidence did not meet the requirements for admission under RCW 10.58.090.

(i) The court did not conduct an on-the-record evaluation of the statutory factors that ensure compliance with ER 403.

(ii) The State did not provide the mandatory notice imposed by RCW 10.58.090(2) as a

amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein. RCW 10.01.040 (emphasis added.)

prerequisite for admitting evidence otherwise precluded by ER 404(b).

(iii) The prior accusation evidence included a photomontage image of appellant from which a reasonably alert and intelligent juror would have inferred that Appellant was either convicted or suspected of yet another similar crime.

3. Appellant received ineffective assistance of counsel.
 - (a) Counsel failed to object to out-of-court testimonial statements by a 911 operator that were admitted in violation of the Sixth Amendment Confrontation Clause.
 - (b) Counsel failed to object to inadmissible hearsay by several prosecution witnesses.
4. The evidence was insufficient to prove a deadly weapon.
5. The court erroneously imposed a persistent offender sentence of life without possibility of parole based on a prior plea of guilty that did not qualify as a predicate offense.

B. Issues Pertaining to Assignments of Error

1. Was an unproven accusation of an unrelated sex offense months before the current alleged offense admissible under ER 404(b) to prove common scheme or plan?
2. If RCW 10.58.090 is procedural, is it facially invalid under the separation of powers doctrine?
3. If RCW 10.58.090 is substantive, is it facially invalid under the ex post facto doctrine?
4. As applied here, did RCW 10.58.090 violate the savings clause of RCW 10.01.040?
5. As applied to Appellant, did RCW 10.58.090 nullify the protection of art.1, § 7 and the Fourth Amendment by eliminating

the exclusionary rule regarding evidence unlawfully obtained in the other investigation?

6. As applied to Appellant, did RCW 10.58.090 create a structural constitutional error by conditioning his right to testify in this trial on foregoing his right to remain silent in the ongoing prosecution on the alleged prior conduct?

7. Did the RCW 10.58.090 evidence meet the statutory requirements for admission?

8. Did the State satisfy the mandatory notice requirements set forth in RCW 10.58.090(2)?

9. Did a photomontage admitted under RCW 10.58.090 open the back door to unexamined similar accusations?

10. Did out-of-court statements by an anonymous 911 operator constitute testimonial hearsay the admission of which violated the Confrontation Clause and *Crawford*⁴ ?

11. Where the verdict hung on the relative credibility of accuser and accused, did counsel's failure to object to inadmissible hearsay corroborating the accuser's account constitute ineffective assistance that resulted in reversible prejudice?

12. Did Appellant's prior *Alford*⁵ plea of guilty to burglary with sexual motivation constitute a predicate offense for a persistent offender sentence?

⁴ *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

⁵ *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

III. STATEMENT OF THE CASE

A. **Overview:** This case illustrates a worst-case scenario of what can happen when the Legislature intrudes into the domain of the Judiciary. All aspects of this trial were affected by due process land mines inherent in RCW 10.58.090, a statute that effectively repeals ER 404(b) in prosecutions for sex offenses.

On its face, RCW 10.58.090 violates the constitutional separation of powers and the prohibition against ex post facto laws. It also is unconstitutional as applied here because it abrogates the protections of Wash. Const. art 1, §§ 7, 9 and 22 and the Fourth, Fifth, and Sixth Amendments to the U.S. Constitution. As applied here, RCW 10.58.090 also violated Washington's saving statute, RCW 10.01.040. Moreover, even if RCW 10.58.090 were constitutional and applicable, the prosecutor and the court failed to comply with its requirements in this case.

The RCW 10.58.090 evidence led in turn to extensive, prejudicial hearsay, including violations of the Confrontation Clauses of Const. art 1, § 22 and the Sixth Amendment.

Finally, the trial court erroneously imposed a persistent offender sentence of life without the possibility of parole based on a 15-year-old *Alford* plea that does not constitute a predicate conviction.

B. Procedural Facts: A jury convicted Rodolfo Ramirez Tinajero of first degree rape while armed with a deadly weapon. RCW 9A.44.040(1)(a); RCW 9.94A.602; RCW 9.94A.533. CP 38, 40. The sentencing court concluded Mr. Tinajero was a persistent offender under RCW 9.94A.575 and RCW 9.94A.030(34). The predicate offense was 1^o burglary with sexual motivation to which Mr. Tinajero pleaded guilty in 1994. Findings of Fact and Conclusions of Law, CP 14-16. The court sentenced Mr. Tinajero to life in prison without possibility of parole, plus a 24-month weapon enhancement. CP8; RP 1314, 1318.

B. Substantive Facts: Yakima police arrested Mr. Tinajero on August 14, 2007. RP 997. The Information alleged that an act of sexual intercourse between Mr. Tinajero and Maria Valdez on August 6, 2007, was not consensual, but that Tinajero exerted forcible compulsion that included threatening Ms. Valdez with a knife. CP 99; RP 2.

At the jury trial, Ms. Valdez⁶ claimed she met Mr. Tinajero in the early morning of August 6, 2007, while she was out in the countryside looking for field work. RP 648-49. She stopped her car at an intersection and waited by the side of the road, but could not explain what she was waiting for. Tinajero arrived and asked if she was looking for work. RP 651, 683. Ms. Valdez then followed Mr. Tinajero in her car as he left the

⁶ The prosecutor consistently addressed Ms. Valdez as 'Maria.' RP 646-680.

highway. RP 653. She said Tinajero stopped, showed a knife, forced her out of her car and into an apple orchard, and made her submit to penile-vaginal intercourse. RP 658.

According to Mr. Tinajero, Ms. Valdez initiated the contact at the stop sign, saying she desperately needed money, and offering to have sex with him for \$50.00. RP 1071, 1074. There were no witnesses.

To rebut the consent defense, the State moved to admit evidence under RCW 10.58.090. The police had charged Tinajero with an unrelated attempted assault that was the subject of a pending prosecution. RP 5. A woman called Beatriz Serrano claimed a man with a knife tried to rape her in an orchard four months prior, on April 21, 2007. As of the Valdez trial date, the defense had not been able to interview Ms. Serrano. RP 9.

The court held an all-purpose pretrial hearing to determine (a) the admissibility under CrR 3.5 of Tinajero's statements to police; (b) whether to admit the RCW 10.58.090 evidence; and (c) what to do about an uncertified interpreter who translated at Tinajero's custodial interview. The focus continually switched back and forth. RP 502-598.

The State claimed it had established the Serrano incident by a preponderance of the evidence and that it was admissible under ER 404(b) as well as RCW 10.58.090 to prove intent, identity and common scheme or plan. RP 600-01. The defense argued that RCW 10.58.090 was

unconstitutional on its face. RP 3. The court decided the evidence was admissible under both ER 404(b) and RCW 10.58.090 to prove motive, opportunity, intent, and common scheme or plan. RP 612. Later, the court narrowed this to identity, intent and common plan. Conclusion 3, CP 27. The court found that the prior accusation evidence also satisfied ER 403. RP 612. The jury was not told that the State was currently proceeding against Tinajero for the Serrano incident. RP 612.

The court ruled that RCW 10.58.090 does not violate ex post facto law. CP 25. The court found the State satisfied the mandatory notice requirement. Finding 1, CP 26. The judge ruled the State could introduce testimony from Ms. Serrano and Sheriff's deputies Richard Mottice and Mike Russell as well as physical evidence including DNA evidence and a pruning tool. RP 796, 800.

After the State rested, Tinajero was obliged to forego testifying in his own defense because the court ruled that taking the stand to defend himself against the Valdez charge would open the door to cross examination about the Serrano charge. RP 1122-31.

The jury found Mr. Tinajero guilty. CP 38, 40. At sentencing, the court imposed a persistent offender sentence of life without the possibility of parole. The predicate offense was a 1994 conviction for 1^o burglary with sexual motivation, to which Mr. Tinajero had entered an *Alford* plea

of guilty on March 15, 1994 in Cause Number 94-1-00123-5. CP 99; RP 1304-05; Sentencing Exhibit SI-2, 1994 Statement on Plea of Guilty.

Mr. Tinajero appeals the judgment and sentence.

IV. **ARGUMENT**

A. THE UNRELATED SERRANO ACCUSATION WAS NOT ADMISSIBLE UNDER ER 404(b).

Evidence of other crimes is presumptively inadmissible to prove character to show action in conformity therewith. ER 404(b); *State v. Powell*, 126 Wn.2d 244, 258-259, 893 P.2d 615, 24 (1995). Such evidence may be admissible for other purposes, such as to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b); *Powell*, 126 Wn.2d at 259, citing *State v. Goebel*, 36 Wn.2d 367, 369, 218 P.2d 300 (1950).

In reviewing a 404(b) challenge, this Court considers the State’s theory for offering the evidence, the trial court’s theory for admitting it, and harmless error. *State v. Stanton*, 68 Wn. App. 855, 861, 845 P.2d 1365 (1993). The decision to admit or exclude ER 404(b) evidence is reviewed for abuse of discretion. *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). A trial court abuses its discretion if it relies on unsupported facts, takes a view that no reasonable person would take,

applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

Here, the State's theory for offering the prior bad acts evidence and the court's reasons for admitting it are erroneous under ER 404(b).

The State must prove the essential elements of the charged crime and the nonexistence of any defense that negates one of those elements. *State v. Clausing*, 147 Wn.2d 620, 627, 56 P.3d 550, 554 (2002), citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). To admit prior "bad acts" evidence, the State must prove by a preponderance of the evidence that the alleged misconduct actually occurred. ER 404(b); *State v. Lough*, 125 Wn.2d 847, 853, 864, 889 P.2d 487 (1995).

Once the court is satisfied the defendant in fact committed the misconduct, it must then identify a legitimate purpose for which the evidence is relevant. ER 404(b) excludes prior acts evidence if its sole relevance is to show propensity. *Lane*, 125 Wn.2d at 831-32; *Powell*, 126 Wn.2d at 259; Robert H. Aronson, *EVIDENCE IN WASHINGTON*, 404-10 (2d ed. 1994). Finally, the court weighs the probative value of the evidence against its potential prejudicial effect. *Lough*, 125 Wn.2d at 853.

The court concluded that Tinajero's RCW 10.58.090 objections were immaterial because the accusation was admissible under ER 404(b)

to prove (a) identity, (b) intent, and (c) a common scheme or plan. RP 600-01; 611. This was wrong.

(a) ***Identity Was Undisputed***: Uncharged misconduct evidence is not admissible under the identity exception unless identity is at issue. *State v. Thang*, 145 Wn.2d 630, 643, 41 P.3d 1159 (2002). Even then, the evidence is inadmissible on relevance grounds unless both crimes were committed by essentially unique means that demonstrate a pattern so peculiar that the uncharged and charged crimes must have been perpetrated by a single individual. *Id.*; *State v. Coe*, 101 Wn.2d 772, 777, 684 P.2d 668 (1984); Edward J. Imwinkelried, UNCHARGED MISCONDUCT EVIDENCE § 3:10, at 3-43 (1995).⁷

Here, Tinajero's identity was not at issue. He freely admitted having intercourse with Valdez. His defense was consent. RP 602. Moreover, the State had DNA evidence that rendered any additional identity evidence completely superfluous. RP 796, 800. And, as discussed below, the current and prior alleged incidents did not exhibit a pattern so unique as to create a signature.

The Court Confused "Intent" With "Guilt": Likewise, the court may not admit prior acts evidence to prove the defendant's state of mind

⁷ See also, Norman Krivosha et al., RELEVANCY: THE NECESSARY ELEMENT IN USING EVIDENCE OF OTHER CRIMES, WRONGS OR BAD ACTS TO CONVICT, 60 Neb. L. Rev. 657, 675 (1981).

unless mental state at the time of the alleged offense is relevant. *State v. Acosta*, 123 Wn. App. 424, 434-35, 98 P.3d 503 (2004). To admit evidence of prior acts to prove intent, some logical theory – other than propensity – must connect the prior acts to intent, which must be an element of the charged offense. *State v. Wade*, 98 Wn. App. 328, 334, 989 P.2d 576 (1999).

Specifically, ER 404(b) does not permit evidence of an unconnected sexual assault to prove intent, where, as here, intercourse is admitted and the sole jury question is consent. *State v. Harris*, 36 Wn. App. 746, 751, 677 P.2d 202, 205 (1984). Moreover, when the State offers a prior unrelated incident for the purpose of assessing the credibility of an alleged victim, as it did here, the jury is likely to consider it for propensity purposes, even with a limiting instruction. *State v. Cook*, 131 Wn. App. 845, 853-54, 129 P.3d 834 (2006).

The sole relevance of the alleged Serrano incident was to establish that Valdez was telling the truth, Tinajero was lying, and the sex was not consensual but forced. That is, the prior incident was offered as evidence not of “intent” but of “guilt.”

The trial court’s ER 404(b) analysis is difficult to pin down because it is scattered throughout the record. The court recognized that intent is not an element of rape, but nevertheless admitted the prior acts

evidence and even instructed the jury on the definition of intent, “because the State wants to argue intent as an issue. The defendant’s intent versus – forcible compulsion as opposed to the consent.” RP 1140. This ruling conflates an imaginary mens rea intent element with the essential actus reus element of forcible compulsion and a consent defense theory.⁸ RP 1140. It is wrong. The Serrano incident was not admissible to prove intent.

*No Common Scheme or Plan:*⁹ If current and prior alleged incidents are similar enough, ER 404(b) permits evidence of prior sexual conduct to refute a consent defense. *See, e.g. Lough*, 125 Wn.2d at 857, n.14, cited in *Chandler*, at 270.

The alleged similarities here fall far short of that standard. As trial counsel argued, two assaults in orchards are no more remarkable than two assaults in houses. RP 609.

The *Harris* court describes “common scheme or plan” as a condition that points to the planning of the charged crime. It involves more than similar acts. The purpose of common plan evidence is to prove

⁸ The court solicited opinion testimony on this point of law from an unsworn spectator. RP 1140. Even a sworn expert witness may not give opinion testimony regarding legal issues. *Bell v. State*, 147 Wn.2d 166, 179-80, 52 P.2d 503 (2002).

⁹ This section draws heavily from Blythe Chandler, BALANCING INTERESTS UNDER WASHINGTON’S STATUTE GOVERNING THE ADMISSIBILITY OF EXTRANEOUS SEX-OFFENSE EVIDENCE, 84 Wash. L. Rev. 259, 260, note 8 (2009) (Chandler).

the existence of a big-picture scheme of which an earlier act was directed toward completion of the charged crime. *Harris* at 751.¹⁰ Prosecutors frequently offer so-called “common plan” evidence in sex offense cases where no such plan exists, simply to show a defendant’s conformity with prior acts in committing the crime charged. See, e.g., *Imwinkelreid*, § 3:21 (1995).¹¹

According to *Imwinkelreid*, there are two variations of the common plan exception. “True” plan evidence is properly admissible to show uncharged misconduct committed either in a “plot” or to prepare for the commission of the present crime. What we have here, by contrast, is “spurious” plan evidence – that is, evidence created by manipulating the exception. *Imwinkelreid* at § 3:21. “Spurious” plan evidence merely shows a pattern of conduct wherein the “plan” was simply to commit a string of similar unlinked crimes. Such “pattern of criminality” exception is a “guise” under which to admit pure propensity evidence.

Imwinkelreid, §§ 3:21-:23. To be admissible, the uncharged offense should show the defendant’s design — not merely disposition — to

¹⁰ Quoting M. Slough and J. Knightly, *OTHER VICES, OTHER CRIMES*, 41 *Iowa L. Rev.* 325, 329-30 (1956).

¹¹ Discussed in *AND JUSTICE FOR ALL: ADMISSIBILITY OF UNCHARGED SEXUAL MISCONDUCT EVIDENCE UNDER THE RECENT AMENDMENT TO THE FEDERAL RULES OF EVIDENCE* 5 *S. Cal. Rev. L. & Women’s Stud.* 501, 548 (Spring, 1996).

commit the charged crime. *State v. Krause*, 82 Wn. App. 688, 694-95, 919 P.2d 123 (1996), *review denied*, 131 Wn.2d 1007 (1997).

Harris illustrative. There, the State claimed that rapes committed two weeks earlier were part of a common scheme or plan and thus were admissible under ER 404(b) to prove the current charge of rape. Division II rejected this, holding the prior acts showed no more than a propensity to commit rape. *Harris*, 6 Wn. App. at 751. The Court characterized this as the “common error of equating acts and circumstances which are merely similar in nature with the more narrow common scheme or plan.” *Harris*, at 751. Thus, “common scheme or plan” becomes an “open sesame” whose “mere incantation will open wide the courtroom doors to whatever evidence may be offered in their names.” *Harris*, 36 Wn. App. at 751, quoting *State v. Saltarelli*, 98 Wn.2d 358, 364, 655 P.2d 697 (1982).

The unrelated crimes in *Harris*, moreover, were very similar. A series of women voluntarily entered vehicles with the defendants and were driven against their will to a place where they were raped. Here, by contrast, we have two alleged assaults with little in common beyond orchards and a pocket knife. A single previous incident is alleged four months before, not several within two weeks. And the manner of the

alleged assaults is different. The first involved a particular woman¹² lured by means of a premeditated scheme featuring a radio station, CP 26, Findings 3-5. The second involved a random chance encounter. RP 684. Serrano repeatedly failed to identify Tinajero, either in a photograph or in person. CP 27, FF 13. The single common element of both assaults being outdoors might be significant if accused and accusers were not all field workers. But, when these alleged victims were not working in the fields, they were in the fields looking for work. It would be a great deal more significant had they both been assaulted any place *but* in the fields.¹³

¹² Assuming Radio Station KDNA's audience size is greater than one.

¹³ The composition of the jury panel is interesting in light of the State's theory that two unrelated sex offenses would not likely occur in a four-month period in orchards around Yakima. Several jurors were acquainted with Detective Johnson, RP 13, 16, 18, 19, 55, 56, 57; one's wife worked with one of the police witnesses at the DOC and the juror knew a couple of deputy sheriffs, RP 21, 25, 60; two were retired police officers, one of whom was currently in charge at DOC Yakima and the other knew the prosecutor, RP 41, 51; a third was a former police officer, RP 53-54; one worked 34 years at juvenile court, RP 52; one's sister was the court's JAVS taping system operator, RP 371; another was good friends with Chief Alameda of Union Gap; one's mother recently retired after many years with the Sheriff's Dept., RP 369; one was a long-time friend of Yakima County Chief Prosecutor's wife, RP 53; one's daughter was in school with Deputy Mottice's, RP 57; one was a former civil servant who hired police officers, RP 58-59; one knew Deputy Russell, RP 60-61; another knew Deputy Bermudas, RP 62; another was Bermudas's brother-in-law, RP 62; another knew "several of these people." RP 63. One's daughter is a welfare fraud investigator; one's father and another's husband are retired YPD officers, RP 368; one's son was a police officer in Texas, and another son was a security officer in Yakima; RP 372; one woman's nephew was a corrections officer, and another's cousin worked at the jail; one knew one of the court commissioners. RP 373. These people were not selected, but it is notable that the jurors were not asked about connections with current or former field workers. Not a single prospective juror knew Tinajero, Valdez, Valdez's boyfriend, Serrano, or orchard owner Tom Silva. RP 58, 60.

If the *Harris* rapes were inadmissible propensity evidence, then the Serrano incident was, too. There is simply no indication of a common design; even if similarities were established, the evidence still shows no more than a disposition to rape. *Harris* at 451, citing *State v. Goebel*, 40 Wn.2d 18, 21, 240 P.2d 251 (1952).

The trial court found the logically unrelated Serrano incident was probative under ER 403 to prove compulsion. RP 1140. But the sole purpose was to bolster the credibility of Valdez. This is not a sufficient reason under ER 404(b). *Cook*, 131 Wn. App. at 853-54.

As to prejudice, the court conceded that the evidence labeled Tinajero a sexual predator, but the judge erroneously concluded this was not prejudicial enough to outweigh legitimate probative value. RP 611. This is wrong. This evidence seriously prejudiced Tinajero's consent defense by simultaneously bolstering the credibility of Ms. Valdez while undermining that of Mr. Tinajero by means of an impermissible inference.

Jurors lack interpretative tools, so the instructions must be manifestly clear to the average juror. *State v. Watkins*, 136 Wn. App. 240, 243, 148 P.3d 1112(2006). If prior bad acts evidence is admitted, the jury needs an explanation of its purpose and a cautionary instruction to consider it for no other. *Saltarelli*, 98 Wn.2d at 362. Here, the jury did not receive a meaningful explanation. They were told they could consider

the Serrano assault as evidence of a “common scheme or plan,” but were never told what that means. RP 827-28. No instruction prevented the jury from interpreting “common scheme or plan” to mean, “he did it before, so he probably did it again.”

Ironically, evidence that a witness has been convicted of a crime is admissible solely to impeach. ER 609(a). RCW 10.58.090(1), by contrast, permits evidence of a mere accusation of a prior offense to come in as substantive evidence.

In summary, the prior accusation evidence here could not have been admitted under ER 404(b) because it showed nothing more than propensity. Therefore, if it was admissible, it could only have been under RCW 10.58.090, and notwithstanding ER 404(b).

B. If RCW 10.58.090 IS PROCEDURAL, IT IS FACIALLY INVALID UNDER THE SEPARATION OF POWERS DOCTRINE.

Mr. Tinajero’s trial counsel argued that retroactive application of RCW 10.58.090 was unconstitutional. CP 79. This Court reviews constitutional challenges de novo. *See, e.g., State v. Cubias*, 155 Wn.2d 549, 552, 120 P.3d 929 (2005).

“The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide.” Const. Art. 4, § 1. The constitutional separation

of powers vests in the Supreme Court the power to dictate its own court rules, “even if they contradict rules established by legislature.” *Marine Power & Equipment Co., Inc. v. Industrial Indem. Co.* 102 Wn.2d 457, 461, 687 P.2d 202 (1984). This inherent power of our Supreme Court to prescribe rules of procedure and practice stems directly from Const. Art. IV, section 1. *State v. Bennett*, 161 Wn.2d 303, 318, n.10, 165 P.3d 1241 (2007).

The inquiry in a separation of powers challenge is not whether two branches of government engaged in coinciding activities, but whether one branch’s activity threatens the independence or integrity or invades the prerogatives of another. *State v. Moreno*, 147 Wn.2d 500, 505-06, 58 P.3d 265 (2002). The question of which branch should make evidence rules should be viewed “from the perspective not of power, but of institutional competence[.]” Chandler at 265, citing Rosanna Cavallaro, FEDERAL RULES OF EVIDENCE 413-415 AND THE STRUGGLE FOR RULEMAKING PREEMINENCE, 98 J. Crim. L. & Criminology 31, 31 (Fall, 2007).

In asserting legislative power to directly contravene ER 404(b) in RCW 10.58.090, the Legislature relied on decisions predating by half a century the a adoption Uniform Rules of Evidence.¹⁴ That is, *State v. Sears*, 4 Wn.2d 200, 215, 103 P.2d 337 (1940) (the legislature has the

¹⁴ See, *Adoption of Rules of Evidence*, 91 Wn.2d 1117 (1978).

power to enact laws that create rules of evidence); *State v. Pavelich*, 153 Wash. 379, 382, 279 P. 1102 (1929) (rules of evidence are substantive law). Chandler, at 275.

This contradicts the Legislature’s own doctrine regarding the effect of rules upon statutes: “When and as the rules of courts herein authorized shall be promulgated[,] all laws in conflict therewith shall be and become of no further force or effect.” RCW 2.04.200. But, by its plain language, the sole purpose of RCW 10.58.090 is to conflict with ER 404(b). Then-Chief Justice Gerry Alexander urged the Legislative Judiciary Committee Chair to reconsider this law and leave the matter to the courts. Chandler, at 275-76.

By their own plain language, moreover, the Rules of Evidence govern court procedures and thus supersede *Sears* and *Pavlevich*.¹⁵ The rules govern all proceedings in the courts of the State of Washington, with a few non-germane exceptions. ER 101; ER 1101(a). ER 101 states: “These rules govern proceedings in the courts of the state of Washington to the extent an with the exceptions stated in Rule 1101. Rule 1101 provides: “Except as otherwise provided in section (c), these rules apply to all actions and proceedings in the courts of the state of Washington.”

¹⁵ Like statutes, court rules are interpreted as if they were enacted by the legislature. *State v. Carson*, 128 Wn.2d 805, 812, 912 P.2d 1016 (1996). Accordingly, they have equivalent authoritative weight. Therefore, court rules, like statutes, trump case law in the hierarchy of binding authority.

ER 1101(a). Section (c) lists proceedings to which the rules do not apply. Criminal trials are not listed. ER 1101(c).

The Court's judicial task force guiding the adoption process determined that only the judiciary, not the legislature, should create rules of evidence, pursuant to Wash. Const. art 4, § 1. Chandler, at 266-67, citing task force member Karl B. Tegland, THE PROPOSED RULES OF EVIDENCE: AN OPPORTUNITY FOR CODIFICATION, Wash. State Bar News, Jan., 1979 at 28.

Court rules and statutes are interpreted alike as if they were enacted by the legislature. *State v. Carson*, 128 Wn.2d 805, 812, 912 P.2d 1016 (1996). "Ordinary principles of construction require this court to give effect to the clear language of a court rule: 'A court rule must be construed so that no word, clause or sentence is superfluous, void or insignificant.' When the language of a rule is clear, a court cannot construe it contrary to its plain statement." *State v. W.W.*, 76 Wn. App. 754, 757, 887 P.2d 914 (1995).

If possible, if a statute appears to conflict with a court rule, all the provisions of both should be harmonized and given effect. *W.W.*, 76 Wn. App. at 757. Where, as here, the conflict is irreconcilable, the nature of the right at issue determines which controls. *W.W.*, 76 Wn. App. at 758, citing *State v. Smith*, 84 Wn.2d 498, 501, 527 P.2d 674 (1974). When a

court rule and a statute conflict with regard to a procedural right, the court rule prevails. *In re Personal Restraint of Becker*, 96 Wn. App. 902, 907, 982 P.2d 639 (1996). A statute addressing substantive rights supersedes any contrary court rule. *In re Personal Restraint of Johnson*, 131 Wn.2d 558, 563-65, 933 P.2d 1019 (1997). But only if the right is substantive does the statute prevail. *Smith*, 84 Wn.2d at 501-02.

Accordingly, if RCW 10.58.090 is procedural, it violates this doctrine by usurping the inherent power of the judiciary to establish court rules, including those governing the admission of evidence. Specifically, Wash. Const. Article 4 confers the power to adjudicate upon the judiciary. *Smith*, 84 Wn.2d at 501-02.

The questions presented in this appeal are most similar to those before the Court in *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984), regarding the child hearsay statute. The admission of an alleged victim's statements in *Ryan* (a) did not comply with the statute's requirements, and (b) violated the confrontation clauses of Const. art. 1, § 22 and the Sixth Amendment. Our Supreme Court accordingly reversed the convictions. *Ryan*, 103 Wn.2d at 167.

The Supreme Court decided *Ryan* after it adopted the Uniform Rules. The Court asserted that it was the final arbiter of evidentiary rules in cases arising from evidence rules created by the legislature. *Ryan*, 103

Wn.2d at 178. If a rule of court irreconcilably conflicts with a procedural statute, “the court’s rulemaking power is supreme.” *Ryan*, 103 Wn.2d at 178. The Court did not permit the Legislature to pass a procedural rule that directly conflicted with ER 802. *Ryan*, 103 Wn.2d at 178.

This Court should do the same here. RCW 10.58.090 is invalid because it directly conflicts with ER 404(b).

C. IF RCW 10.58.090 IS SUBSTANTIVE, IT IS A FACIALLY INVALID EX POST FACTO LAW.

Wash. Const art 1, § 23 and U.S. Const. art 1, § 10 prohibit all ex post facto laws. This prohibition applies to, “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.*” *State v. Taylor*, 67 Wn. App. 350, 353, 835 P.2d 245 (1992), quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390, 1 L. Ed. 648 (1798) (emphasis in original). A law violates the ex post facto clause if it: (1) is substantive, as opposed to merely procedural; (2) applies to events that occurred before its enactment; and (3) disadvantages the person affected by it. *In re Powell*, 117 Wn.2d 175, 185, 814 P.2d 635 (1991). Thus, the state and federal ex post facto clauses prohibit the retroactive application of RCW 10.58.090 if it is deemed to affect substantive matters as opposed to procedural matters. *See also, State v. Blank*, 80 Wn. App.

638, 641, 910 P.2d 545 (1996); *State v. Ward*, 123 Wn.2d 488, 498, 869 P.2d 1062 (1994).

Whether a change to the rules of evidence violates the Ex Post Facto Clause depends upon whether the evidence rule is a so-called “ordinary” rule, or one that impacts the sufficiency of evidence necessary to convict. *Ludvigsen v. City of Seattle*, 162 Wn.2d 660, 671-72, 174 P.3d 43 (2007). An “ordinary” evidence rule operates evenhandedly, meaning it may benefit either the State or the defendant in any given case.

Ordinary evidence rules do not present ex post facto concerns. *Carmell v. Texas*, 529 U.S. 513, 532, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000).

In criminal prosecutions, ER 404(b) is not evenhanded, for example. It operates exclusively to benefit criminal defendants by excluding evidence of similar past conduct from which a jury could impermissibly infer a propensity to commit the same sort of acts in the present case. It is not, then, “ordinary.” Likewise, RCW 10.58.090 is neither evenhanded nor “ordinary.” It operates exclusively to benefit the State by permitting evidence of past sexual misconduct “notwithstanding ER 404(b).” Accordingly, if RCW 10.58.090 is substantive, it is subject to the ex post facto prohibition.

Two recent Division I cases concluded that RCW 10.58.090 is facially constitutional. Neither is authoritative here, however. *State v.*

Scherner,¹⁶ expounds at length on the separation of powers and ex post facto doctrines. The Court opines that RCW 10.58.090 is not an ex post facto law and does not violate the separation of powers doctrine. *Id.* The analysis is dictum, however, and entirely irrelevant, because the Court had already concluded the prior acts evidence was admissible under ER 404(b). *Scherner*, Slip Op. at. 2-3.

The *Scherner* opinion then erroneously concludes that RCW 10.58 does not contemplate admitting unproven accusations of prior misconduct because the State must prove the existence of the alleged misconduct by a preponderance. *Scherner*, Slip Op. at 3. But the standard of proof for criminal accusations is beyond a reasonable doubt. Unless the prior acts evidence is a conviction, therefore, it is “unproven” by definition. It is, moreover, highly prejudicial because it facilitates convictions on evidence that not only falls short of proof beyond a reasonable doubt but that also may well have been obtained in violation of Const. art 1, §§ 7, 9, and 22 and U.S. Const. Amendments Four, Five and Six. This is because only a criminal prosecution – not a mere accusation by a lay person – subjects so-called evidence to scrutiny under the exclusionary rule.

¹⁶ ___ Wn. App. ___, ___ P.3d ___, 2009 WL 4912703.

In *State v. Gresham*,¹⁷ the constitutional analysis is not dictum because the evidence was not admissible under ER 404(b). Slip Op. at 2. *Gresham* is distinguishable on its facts, however, because the challenged propensity evidence was an actual conviction, not a mere unsubstantiated accusation. Accordingly, RCW 10.58 was applied differently and *Gresham* does not reach Tinajero’s as-applied constitutional challenges. (See Issues E and F below).

D. IF RCW 10.58.090 IS SUBSTANTIVE, ITS APPLICATION HERE IS BARRED BY THE SAVINGS CLAUSE OF RCW 10.01.040.

No offense committed... previous to the time when any statutory provision shall be repealed, *whether such repeal be express or implied*, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act... . Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings ... pending at the time of its enactment, unless a contrary intention is expressly declared therein.

RCW 10.01.040 (emphasis added.)

This savings statute presumptively “saves” all offenses already committed from the effects of express or implied amendment or repeal,

¹⁷ ___ Wn. App. ___, ___ P.3d ___ 2009 WL 4931789.

and requires that crimes be prosecuted under the law that was in effect when they were committed. *State v. Pillatos*, 159 Wn.2d 459, 472, 150 P.3d 1130 (2007). It applies to all criminal and penal statutes. *State v. Kane*, 101 Wn. App. 607, 610, 5 P.3d 741 (2000). But the saving statute applies solely to substantive changes in the law, not procedural ones. See *Pillatos*, 159 Wn.2d at 472.

Therefore, if RCW 10.58.090's implicit repeal of ER 404(b) in prosecutions on sex offense charges is not subject to a separation of powers challenge because it is not procedural and thus does not invade the rule-making prerogative of the courts, then it is substantive and is subject to the saving statute.

Mr. Tinajero was charged with offenses in April, 2007 (Serrano) and August, 2007 (Valdez). The effective date of RCW 10.58.090 was June 12, 2008. Therefore, It's application here is barred.

The prior acts evidence was inadmissible under ER 404(b), and RCW 10.58.090 is facially unconstitutional. Therefore, the evidence was erroneously admitted to Mr. Tinajero's incalculable prejudice. Without it, the evidence was utterly insufficient to support the conviction. Therefore, the appropriate remedy is to reverse and dismiss the prosecution with prejudice. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

E. RCW 10.58.090 IS UNCONSTITUTIONAL AS APPLIED TO MR. TINAJERO, BECAUSE IT VIOLATED THE FOURTH AMENDMENT.

A major unintended consequence of admitting the accusation of prior misconduct in this case was that it allowed the State to benefit from evidence derived from a police investigation with no opportunity for the defense to examine the investigation under the principles of exclusion in Washington's Const. art.1 § 7 and the Fourth Amendment.

Pertinent Facts: First, Deputy Mottice testified that his general comment about "another lady back in April" during the interrogation of Tinajero in August prompted a response from Tinajero that clearly implied he knew precisely what Mottice was talking about without the benefit of any facts. RP 1072. For whatever reason, defense counsel revisited this testimony on cross examination but did not elicit an explanation for Tinajero's apparent "guilty knowledge" that was consistent with innocence. RP 1105. But, if Tinajero was seized and interrogated for the Serrano incident back in April, it cannot logically be inferred that his later knowledge was evidence of guilt.

Second, under the banner of RCW 10.58.090, the State introduced a photomontage the jury could infer was prepared on April 24, 2007 as

part of the Serrano investigation.¹⁸ It was then showed to Maria Valdez in August. RP 716, 1058. But, given the vagueness of Serrano's description, this tipped off the jury that the police must already have suspected Tinajero of similar offences even before Serrano. Serrano described a Spanish-speaking male of average height with dark hair and a gap in his teeth, wearing a baseball cap, sweat shirt, and jeans. RP 835, 886, 888, 895-95. The license plate number of the assailant's vehicle checked out to a woman living at a different address than that on record for Tinajero and with no apparent connection with him. RP 762. Serrano did not identify Tinajero in the photo lineup.

The backdoor introduction of evidence of similar accusations in this case illustrates the constitutional defects inherent in RCW 10.58.090. It is a statutory Trojan horse to put potentially constitutionally incompetent evidence in front of the jury in such a way that the defendant cannot respond. The State introduced only evidence of guilt concerning the prior accusation under RCW 10.58.090 — not the conduct of the investigation. Therefore, the defense was unable to move to suppress any evidence that was unlawfully obtained. This effectively stripped Mr. Tinajero of the protection of art 1, § 7 and the Fourth Amendment.

¹⁸ That is the date Tinajero's picture was taken. SE1, page 2.

A manifest constitutional error may be raised for the first time on appeal. An error is “manifest” if it has “practical and identifiable consequences in the trial” and the necessary facts are in the record. *State v. Barr*, 123 Wn. App. 373, 381, 98 P.3d 518 (2004), quoting *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Here, the record contains sufficient facts for this Court to determine that RCW 10.58.090 deprived Mr. Tinajero of the protections of Const. art. 1, §7 and the Fourth Amendment.

Under the state and federal constitutions, the state may not seize potential suspects without a warrant and probable cause. *State v. Chenoweth*, 160 Wn.2d 454, 466, 158 P.3d 595 (2007). Both physical evidence and incriminating statements obtained as a result of unlawful seizure are infected with the illegality and must be suppressed. *State v. Byers*, 88 Wn.2d 1, 7, 559 P.2d 1334 (1977). The “fruit of the poisonous tree” doctrine precludes the State from offering infected evidence in any Washington court at any time for any reason. *Chenoweth*, 160 Wn.2d at 473; *State v. White*, 97 Wn.2d 92, 110-12, 640 P.2d 1061 (1982); *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

Police have probable cause to arrest if facts and circumstances within their knowledge are sufficient to cause a person of reasonable caution to believe that a suspect has committed a crime. *State v. Graham*, 130 Wn.2d 711, 724, 927 P.2d 227 (1996), quoting *State v. Terrovona*, 105 Wn.2d 632, 643, 716 P.2d 295 (1986). Where nothing connects a particular individual to an alleged crime, however, no probable cause exists, and detaining that person violates Const. art. 1, §7. *State v. Grande*, 164 Wn.2d 135, 142, 187 P.3d 248 (2008).

It would be per se deficient representation for defense counsel to fail to seek suppression if a viable ground exists for doing so. *State v. Nichols*, 161 Wn.2d 1, 14, 162 P.3d 1122 (2007). But Tinajero's counsel was not permitted to mention that his client had been charged in the Serrano case. RP 612. Therefore, counsel could not challenge the constitutionality of that investigation — specifically, the existence of probable cause to detain Mr. Tinajero, which strongly appears to be lacking. The record strongly suggests that the police brought Tinajero in for questioning. They showed Serrano a photomontage on April 24, 2007 that includes a photograph of Mr. Tinajero that was taken April 24, 2007. RP 521; Ex. SE 1. Deputy Mottice testified that this was an old Department of Licensing picture, but it is clearly a different picture. Ex. SE 7.

Tinajero may or may not have been unlawfully seized in April, 2007. But bringing in the evidence by way of RCW 10.58.090 divested him of his constitutional right in this prosecution to seek suppression for all purposes of any evidence unlawfully obtained in the other prosecution. This end-run around the exclusionary rule illustrates a facial constitutional defect of the statute that springs from the explicit language that permits the use of uncharged and unproven accusations. At minimum, as applied on these facts RCW 10.58.090 deprived Tinajero of the protections of art. 1, § 7 and the Fourth Amendment.

F. RCW 10.58.090 IS UNCONSTITUTIONAL AS APPLIED, BECAUSE IT PREVENTED TINAJERO FROM TESTIFYING.

Another unintended consequence of RCW 10.58 here was that – whether intentionally or not – the prosecutor’s threatened use of it in cross examination intimidated Tinajero into surrendering his right to testify in his own defense. Tinajero’s only chance for acquittal lay in the hope that, after weighing his credibility against that of Ms. Valdez, the jury would harbor a reasonable doubt as to who was telling the truth. But Tinajero could not testify without subjecting himself to interrogation under oath on the subject of the ongoing Serrano prosecution. This is a structural error that requires reversal.

Criminal defendant have a fundamental right to testify. *Rock v. Arkansas*, 483 U.S. 44, 50, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). This right is implicit in the Fifth, Sixth, and Fourteenth Amendments. *Id.* at 51-52. In Washington, the right to testify is explicit in Const. art 1, § 22. *State v. Robinson*, 138 Wn.2d 753, 758, 982 P.2d 590 (1992). A procedure that deprives a criminal defendant of the chance to testify may be a so-called “trial error,” subject to harmless error analysis. *Robinson*, 138 Wn.2d at 757-58 (defendant waived right to testify even if in reliance on ineffective counsel.) Here, by contrast, the error was structural.

A structural error creates a defect that affects “the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *In re Det. of Kistenmacher*, 163 Wn.2d 166, 185, 178 P.3d 949 (2008) (Sanders, J., concurring in part, dissenting in part), quoting *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). An error is structural, and thus requires automatic reversal. where “the error ‘necessarily’ render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” *Washington v. Recuenco*, 548 U.S. 212, 219, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006), quoting *Neder*, 527 U.S. at 8, 9. Structural errors are never harmless. *Kistenmacher*, 163 Wn.2d at 185, quoting *State v. Frost*, 160

Wn.2d 765, 779, 161 P.3d 361 (2007), *cert. denied*, ___ U.S. ___, 128 S. Ct. 1070, 169 L. Ed. 2d 815 (2008).

Mr. Tinajero informed the court he wanted to testify in his own defense. RP 19, 1122. He moved in limine to limit the scope of the State's cross examination to matters raised on direct – where his counsel would address solely the Valdez incident with which he was charged. RP 1122. The prosecutor insisted the State could and would cross examine Tinajero about Serrano if he “opened the door” by taking the stand. RP 1122-25. Defense counsel argued that the separate prosecution pending on that charge invoked Mr. Tinajero's Fifth Amendment right to remain silent regarding the Serrano allegations. RP 1123.

The court disagreed, ruling that Mr. Tinajero effectively waived any right to remain silent about the Serrano charge when he talked to Deputy Mottice after his arrest on the Valdez charge and that taking the stand on the current charge would indeed open the door. RP 1123. The defense argued that the State had extracted the full measure of permissible benefit from the RCW 10.58 evidence. RP 1126. The court nevertheless denied the motion. The court recognized the principle of not exceeding scope of direct examination but could not put prior constraints on the scope of cross examination. RP 1128. The court stated that, by making a custodial statement to Mottice concerning the events of August 6th, he

divested the court of the power to prevent the State from freely questioning him about that statement, including the Serrano matter. RP 1129. Counsel: “We will not be taking the stand.” RP 1131. Here, Tinajero clearly asserted his wish to testify. With no eye witnesses, his credibility relative to that of his accuser was central to his defense. The effect of the court’s ruling was to foreclose the possibility for the jury to judge his credibility. This could not have happened but for RCW 10.58. This is a structural error and reversal is required.

Prejudice: Even if the error is not structural, the probative value of a challenged line of questioning must exceed its potential to prejudice. *State v. DeVincentis*, 150 Wn.2d 11, 22, 74 P.3d 119 (2003). The court must balance these interests on the record. *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). That did not happen here.

Defense counsel disputed the probative value of confronting Tinajero with Serrano’s accusation because it already had been belabored extensively to the jury, and that the prejudice was huge because Tinajero was forced to forego either his right to testify or his right to remain silent about a pending prosecution on the Serrano charge. RP 1126.

The trial court did not request, and the prosecutor did not offer, any authority for the proposition that the State’s right to cross examine a criminal defendant with no restraints outweighs the defendant’s trial

rights. RP 1124. When the State continually invokes the same disputed evidence over and over again throughout the trial, the court has an obligation to remain alert to the changing landscape and to take note of developing constitutional obstacles.

Reversal is required under either analysis.

G. THE SERRANO EVIDENCE DID NOT MEET
THE STATUTORY REQUIRMENTS FOR
ADMISSION UNDER RCW 10.58.090.

Criminal statutes and court rules¹⁹ must receive a strictly literal interpretation. *State v. Wilson*, 125 Wn.2d 212, 216-17, 883 P.2d 320 (1994). This court reviews the trial court's interpretation of an evidentiary rule de novo as a question of law. *DeVincentis*, 150 Wn.2d at 17. Once the rule is correctly interpreted, the decision to admit or exclude evidence is reviewed for an abuse of discretion. *Id.*

RCW 10.58.090(6) provides: When evaluating whether evidence of the defendant's commission of another sexual offense or offenses should be excluded pursuant to ER 403, the trial judge shall consider:

- (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;

¹⁹ Court rules and statutes both are interpreted as if they were enacted by the legislature. *State v. Carson*, 128 Wn.2d 805, 812, 912 P.2d 1016 (1996).

- (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.

The court must balance on the record the probative value versus potential for prejudice before allowing admission of prior bad acts. *State v. Wade*, 138 Wn.2d 460, 463, 979 P.2d 850 (1999); *Saltarelli*, 98 Wn.2d at 362.

Here, defense counsel strenuously argued that the statutory factors were not satisfied. RP 761-765. The factors weigh heavily against admitting the evidence. The similarity between the current and prior acts was minimal; the alleged acts were fourth months apart; there was only a single alleged prior act; no circumstances mitigated the lack of similarity; the prior act evidence was entirely superfluous for any legitimate purpose; and the evidence was not a conviction but merely an accusation against an unidentifiable assailant. In other words, any probative value was immensely outweighed by its potential for unfair prejudice. *See, Lough*, 125 Wn.2d at 862.

The court recognized the immensity the prejudice here. RP 767. Nevertheless, the court concluded it was sufficient that the evidence was “necessary” to rebut consent. The court thought the State could introduce the prior bad acts evidence simply because it was consistent with their theory of the case. RP 768, 769. This ruling that factor (g) alone supported admitting the prior acts evidence was an arbitrary conclusion that ignores the facts.

Accordingly, RCW 10.58’s own requirements for admission of otherwise inadmissible evidence render this evidence inadmissible. This Court should reverse the conviction on that ground.

Policy Considerations: Respected commentators have noted that the federal courts have applied a “toothless and ineffectual” version of Rule 403 in sex offense cases. Chandler at 265, citing Aviva Orenstein, DEVIANCE, DUE PROCESS, AND THE FALSE PROMISE OF FEDERAL RULE OF EVIDENCE 403, 90 Cornell L. Rev. 1487, 1491 (2005). Washington courts, by contrast, are not shy about defending due process against incursions by the legislature. *State v. A.N.J.*, ___ Wn.2d ___, ___ P.3d ___, WL 314512 (Jan. 28, 2010) (reversing for failure of fundamental due process), Slip Op. at 8, Sanders, J. concurring. ““Courts must in the end say what is required; there are precautions so imperative that even their universal

disregard will not excuse their omission.” *Id.* quoting *Texas & Pac. Ry. v. Behymer*, 189 U.S. 468, 470, 23 S. Ct. 622, 47 L. Ed. 905 (1903).

The bar against evidence of other crimes is deeply rooted in Anglo-American jurisprudence. It distinguishes Anglo-American evidence law from that of civil law nations. Chandler at 261, citing 1A John H. Wigmore, *EVIDENCE IN TRIALS AT COMMON LAW*, § 58.2 (Tiller rev., 1983). Every person accused of a crime is “entitled to be tried upon competent evidence, and only for the offence charged.” *Id.*; *Boyd v. United States*, 142 U.S. 450, 458, 12 S. Ct. 292 (1892).

One reason for this prohibition is not that prior acts evidence is irrelevant, but because it “threatens the accuracy of trials.” Chandler, at 261. Juries give it too much weight and may return a verdict of guilty of the current crime even with reasonable doubt, in order to punish the defendant for perceived prior offenses. *Id.* Our courts have long recognized that accusations of sexual misconduct are particularly likely to inspire abhorrence. *Saltarelli*, 98 Wn.2d at 363, citing *Slough & Knightly*, 41 Iowa L. Rev. at 333-34; Chandler at 262. The trial court must beware of straining “the minute peg of relevancy” with the weight of “dirty linen hung upon it.” *State v. Smith*, 106 Wn.2d 772, 774, 725 P.2d 951 (1986), quoting *State v. Goebel*, 36 Wn.2d 367, 379, 218 P.2d 300 (1950).

As a matter of policy, our Supreme Court interprets evidentiary rules so as to avoid the sort of trial-within-a-trial that developed here. *See, e.g., State v. Kilgore*, 147 Wn.2d 288, 293, 53 P.3d 974, 977 (2002). The admissibility of evidence, including proof of preliminary facts, is for the court, not the jury. ER 104(a); *State v. Freigang*, 115 Wn. App. 496, 509, 61 P.3d 343 (2002) Morgan, J., concurring; *Condon Bros., Inc. v. Simpson Timber Co.*, 92 Wn. App. 275, 288-89, 966 P.2d 355 (1998). After a hearing, the court decides the preliminary question by a preponderance of the evidence. *Freigang*, 115 Wn. App. at 509; *Condon Bros.*, 92 Wn. App. at 289. The failure to do this is not harmless unless this Court finds that a preponderance of the evidence establishes the preliminary facts at issue. *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985).

Here, the other acts evidence occupies the bulk of this needlessly voluminous transcript. The judge should have requested an offer of proof, determined outside the presence of the jury that the alleged conduct was supported by a preponderance of the evidence, and then allowed the State to allude to it as an established fact. *Kilgore*, 147 Wn.2 at 293. Instead, the Valdez rape charge – for which Tinajero faced a life sentence – was almost a footnote to the facts alleged by Serrano. Besides bulking up the record, this caused unfathomable prejudice to Mr. Tinajero by improperly putting to the jury a question of fact properly decided by the judge.

For this reason alone, the Court should hold that only ER 404(b), should govern the admission of uncharged accusations.

H. THE STATE DID NOT GIVE SUFFICIENT NOTICE AS REQUIRED BY RCW 10.58.090.

The Legislature conditioned admissibility of prior accusations of sexual misconduct under on proper notice of the proposed evidence:

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.

RCW 10.58.090(2).

This statutory language is unambiguous. To be sufficient, the notice must include either the actual “statements of witnesses” or “a summary of the substance of *any* testimony” to be offered. (Emphasis added.) The State’s attorney did not do this.

The so-called “notice” here merely states that the State intends to offer “evidence pursuant to RCW 10.58.090, based upon the testimony of a witness, [Serrano].” The nature of the evidence supposedly was made known to the defense in discovery purportedly provided outside the record. CP 85. This “notice” does not even specify the general subject area to be addressed by Serrano, let alone inform the defendant of the

substance of her proposed testimony. Moreover, the “notice” falsely states that only Serrano will testify. In fact, the prosecutor presented testimony by deputies Mottice, Russell and Tucker as well as DNA from some gloves found in the fields. The State also threatened to elicit testimony from Mr. Tinajero himself if he exercised his right to testify.

This constituted unfair surprise and was highly prejudicial. The lack of notice left the defense unprepared to respond to the police testimony or the physical evidence. Most devastating was the last-minute discovery – after the State rested – that testimony would be elicited from Mr. Tinajero himself so as to preclude him from testifying in his own defense. See Issue F.

Tinajero was arrested August 19, 2008. the 10.58 “notice” was filed January 26, 2009. Supp. RP 73. As of the trial date, defense counsel had yet to be afforded the opportunity to interview Serrano. RP 9. Defense counsel objected to the lack of notice. 1Supp. RP 72, 73.²⁰ This objection included the Serrano DNA evidence. RP 759. Deputy Russell’s RCW 10.58 evidence was not only withheld from the defense in the notice but also to the court at the 10.58 hearing. CP 85; 1Supp. RP.

Due process requires proper notice. As discussed, the RCW 10.58 evidence enabled the State to short-circuit numerous state and federal

²⁰ 1Supp. RP is titled February 24, 2009 (Supplemental). It was originally omitted from the VRP.

constitutional protections. Without adequate notice, defense counsel was powerless to defend his client from the insidious effect of poisoned fruit evidence or to argue effectively for his right to testify.

Where due process is concerned, there is no such thing as “implicit compliance” with statutory prerequisites. *State v. Williams-Walker*, ___ Wn.2d ___, ___ P.3d ___, 2010 WL 118211, Slip Op at 10-11. The failure to give statutorily-mandated notice is fatal to the admissibility of the evidence. The appropriate remedy is to reverse.

I. TESTIMONIAL HEARSAY FROM AN ANONYMOUS 911 OPERATOR VIOLATED THE CONFRONTATION CLAUSES OF CONST. ART 1, § 22 AND THE SIXTH AMENDMENT.

The Confrontation Clauses of Const. art 1, § 22 and the Sixth Amendment exclude testimonial hearsay from criminal trials unless the declarant either testifies or is otherwise made available for cross examination. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). A statement is testimonial if the declarant would reasonably expect it to be used prosecutorially. *Crawford*, 541 U.S. at 52. The State has the burden of establishing on appeal that a statement is not testimonial. *State v. Koslowski*, 166 Wn.2d 409, 417 n.3, 209 P.3d 479 (2009). Statements made to police officers during an investigation are testimonial per se. *Crawford*, 541 U.S. at 53. Statements recorded during

a 911 call generally are testimonial unless the caller is facing an ongoing emergency and describing ongoing events. *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), quoting *Crawford*, 541 U.S. at 53-54.

The Confrontation Clause was clearly violated here. Deputy Mike Russell testified that an anonymous 911 operator told him the phone number 985-1923, reported by Serrano, was Tinajero's number. RP 966. This was testimonial hearsay and inadmissible. The statement was not recorded as part of a 911 emergency call. It allegedly was made by an unidentified 911 operator to Russell in the course of his subsequent investigation. Moreover, the 911 declarant's alleged information incorporated a further degree of hearsay by yet another unidentified declarant who apparently obtained the information from an unidentified source one or more steps even further removed.

Not Harmless: The admission of testimonial hearsay requires reversal unless the error was harmless beyond a reasonable doubt. *State v. Davis*, 154 Wn.2d 291, 304, 111 P.3d 844 (2005).

This error was particularly prejudicial, because Serrano could not recognize Tinajero either in a photomontage shortly after the incident or multiple times in the courtroom, even her attention was directed to Mr. Tinajero. RP 888, 890, 899, 917, 919. This witness was attacked in broad

daylight, faced her assailant and looked at the man's face for five to seven minutes. RP 909. She told police she definitely would know the man again. RP 911-12, 916. Moreover, the only identifying information she gave was the license number of a vehicle registered to a woman whose nephew was close in age to Tinajero, had missing teeth and a receding hairline, and had a history of sex offenses. RP 762. Accordingly, the 911 evidence affected the outcome of the trial. Reversal is required.

J. DEFENSE COUNSEL WAS INEFFECTIVE IN PERMITTING PREJUDICIAL HEARSAY.

A defendant is entitled to effective counsel. Const. art. I, § 22; U.S. Const. amend. VI. Counsel is ineffective if it was both deficient representation and resulted in prejudice. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Reviewing courts begin by presuming counsel was effective. *Thomas*, 109 Wn.2d at 226.

Performance is not deficient if it can be explained by legitimate trial strategy or tactics. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). The decision whether to object is a classic example of this. The appellant must show there is no legitimate strategic or tactical reason not to object and that an objection likely would have been sustained. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). The failure to object to crucial State's evidence, however, is per se

incompetent and justifies reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). That is what we have here.

(1) Felipe Bravo, Valdez's then-boyfriend, testified at length to Ms. Valdez's statements to him. RP 720-745. His story coincided with Valdez's only sporadically, exaggerated gory details, and invented new ones. Bravo's testimony was inadmissible under any exception to the hearsay rules. ER Title 8. Instead of objecting, counsel obliged with extensive cross examination. What distinguishes effective counsel from jurors is the ability to recognize unreliable hearsay and interpose a timely objection. No legitimate strategy can account for counsel's lapse. The State's entire case depended on persuading the jury to believe Valdez. Bravo's testimony amplified Valdez's story in the minds of the jurors.

(2) Without objection, Dr. George Seymour read from notes jotted on August 7, 2007, when Ms. Valdez came in for 'morning after' pregnancy and disease prevention. RP 807, 953. He had no independent recollection. His notes did not even record what he was told but reflected his understanding of a nurse's notes of what Valdez told her. RP 805-06. Seymour said the nurse said Valdez said she was raped. RP 807. Besides being delayed for 30 hours, this was unnecessary for the medical care sought. RP 808, 811. It was sufficient that she had unprotected sex.

(3) The nurse also testified. She too read from her notes of what Valdez told her. RP 937, 939. This witness forthrightly admitted she had absolutely no independent recollection of this patient. RP 943. “I don’t re– do you have a rape case? I don’t remember doing a rape case.” RP 945. Q: “Are those your notes, or someone else’s?” A: “They’re probably mine, it looks like my writing.” RP 952. She remembered nothing. RP 949, 952. Valdez’s comments were hearsay if the witnesses actually remembered them. Read from notes, they were double hearsay.

(4) Detective Mike Russell repeated Serrano’s story with no hearsay exception and no objection. RP 965-89. Like Valdez, Serrano is not a party and no hearsay exception qualifies her statements as evidence. This was defective performance constituting grounds to reverse.

These errors prejudiced Tinajero because it is reasonably certain that they contributed to the verdict. *Saunders*, at 578; *Thomas*, at 226.

K. THE EVIDENCE WAS INSUFFICIENT TO PROVE A DEADLY WEAPON.

A knife with a blade longer than three inches is a deadly weapon by definition. RCW 9.94A.825. To prove a knife with a shorter blade is a deadly weapon, the State must prove that *the particular knife used* had the capacity to cause death and was could have done so as used in the crime. *State v. Zumwalt*, 79 Wn. App. 124, 130, 901 P.2d 31 (1995).

Valdez said Tinajero used a knife. RP 654. Police found a knife on the porch where Tinajero was arrested, but the State did not produce a knife at trial. RP 527. Moreover, the prosecutor did not ask how long the blade of the knife on the porch was. Mottice merely said he was familiar with blades of pocket knives in general and that they usually were three to five inches. RP 1092. The court instructed the jury that a blade longer than three inches is a deadly weapon and a shorter blade may be a deadly weapon. Instr. No. 20, CP 63; RP 1166. Absent any evidence as to the length of the actual blade used, the jury could only speculate. This is insufficient for proof beyond a reasonable doubt.

L. THE PREDICATE OFFENSE FOR PERSISTENT OFFENDER STATUS IS AN *ALFORD* PLEA THAT COMPRISES NEITHER PROOF NOR STIPULATED FACTS CONSTITUTING GUILT.

The court sentenced Tinajero to life in prison as a persistent offender pursuant to RCW 9.94A.575 and former RCW 9.94A.030(33).²¹ 2Supp. RP 3, 34-35.²² The predicate offense was a 1994 Alford guilty plea to 1^o burglary with sexual motivation. *Id.* at 6. This was error.

The Sentencing Reform Act (SRA) defines a “conviction” as “an adjudication of guilt” that can result from either a verdict or a plea of guilty. RCW 9.94A.030(10). This definition applies throughout the SRA

²¹ Now RCW 9.94A.030(34).

²² This is the sentencing hearing held the morning of July 6, 2009.

unless the context “clearly requires otherwise.” RCW 9.94A.030. *State v. Monson*, 149 Wn. App. 765, 769, 205 P.3d 941(2009).

An Alford plea is not a conviction by this definition. “The facts supporting a prior conviction for sentencing purposes must either be proved beyond a reasonable doubt or admitted by the defendant.” *State v. Releford*, 148 Wn. App. 478, 489, 200 P.3d 729 (2009); *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 258, 111 P.3d 837 (2005). An Alford plea is not conclusive evidence that the underlying facts were admitted or proved beyond a reasonable doubt. *Clark v. Baines*, 150 Wn.2d 905, 912-14 (2004). It does not, therefore result in a conviction for all purposes. *In re Pers. Restraint of Spencer*, 152 Wn. App. 698, 715, 218 P.3d 924 (2009) (remedy was to withdraw plea, not reverse conviction). Where crucial evidence of guilt is never introduced, the guilty plea does not constitute a conviction. *Spencer*, 152 Wn. App. at 715. Mr. Tinajero’s 1994 guilty plea was an Alford. Statement on Plea of Guilty, March 15, 1994, Ex. SI-2; RP 8-9. 2Supp. RP 6-7, 8-10. Mr. Tinajero stated:

I deny the accusation against me. I did not do what the State claims I did. However, after reviewing the reports, I believe there is a substantial basis upon which a jury could find me guilty and therefore plead guilty to take advantage of the State’s recommendation.

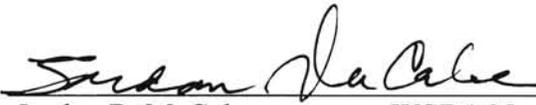
Plea Statement, paragraph No. 12. Tinajero repeated his denials at the plea hearing. 3/15 RP²³ 8 (lines 12, 23), 12, 16. As in *Spencer*, no crucial facts were admitted or proved. Moreover, the complaining witness retracted in a sworn statement denying the offense happened. 3/15 RP 9-10. A Sheriff's employee matched the 2009 arrest prints with those from 1994, but this was proof merely of arrest, not of guilt. 2Supp. RP 15, 20.

Accordingly, the 1994 Alford guilty plea cannot constitute a predicate offense for persistent offender sentencing purposes. Tinajero asks the Court to rule on this error, which may recur on remand.

V. CONCLUSION

For the reasons stated, this Court should hold that multiple errors resulted in a conviction on inadmissible evidence. The Court should reverse and dismiss with prejudice or remand for a new trial. The Court should reverse the sentence of life without parole.

Respectfully submitted this 24th day of February, 2010.


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²³ 3/15RP refers to the March 15, 1994, Alford plea hearing, Ex. SI 5..

CERTIFICATE OF SERVICE

I certify that I mailed this day, postage prepaid,
a copy of the foregoing Appellant's Brief to:

Kevin Eilmes
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Jordan B. McCabe, WSBA No. 27211
Bellevue, Washington February 24, 2010