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Court of Appeals
Division III
State of Washington

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION III

State of Washington
Respondent

v.

Rodolfo Ramirez Tinajero
Appellant

On Appeal from the Yakima County Superior Court
Cause No. 07-1-01904-4

The Honorable Michael Schwab

APPELLANT'S SUPPLEMENTAL BRIEF

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II. ASSIGNMENTS OF ERROR AND ISSUES

This supplemental brief addresses those errors assigned in Mr. Tinajero's opening brief that are affected by the Washington State Supreme Court decision in *State v. Gresham*, 2012 WL 19664, Slip Op. 84148-9, filed January 5, 2012.

A. Assignments of Error

1. In a jury trial for rape, the trial court erroneously admitted accusations of prior sexual misconduct under ER 404(b) as well as RCW 10.58.090.
2. The nature of the prior bad acts evidence was such as to enable the State to convict Mr. Tinajero on evidence obtained in the course of a criminal investigation which the defense had no opportunity to challenge in constitutionally-mandated suppression proceedings to determine if the police obtained the evidence in compliance with Article I, section 7 of the Washington Constitution and the Fourth Amendment of the United States Constitution.
3. The erroneously admitted evidence also prevented Mr. Tinajero from exercising his Sixth Amendment right to testify in

his own defense without sacrificing his Fifth Amendment right to remain silent regarding the prior accusations.

B. Issues Pertaining to Assignments of Error

1. Was the prior acts evidence admissible under ER 404(b) to prove identity?
2. Was the prior acts evidence admissible under ER 404(b) to prove intent?
3. Was the prior acts evidence admissible under ER 404(b) to prove common plan?
4. Was Mr. Tinajero seriously prejudiced by the erroneous admission of prior acts evidence?
 - (a) Did admitting the prior acts evidence under RCW 10.58.090 violate Wash. Const. art. 1, § 7 and 9, and the Fourth and Fifth Amendments by short-circuiting the constitutionally-mandated procedure for seeking suppression of evidence that is illegally obtained?
 - (b) Did admitting the prior acts evidence under RCW 10.58.090 violate Wash. Const. art. 1, § 22 and the Sixth Amendment by preventing Mr. Tinajero from testifying in

his own defense on the current charge without waiving his right to remain silent on the earlier, untried charge?

Mr. Tinajero also seeks review of the following issues unaffected by the *Gresham* decision, as presented in the opening brief:

5. Whether trial counsel was ineffective in —
 - (a) Failing to object to out-of-court testimonial statements by a 911 operator in violation of the Sixth Amendment Confrontation Clause.
 - (b) Failing to object to inadmissible hearsay by several prosecution witnesses.
6. Whether the evidence was insufficient to prove a deadly weapon.
7. Whether the sentencing court erroneously imposed a persistent offender sentence of life without possibility of parole based on a prior *Alford* plea of guilty that did not qualify as a predicate offense.

II. SUMMARY OF THE CASE

In 2008, the Washington State Legislature passed RCW 10.58.090, whereby accusations of unrelated sexual misconduct were deemed admissible at trial. Laws 2008, Ch. 90. In the context of alleged sex offenses, this essentially repealed ER 404(b), which excludes evidence of which the sole relevance to the current charge is to show propensity. On January 5, 2012, our Supreme Court decided *State v. Gresham*, and struck down RCW 10.58.090 as an affront to the separation of powers. 2012 WL 19664, Slip Op. at 11. The Court held that ER 404(b) is a categorical bar to the introduction of prior misconduct evidence for the purpose of showing a defendant's character and action in conformity therewith. There are no exceptions to this rule. *Gresham*, Slip Op. at 9.

Appellant Rodolfo Ramirez Tinajero was charged with rape and was tried by jury in the Yakima County superior court in 2009, while RCW 10.58.090 was still in effect. RP 997. The Information alleged that an act of sexual intercourse in which Mr. Tinajero admittedly engaged with Maria Valdez on August 6, 2007, was not consensual, but that

Tinajero exerted forcible compulsion by threatening Ms. Valdez with a knife. CP 99; RP 2.

Mr. Tinajero denied the accusation. He claimed that Ms. Valdez initiated the contact, saying she desperately needed money and would have sex with him for \$50.00. RP 1071, 1074.

At the jury trial, the State offered evidence of an accusation of prior sexual misconduct to rebut Mr. Tinajero's consent defense.

A woman called Beatriz Serrano alleged that a man tried to rape her in an orchard in April, 2007. RP 9. In addition to Ms. Serrano, the prior acts evidence included testimony from two Sheriff's deputies, DNA evidence, and a pruning tool allegedly used to exert force. RP 796, 800. The court ruled that this evidence was admissible under ER 404(b) as well as RCW 10.58.090 to prove identity, intent and common plan. Conclusion 3, CP 27.

The jury found Mr. Tinajero guilty of first degree rape with a deadly weapon. RCW 9A.44.040(1)(a); RCW 9.94A.602; RCW 9.94A.533. CP 38, 40.

Mr. Tinajero appealed, contending that the erroneous admission of the accusation of prior sexual misconduct undermined due process and denied him a fair trial.

- It opened the door to extensive inadmissible hearsay, that violated the Confrontation Clauses of Wash. Const. art. 1, 22 and the Sixth Amendment.
- It prevented Mr. Tinajero from testifying in his defense, because the court ruled that doing so would open the door to cross examination about the pending Serrano charges.
RP 1122-31.

This Court stayed the appeal on June 18, 2010, pending a decision in *Gresham*. Now, Mr. Tinajero having prevailed in his challenge to RCW 10.58.090, it remains for this Court to determine whether the prior bad acts evidence was erroneously admitted under ER 404(b).

III. ARGUMENT

1. ADMITTING THE PRIOR ACCUSATIONS VIOLATED ER 404(b).

Standard of Review: This Court reviews a trial court's interpretation of evidentiary rules de novo as a matter of law. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). The Court considers the State's theory for offering the evidence and the trial court's theory for admitting it. *State v. Stanton*, 68 Wn. App. 855, 861, 845 P.2d 1365 (1993). If the trial court interpreted the rule correctly, then the Court asks whether admitting the evidence constituted an abuse of discretion

based on the particular facts. *Foxhoven*, 161 Wn.2d at 174. A trial court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds. *Foxhoven*, 161 Wn.2d at 174. Specifically, a court may not rely on unsupported facts, take a view that no reasonable person would take, apply the wrong legal standard, or base its ruling on an erroneous view of the law. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003); *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236, 1239 (2009).

Here, this Court will not accord the trial court's ER 404(b) rulings the deference generally shown to evidentiary rulings. The judge had already decided to admit the evidence under RCW 10.58.090.

Accordingly, as with appellate pronouncements that are not dispositive, the trial court's ER 404(b) remarks are essentially dicta and presumed not to have been intended to withstand rigorous analysis. *See, State v. Halgren*, 137 Wn.2d 340, 347 n. 3, 971 P.2d 512 (1999).

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).

Trial Court's Ruling: The trial court ruled from the bench that Ms. Serrano's accusations and the associated evidence were admissible under ER 404(b) to prove motive, opportunity, intent and common scheme or plan. RP 612. In its written findings and conclusions, however, the court settled upon identity, intent and common plan as the legitimate purposes for which the evidence was admissible. Conclusion 3, CP 27.

The trial court's written findings and conclusions control over inconsistent oral comments. *State v. Bryant*, 78 Wn. App. 805, 812, 901 P.2d 1046 (1995). The court's oral ruling "has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment." *State v. Mallory*, 69 Wn.2d 532, 533-34, 419 P.2d 324 (1966).

Accordingly, the questions presented here are —

1. Whether the evidence was admissible to prove:
 - (a) Identity
 - (b) Intent
 - (c) Common Plan

(a) The Prior Accusations Could Not Prove Identity.

Uncharged misconduct evidence may not be admitted under the identity exception unless identity is at issue. *State v. Thang*, 145 Wn.2d

630, 643, 41 P.3d 1159 (2002). Then, the evidence is still not relevant unless both crimes were committed by essentially unique means, demonstrating 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).¹

Identity Was Undisputed: Tinajero's identity was simply not at issue. He freely admitted having intercourse with Valdez. His defense was that she consented, not that another man raped her. RP 602. Moreover, the State's DNA evidence eliminated any need for further identity evidence. RP 796, 800. And, as discussed below, the incidents did not exhibit a pattern so unique as to create a signature.

(b) The Prior Accusations Were Not Relevant to Prove Intent.

Courts may admit prior acts evidence to prove the defendant's state of mind at the time of the alleged offense, but only if mental state 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, there must be a logical theory — other than propensity — connecting those acts to intent as an element of the charged offense. *State v. Wade*, 98 Wn. App. 328, 334, 989 P.2d 576 (1999).

¹ 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).

Here, 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 a non-existent mens rea intent element with the essential actus reus element of forcible compulsion and a consent theory of the defense. RP 1140.

Specifically, ER 404(b) does not permit evidence of an unconnected sexual assault to prove intent, where the defendant does not deny the intercourse and the sole jury question is consent. *State v. Harris*, 36 Wn. App. 746, 751, 677 P.2d 202, 205 (1984). That is the case here.

The Serrano incident was not admissible to prove intent.

(c) The Prior Accusations Did Not Establish a Common Plan.

Where the current and prior alleged incidents are similar enough, ER 404(b) permits evidence of prior sexual conduct to refute a consent defense to the current charge. *See, e.g. State v. Lough*, 125 Wn.2d 847, 857, n.14, 889 P.2d 487 (1995); *Chandler*, at 270.² The similarities here, however, fall far short of that standard. As defense counsel argued, two attacks in orchards means no more than if both were in a house. RP 609.

² 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 *Harris* court describes common scheme or plan as a prior mental condition that points to the planning of the charged crime. *Harris*, 36 Wn. App. at 751. This requires more than the doing of similar acts. The purpose of common plan evidence is to prove the existence of a big-picture project that incorporates an earlier act that was directed toward completion of the charged crime. *Id.*³ Commentators have recognized that prosecutors frequently offer so-called “common plan” evidence in sex offense cases where no such plan exists, in order to simply show a defendant’s conformity with prior acts in committing the crime charged. See, e.g., Imwinkelreid, § 3:21.

Imwinkelreid explains that there are two variations of the common plan exception for prior bad acts. “True” plan evidence is properly admissible to show that the defendant committed previous uncharged misconduct either in a “plot” or in preparation for committing the present crime. Here, by contrast, we have what Imwinkelreid calls “spurious” plan evidence, that is an artifact resulting from manipulating the exception. Imwinkelreid at § 3:21.

“Spurious” plan evidence merely shows a pattern of conduct, whereby the so-called “plan” was simply to commit a string of similar unlinked crimes. Frequently, pure propensity evidence is admitted based

³ Quoting M. Slough and J. Knightly, OTHER VICES, OTHER CRIMES, 41 Iowa L. Rev. 325, 329-30 (1956).

on no more than this sort of “pattern of criminality.” *Imwinkelried*, §§ 3:21-:23. The uncharged offense should show a design — not merely a disposition — for committing 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, 36 Wn. App. at 751 illustrative. The State argued that rapes committed two weeks earlier were part of a common scheme or plan and were thus admissible under ER 404(b) to prove the charged rape. Division II rejected this, holding the prior acts showed no more than a propensity to commit rape. *Harris*, 36 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. This uses “common scheme or plan” as “magic words” 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).

In *Harris*, moreover, the crimes were much more similar than those here. There, a series of women voluntarily entered vehicles with the defendants and were driven against their will to a place where they were raped. Here, we have two assaults with little in common but orchards and

a pocket knife. If the *Harris* rapes were inadmissible as propensity evidence, then the Serrano incident was, too. The State alleged a single previous incident months before, not two within two weeks. The first alleged assault involved a particular woman supposedly lured by means of a premeditated scheme involving a radio announcement. CP 26, FF 3-5. The current charge involved a random chance encounter. RP 684.

Ms. Serrano repeatedly failed to identify Mr. Tinajero, either in a photograph or in person. CP 27, FF 13. The single common element that both encounters took place in the fields might be deemed significant if accused and accusers were not all field workers. It would be a great deal more significant had two assaults been alleged any place *but* in the fields. There is simply no evidence 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).

(d) The Error Was Not Harmless. An ER 404(b) violation may be harmless in some circumstances. *Gresham*, Slip Op. at 8. The harmless error standard for reviewing ER 404(b) errors is whether, “within reasonable probabilities,” the outcome of the trial would have been materially different without the errors. *Gresham*, Slip Op. at 12, (internal cites omitted.) The errors here cannot be deemed harmless.

The trial court acknowledged that the evidence labeled Mr. Tinajero a sexual predator, but erroneously concluded this was not sufficiently prejudicial to outweigh legitimate probative value. RP 611. This is wrong. The prior acts 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 such 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 should receive 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 that the Serrano assault could be considered as evidence of a "common scheme or plan," but were never told what this means. RP 827-28. Nothing in the instructions prevented the jury from interpreting "common scheme or plan" to mean, "he did it before, so he probably did it again."

Here, as in *Gresham*, it cannot be claimed that the prior acts evidence did not affect the outcome for Mr. Tinajero. As in *Gresham*, much of the State's evidence was predicated on the earlier offense. There were no witnesses to the incident giving rise to the current charge, so, as in

Gresham, the verdict came down to Tinajero’s credibility versus that of Ms. Valdez. See *Gresham*, Slip Op. at 12. As in *Gresham*:

While this evidence is by no means insufficient for a jury to convict a defendant, there is a reasonable probability that, absent this highly prejudicial evidence of [the alleged] prior sex offense, ... the jury’s verdict would have been materially affected. Thus, we cannot say that the erroneous admission of the evidence of [the defendant’s] prior conviction was harmless error.

Gresham, Slip Op. at 13, citing *Saltarelli*, 98 Wn.2d at 363 (the prejudice potential of prior acts is at its highest in sex cases.)

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 Ms. Valdez was telling the truth, Mr. 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.”

In summary, the jury should not have heard the prior acts evidence because it was extremely prejudicial and established nothing of relevance beyond mere propensity.

2. THE ERROR DENIED MR. TINAJERO
THE RIGHT TO CONFRONT THE
WITNESSES AGAINST HIM.

Admitting the prior accusation evidence under RCW 10.58.90 created due process errors beyond introducing the impermissible inferences of propensity. The erroneous admission of prior unproven accusations denied Mr. Tinajero the full measure of due process to which he was entitled.

The Sixth Amendment to the United States Constitution and article 1, section 22 of the Washington Constitution guarantee criminal defendants the right to confront and cross examine witnesses. And the Fifth Amendment and Const. art. 1, § 9 protect the right to remain silent. Our courts do not allow the State to use procedural rules to circumvent or supersede constitutional mandates. *State v. Waldon*, 148 Wn. App. 952, 965, 202 P.3d 325 (2009), quoting *State v. Duckett*, 141 Wn. App. 797, 808, 173 P.3d 948 (2007). Constitutional rules cannot be superseded legislatively. *Dickerson v. United States*, 530 U.S. 428, 444, 120 S. Ct. 2326, 147, L. Ed. 2d 405 (2000).

Moreover, the State cannot force a defendant to choose between his constitutional rights. *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980). Where a defendant is presented with an unavoidable Hobson's choice between fundamental trial rights, "the appropriate

remedy is dismissal of the charges.” *State v. Smith*, 67 Wn. App. 847, 862, 841 P.2d 65 (1992). That is the case here.

Mr. Tinajero informed the court he wanted to testify in his own defense. RP 19, 1122. The only chance for acquittal lay in the hope that, after weighing his credibility against that of Ms. Valdez, one or more jurors would harbor a reasonable doubt. But the court ruled that Mr. Tinajero could not testify without subjecting himself to interrogation under oath on the subject of the ongoing Serrano prosecution.

The defense moved in limine to limit the scope of the State’s cross examination to matters raised on direct — which would address only the Valdez incident with which Mr. Tinajero was charged. RP 1122. But the prosecutor insisted the State could and would cross examine Mr. 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 ruled 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 court acknowledged the principle of not exceeding scope of direct examination

but believed it could not put prior constraints on the scope of cross examination by granting the defense motion in limine. 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. Mr. Tinajero's only option was to forego taking the stand. RP 1131.

Defense counsel argued that the probative value of the allegation of prior misconduct was low because the State had already belabored it extensively before the jury, while the prejudice to Mr. Tinajero was, by contrast, huge because he was forced to sacrifice either his right to testify on his own behalf in this trial or his right to remain silent about a pending prosecution on the prior misconduct claim. But the 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.

This was a structural error that requires reversal.

Criminal defendant have a fundamental right to testify. *Rock v. Arkansas*, 483 U.S. 44, 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*, 128 S. Ct. 1070, 169 L. Ed. 2d 815 (2008).

Here, Mr. 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.

Dismissal is the appropriate remedy.

3. THE PRIOR ACTS EVIDENCE WAS
ADMITTED WITH NO ASSURANCE
IT WAS LAWFULLY OBTAINED.

Another unintended due process violation in consequence of admitting the prior accusation evidence under RCW 10.58.090 was that it denied Mr. Tinajero the opportunity to challenge it under CrR 3.5 and CrR 3.6 as is mandated for all evidence the State obtains in the course of an ongoing criminal investigation. An opportunity for suppression proceedings is mandated by Const. art.1 § 7 and the Fourth Amendment.

This is a manifest constitutional error that may be raised for the first time on appeal. RAP 2.5(a)(3). An error is "manifest" if it has "practical and identifiable consequences in the trial," and if the facts necessary to adjudicate the claimed error are in the record on appeal. *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, in addition to the non-constitutional violation of ER 404(b), evidence erroneously admitted

under RCW 10.58.090 deprived Mr. Tinajero of the protections of Const. art 1, §7 and the Fourth Amendment.

This erroneously admitted evidence included police testimony that Mr. Tinajero implicated himself during the investigation of the Valdez allegations by appearing to be familiar with the Serrano investigation. RP 1105. The jury was not told that Tinajero was seized and interrogated in connection with that investigation back in April, so it could not logically be inferred that his knowledge was evidence of guilt.

The State also introduced a photomontage for which Mr. Tinajero's picture was taken on April 24, 2007, and which the jury could therefore infer was prepared for the Serrano investigation. RP 716, 1058; Exh. 7, page 2. This indirectly informed the jury that the police had reason to associate Tinajero with similar offences even before Serrano. (Otherwise, why would they just happen to have his picture on file?)

Because RCW 10.58.090 allowed evidence of guilt concerning the prior accusation — but not regarding the conduct of the prior investigation — the defense was unable to challenge evidence that may have been unlawfully obtained. This effectively divested Mr. Tinajero of the protection of Article I, section 7 of the Washington Constitution and the Fourth Amendment to the U.S. Constitution.

Under both art. 1, §7 and the Fourth Amendment, 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, 9 L. Ed. 2d 441, 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 is 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 defense counsel was not permitted to mention that Tinajero 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. Ms. Serrano described a Spanish-speaking male of average height with dark hair and a gap in his teeth. RP 835, 886, 888. He was wearing a baseball cap, sweat shirt, and jeans. RP 895-95. The license plate number of his vehicle checked out to a woman living at a different address than that then on record for Tinajero and with no apparent connection with him. RP 762. Serrano could not identify Tinajero in a photo lineup.

Whether or not Mr. Tinajero was lawfully seized in April of 2007 is not the issue, however. The point is that bringing the evidence into court by way of RCW 10.58.090 divested Tinajero of his constitutional right to seek suppression for all purposes of any evidence that was unlawfully obtained unless the State could affirmatively show that it was untainted. The remedy is to reverse the conviction.

V. **CONCLUSION**

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*, 261.⁴ 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).

Here, the other acts evidence occupies the bulk of this record, and the evidence regarding the current charge was overwhelmed by the effort to prove that Mr. Tinajero previously assaulted someone else. This Court should hold that Mr. Tinajero was prejudiced by the unlawful admission of much of the evidence against him.

Because of the constitutional implications, the appropriate disposition is to reverse and dismiss with prejudice.

Regardless, for the reasons set forth in Mr. Tinajero’s opening brief, the Court should vacate the sentence of life without parole.

Respectfully submitted this 23rd day of February, 2012.

Jordan B McCabe

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⁴ Citing 1A John H. Wigmore, EVIDENCE IN TRIALS AT COMMON LAW, § 58.2 (Tiller rev., 1983).

CERTIFICATE OF SERVICE

With the prior agreement of the Yakima Prosecutor's Office, Jordan McCabe served opposing counsel, Kevin Eilmes, with this Supplemental Brief via the Division III upload portal:

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A paper copy was also mailed this day, postage prepaid, to:

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Jordan B McCabe February 23, 2012

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