

FILED

JUN 28 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 28697-5-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

PAUL BARR,

Appellant.

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

The Honorable C. James Lust, Judge

OPENING BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied his constitutional right to a public trial.
2. Appellant was denied his constitutional right to be present at all critical stages of trial.
3. The trial court erred under RCW 10.58.090 when it admitted evidence of prior offenses to prove appellant committed the current offenses.
4. RCW 10.58.090 violates state and federal constitutional prohibitions on ex post facto legislation.
5. The Legislature's enactment of RCW 10.58.090 violates the separation of powers doctrine of the state and federal constitutions.
6. RCW 10.58.090 violates the Washington Constitution's fair trial guarantees.
7. One of appellant's two convictions for child molestation violates double jeopardy.
8. The combination of appellant's prison time and his term of community custody potentially exceeds the statutory maximum sentence for his offenses.

Issues Pertaining to Assignments of Error

1. The trial judge conducted a portion of jury voir dire at sidebar. Where the trial court did not analyze the Bone-Club¹ factors before conducting this private hearing, did the chosen procedure violate appellant's constitutional right to public trial?

2. Voir dire is a critical stage of trial and appellant had a constitutional right to attend and participate. When the court conducted voir dire by sidebar, only defense counsel and the prosecuting attorney participated in the process. There is no indication appellant was present or consulted in any way. Did this violate appellant's due process rights?

3. A retrospective law violates the ex post facto provisions of the federal Constitution if it is substantive and disadvantages the person affected by it. In enacting RCW 10.58.090, the Legislature stated it intended the statute to work a substantive change and that it applies retroactively. At the time of the offense in question, ER 404(b) would have prevented a jury from considering appellant's prior conduct as evidence of criminal propensity. Is application of RCW 10.58.090, permitting this previously forbidden inference, unconstitutional?

4. The framers of the Washington Constitution copied the

¹ State v. Bone-Club, 128 Wn.2d 254, 926 P.2d 325 (1995).

language of Article I, section 23, regarding ex post facto laws, from the Indiana and Oregon constitutions. The supreme courts of both those states have interpreted those provisions to bar the retroactive application of evidentiary rules that operate in a one-sided fashion to make convictions easier to obtain. RCW 10.58.090 alters the rules of evidence in a one-sided fashion to make convictions easier to obtain. Does application of RCW 10.58.090 to appellant's case violate Article I, section 23?

5. The Separation of Powers doctrine prohibits one branch of government from usurping the prerogatives and duties of another branch of government. Article 4, section 1 of the Washington Constitution vests the Washington Supreme Court with the sole authority to govern court procedure. Because it is a procedural rule regarding the admission of evidence, did the Legislature unconstitutionally usurp the judiciary's constitutional function by enacting RCW 10.58.090?

6. The understanding that a fair trial precludes the use of propensity evidence of other crimes pre-dates the federal and state constitutions. By permitting such evidence, does RCW 10.58.090 violate Article 1, sections 21 and 22 of Washington's Constitution, guaranteeing the right to a fair trial?

7. Appellant was convicted on two counts of child molestation. Inadequate jury instructions exposed him to multiple

punishments for one offense. Must one of the convictions be vacated?

8. The total penalty imposed upon a defendant, including the period of confinement and the subsequent period of community custody, may not exceed the maximum penalty for the offense. Appellant's sentences for molestation violate this prohibition. Is remand required to clarify the judgment?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Yakima County Prosecutor's Office charged Paul Barr with two counts of Rape of a Child in the Second Degree, alleging sexual intercourse with R.H., who was thirteen years old at the time, between February 1, 2002 and January 31, 2003. Alternatively, the State charged Barr with two counts of Child Molestation in the Second Degree, alleged to have occurred during the same time period. CP 139-140.²

A jury found Barr guilty on the molestation charges. CP 64, 68. Jurors also found two aggravating circumstances – that the crime was part of an ongoing pattern of sexual abuse manifested by multiple incidents over a prolonged period of time and that Barr used a position of trust to facilitate

² The State also charged Barr with several additional offenses. CP 140-141. These charges were dismissed, however, following a successful defense motion to suppress under CrR 3.6. CP 34-37.

the crime. CP 62-63.

Barr was sentenced to an exceptional 120-month sentence on each count, to be followed by 36 months' community custody. CP 17. He timely filed his Notice of Appeal. CP 3-14.

2. Jury Voir Dire

All prospective jurors filled out a questionnaire. RP³ 57; CP 68-73. Those individuals who wished to be questioned outside the presence of other jurors were provided that accommodation, although questioning was conducted in a courtroom open to the public. RP 64-314.

During general questioning, in the presence of the entire venire, the deputy prosecutor asked those jurors who had not already been questioned individually whether anyone had been a victim of sexual abuse or knew someone who had. RP 351-352. Juror 20, Ms. Dibbert, raised her hand. RP 352-353. When it became apparent Ms. Dibbert was uncomfortable discussing the matter in the presence of others, the deputy prosecutor indicated she would not ask her anything further. RP 353-354.

At that point, the trial judge asked Ms. Dibbert and both attorneys to approach the bench for a sidebar conference. RP 354. The content of their

³ "RP" refers to those consecutively paginated volumes of the verbatim report of proceedings labeled volumes I through XII. All other volumes are identified by the date of the proceeding.

discussion is far from clear because the court reporter was unable to hear much of what was said. What is known is that Dibbert began crying, she did not think that the information she possessed would impact her ability to be fair, and she did not like everyone looking at her. The sidebar then concluded. RP 354-355.

After defense counsel questioned other prospective jurors, the judge called another sidebar with counsel to discuss Ms. Dibbert. RP 375. Much of the conversation was once again outside of the court reporter's earshot and it is impossible to determine precisely what was said. RP 368-369. The attorneys then resumed questioning other potential jurors. RP 369-375.

The judge then called a third sidebar regarding Ms. Dibbert, once again inviting her and counsel to the bench for a private discussion. RP 375. The court assured Dibbert that their conversation was "all whited out so nobody hears anything[,]” and that although it was being recorded, other prospective jurors could not hear what was being said. RP 375. The following, largely inaudible, discussion followed:

Prosecutor: (Inaudible -- cannot hear her).
(Question and answer inaudible, cannot hear them).

Court: Ms. Dibbert, I'm going to put it to you this way recognizing that you're asked to maintain a confidence and we're really leaning on you here, would you be more comfortable if I just excused

you?

Dibbert: I think I'd be okay (inaudible) his experience.

Court: Okay, alright. Go ahead.

Dibbert: (Inaudible).

Prosecutor: (Inaudible) based just on this evidence in making your decision just based upon the evidence that's produced in this trial.

Dibbert: I think so.

Prosecutor: (Inaudible -- can't hear her)

Dibbert: (Inaudible). **(Questions and answers inaudible).**

Court: Mr. Connaughton.

Defense: (Inaudible) **(Questions and answers inaudible).**

Court: Ms. Dibbert, I'm going to excuse you. I don't want to put you through the trauma that you're going through. I apologize to you for having you go this far.

RP 376.

3. Trial Evidence

Prior to trial, the State gave notice that it intended to offer evidence, under RCW 10.58.090, that Barr committed crimes against other victims, K.R. and N.H. CP 143; RP (10/20/08 a.m.) 17-21. The defense moved to

exclude this evidence, and argued that its application violated the prohibition against ex post facto laws. CP 124-128, 136-138, 143-146; RP (10/20/08 a.m.) 24-26.

At a hearing on the defense motion to suppress, the State presented the testimony of both young women as an offer of proof, and the court heard additional argument from both sides. RP (10/28/08) 64-132; RP (10/30/08) 157-173. The court precluded the State's use of K.R.'s allegations, but found N.H.'s testimony admissible under the statute.⁴ RP (10/31/08) 175-176.

N.H., who was 24 years old at the time of trial, was the State's first trial witness. RP 477. She began studying martial arts at the Yakima School of Karate ("YSK") in 1999, when she was 15 years old. RP 479. Barr, who was in his mid-thirties at the time, was an instructor at YSK. RP 481, 945-946.

According to N.H., sometime in 2000, she and Barr began to flirt. RP 481. Later, he gave her private instruction on weekends. RP 482. Eventually, when N.H. was 16 years old, the two developed a sexual relationship. RP 483. N.H. testified that the two would engage in various

⁴ It appears from the record that the State drafted proposed findings concerning the court's ruling under RCW 10.58.090. See RP 392-401. No findings were ever entered, however.

sexual acts at the Dojo (karate school) and at Barr's home. RP 484-491. N.H. testified that she never told anyone about the relationship because she was embarrassed and a private person. RP 492. She only came forward after the Yakima Police Department contacted her. RP 495.

The alleged victim in the case, R.H., was 19 years old at the time of trial. RP 574. She began studying martial arts at YSK in 2001, when she was 12 years old. RP 577-578. According to R.H., when she was in the eighth grade, Barr taught her to "grapple" and, while doing so, he touched her breasts and groin area over her clothing. RP 581. Eventually, he began placing his hand up her uniform pants and touching her vagina. RP 582.

According to R.H., when she was 13 and 14 years old, she and Barr engaged in multiple sex acts at the Dojo, at Barr's place of employment, and at Barr's home. RP 584-601. R.H. testified that she eventually ended the relationship and switched to another karate school in 2004. RP 602-603. She and Barr had contact again when she was a senior in high school and the two communicated on the internet. RP 610-617, 626-627, 635.

R.H. testified that she revealed the relationship to a psychiatrist she was seeing while attending college. The therapist threatened to contact law enforcement if R.H. did not. RP 617-618. When R.H. went home for Christmas in 2007, she contacted the Yakima Police Department and claimed sexual abuse. RP 566-569, 618-619. R.H. described the inside of

Barr's home, including some art that N.H. had given Barr. RP 596-597.

In response to R.H.'s claims, police interviewed Barr. RP 942. He was cooperative. RP 943. He denied any inappropriate contact with R.H. RP 979-980, 1023. He admitted a dating relationship with N.H., but said it did not begin until after she had graduated high school. RP 956-957.

Both of R.H.'s parents testified at trial. Her father, who also was a student at YKS, testified that R.H. never mentioned anything about an inappropriate relationship. RP 709-710, 719. He was close to his daughter and never once saw anything concerning. RP 724, 727-728. Similarly, R.H.'s mother, who is a physician, testified that R.H. never mentioned any inappropriate relationship with Barr prior to her report in 2007. RP 756. R.H. never suffered emotional or academic problems in 2002 or 2003. RP 764. R.H.'s brother, who also attended YSK, did not see anything concerning, either. RP 1133-1134.

Several former and current students and teachers at YKS also testified. None of them witnessed the sexual acts R.H. alleged. RP 1024.

One former student, who was dating R.H. in 2004, testified that he once saw Barr grab or pinch R.H. on the behind and R.H. slap his hand away. RP 770, 773-776. And another former student testified that sometimes, when Barr and R.H. stretched together, she saw Barr touch R.H.'s lower thigh and look down the top of her uniform. RP 796. But

several others who spent significant time at the Dojo – as students and instructors – saw nothing concerning. RP 1066, 1081, 1098, 1139-1140. And police were unable to find anyone at the Dojo who could corroborate R.H.'s claims of sexual activity with Barr on the premises. RP 1024.

There was a dispute whether Barr could have performed some of the acts R.H. alleged. R.H. testified that when she performed oral sex on Barr, he could simply rotate his uniform pants and expose his genitalia. RP 585. Others testified this would be very difficult to accomplish. RP 825, 1145. Moreover, Barr generally wore a cup. RP 1141, 1146. When the prosecutor had a police sergeant put on uniform pants over his own clothing and attempt the maneuver R.H. described, the pants ripped. RP 1155-1156.

R.H. sometimes provided inconsistent versions of events. See RP 600-601, 635-636, 1057-1059 (describing events at Barr's home); RP 655-656, 1017-1018 (order and timing of events). Moreover, she claimed that Barr was circumcised and may have only one testicle. RP 601-602, 658-659, 1025-1026. In fact, Barr is not circumcised and clearly has two testicles. RP 900. Based on R.H.'s claims, forensic testing was performed on carpet samples from the Dojo and a pair of pants belonging to R.H. RP 585, 621-623, 1003-1005. All tested negative for the presence of semen. RP 985-993.

4. Jury Instructions and Verdicts

Neither of the “to convict” instructions for the molestation charges contained distinguishing information concerning the time of the crime or a specific act.⁵ Rather, both instruction 8 and instruction 10 required the State to prove:

- (1) That on or about or between February 1, 2002 and January 31, 2003, the defendant had sexual contact with [R.H.];
- (2) That [R.H.] was at least twelve years old but less than fourteen years old at the time of the sexual contact and was not married to the defendant;
- (3) That the defendant was at least thirty six months older than [R.H.]; and
- (4) That the acts occurred in the State of Washington.

CP 90, 92.

Nowhere do any of these instructions, or any other instructions, indicate the jury’s verdict had to be based on an act “separate and distinct” from the other count. See CP 80-104. Nor did the verdict forms impose this requirement. CP 64, 66.

⁵ Nor did the “to convict” instructions for the rape charges. See CP 88, 91.

C. ARGUMENT

1. BARR WAS DENIED HIS CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL.

Under both the Washington and United States Constitutions, a defendant has a constitutional right to a speedy and public trial. Const. art. 1, § 22; U.S. Const. amend. VI. Additionally, the public and press have an implicit First Amendment right to a public trial. U.S. Const. amend. I; Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L.Ed.2d 31 (1984). A violation is presumed prejudicial and is not subject to harmless error analysis. State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006); In the Matter of the Personal Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

Jury voir dire of prospective jurors must be open to the public. Presley v. Georgia, ___ U.S. ___, 130 S. Ct. 721, 723-725, ___ L. Ed. 2d (2010). Before a trial judge can close any part of voir dire, it must analyze the five factors identified in State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). Orange, 152 Wn.2d at 806-07, 809; see also State v. Brightman, 155 Wn.2d 506, 515-16, 122 P.3d 150 (2005) (a trial court violates a defendant's right to a public trial if the court orders the courtroom closed during jury selection but fails to engage in the Bone-

Club analysis).

The Bone-Club requirements are:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a “serious and imminent threat” to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59 (quoting Allied Daily Newspapers of Wash. v. Eikenberry, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

In Brightman, the trial court sua sponte told counsel that for reasons of security “we can’t have any observers while we are selecting the jury.” Brightman, 155 Wn.2d at 511. The court, however, failed to analyze the five Bone-Club factors. The Supreme Court held because the record lacked “any hint that the trial court considered Brightman’s public trial right as required by Bone-Club, we cannot determine whether the closure was warranted.” Id. at 518. The Court remanded for a new trial.

Id.

The State had argued Brightman failed to prove the trial court in fact closed the courtroom during jury selection and, if it was closed, the closure was de minimis. Brightman, 155 Wn.2d at 515-17. The Brightman Court rejected both arguments. It ruled, “once the plain language of the trial court’s ruling imposes a closure, the burden is on the State to overcome the strong presumption that the courtroom was closed.” Id. at 516. It also ruled that where jury selection or a part of the jury selection is closed, the closure is not de minimis or trivial. Id. at 517.

Brightman was decided on direct appeal. In Orange, the same issue was raised in a personal restraint petition. In 1995, Orange was tried for murder, attempted murder, and assault. Orange, 152 Wn.2d at 799. Due to limited courtroom space and security reasons, the trial court closed the courtroom for a portion of jury voir dire. Id. at 808-10. The Orange Court held the trial court’s failure to analyze the five Bone-Club factors before ordering the courtroom closed violated Orange’s right to a public trial. Id. at 812.

More recently, in State v. Strobe, the defendant was charged with multiple sex offenses. His prospective jurors were asked in a questionnaire whether they or anyone they were close to had ever been the victim of or accused of committing a sex offense. The prospective jurors

who answered “yes” were individually questioned in the judge’s chambers to determine whether they could nonetheless render a fair and impartial verdict. Before excluding the public from this private hearing, the trial court failed to hold a “Bone-Club hearing.” *Strode*, 167 Wn.2d at 223-224.

While privately questioning some potential jurors, the trial court stated variously that “the questioning was being done in chambers for ‘obvious’ reasons, to ensure confidentiality, or so that the inquiry would not be ‘broadcast’ in front of the whole jury panel.” The trial judge, prosecutor, and defense counsel questioned the prospective jurors, and challenges for cause were heard and ruled upon. *Strode*, 167 Wn.2d at 224. A majority of the Supreme Court reversed *Strode*’s conviction because the trial court failed to weigh the competing interests as required by Bone-Club. *Id.* at 226-229 (Alexander, C.J., lead opinion); 167 Wn.2d at 231-236 (Fairhurst, J., concurring).

Here, the trial judge also conducted a portion of jury voir dire – that pertaining to prospective juror 20 (Ms. Dibbert) – in private. While the courtroom was open to the public in the sense that no one was precluded from entering or asked to leave, everyone was excluded from the private bench conferences except Ms. Dibbert, counsel, and the court reporter. RP 354, 375. And even the court reporter could not hear most

of what was discussed. Most of the questions and answers are simply unknown. RP 354-355, 375-376. As a practical matter, the judge might as well have conducted this private hearing in chambers or dismissed the public from the courtroom. See RP 375 (court assures Dibbert that their conversation was “all whited out so nobody hears anything[,]” and that other prospective jurors could not hear what was being said).

There is no indication the court considered, much less analyzed, the Bone-Club factors before conducting this private hearing at the bench. Instead, it appears the court chose this process so Ms. Dibbert would not be required to reveal potentially embarrassing information in front of other potential jurors. By employing this procedure, however, the court violated Barr’s right to public trial.

The State may try to argue that because defense counsel did not object to conducting this portion of voir dire at side bar, the issue is waived. That argument fails. Defense counsel in Strode, Orange, and Brightman also failed to object. Strode, 167 Wn.2d at 229; Orange, 152 Wn.2d at 801-02; Brightman, 155 Wn.2d at 517-518. Compare State v. Momah, 167 Wn.2d 140, 151-155, 217 P.3d 321 (2009) (issue waived where defense actively supported closure), abrogation recognized by State v. Paumier, 155 Wn. App. 673, 230 P.3d 212 (2010).

The constitutional public trial right is the right to have a trial open

to the public. Orange, 152 Wn.2d at 804-05. "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions. . . ." Bone-Club, 128 Wn.2d at 259 (citing In re Oliver, 333 U.S. 257, 270 n. 25, 68 S. Ct. 499, 506 n. 25, 92 L. Ed. 682 (1948) (quoting Thomas M. Cooley, Constitutional Limitations 647 (8th ed. 1927)). Moreover, a process that is closed to the defendant and his family prevents these individuals from "contributing their knowledge or insight to jury selection" See Brightman, 155 Wn.2d at 515.

Because a portion of jury voir dire was not open to the public, Barr's constitutional right to a public trial was violated. His convictions must be reversed and the case remanded for a new trial.

2. THE FAILURE TO INCLUDE BARR IN THE PROCESS OF EXCUSING JUROR 20 VIOLATED HIS SIXTH AMENDMENT RIGHT TO BE PRESENT FOR TRIAL.

Due Process guarantees any person accused of a crime the right to be present for all critical stages of the prosecution. U.S. Const. amends. 5, 6, 14; Const. art. 1, §§ 3, 22; Kentucky v. Stincer, 482 U.S. 730, 745, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987); United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985); Illinois v. Allen, 397

U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970). The Washington Constitution specifically provides for the right to "appear and defend in person." Const. art. 1, § 22.

There is no constitutional right when the defendant's "presence would be useless, or the benefit but a shadow[.]" *Stincer*, 482 U.S. at 745. However, the defendant has the right to be present whenever "his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge" *In re Personal Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (quoting *Gagnon*, 470 U.S. at 526), *cert. denied*, 513 U.S. 849 (1994).

The constitutional right to be present for the selection of one's jury is well recognized. See *Lewis v. United States*, 146 U.S. 370, 373-374, 13 S. Ct. 136, 36 L. Ed. 1011 (1892); *Gomez v. United States*, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989); *State v. Wilson*, 141 Wn. App. 597, 604, 171 P.3d 501 (2007). Consistent with this constitutional guarantee, CrR 3.4(a) explicitly requires the defendant's presence "at every stage of the trial including the empanelling of the jury"

Far from being "useless" or its benefit "but a shadow," "[j]ury selection is the primary means by which [to] enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability[.]" *Gomez*, 490 U.S. 858

at 873 (citations omitted). The defendant's presence "is substantially related to the defense and allows the defendant 'to give advice or suggestion or even to supersede his lawyers.'" Wilson, 141 Wn. App. at 604 (quoting Snyder v. Massachusetts, 291 U.S. 97, 106, 54 S. Ct. 330, 78 L. Ed. 2d 674 (1934), overruled on other grounds by Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)); see also United States v. Gordon, 829 F.2d 119, 124 (D.C. Cir. 1987) (Fifth Amendment requires opportunity to give advice or suggestions to lawyer when assessing potential jurors).

The circumstances in Barr's case are remarkably similar to those in People v. Williams, 52 A.D.3d 94, 858 N.Y.S.2d 147 (2008). At Williams' trial, the court conducted sidebar discussions during voir dire to determine whether three prospective jurors should be excused. At each conference, only the judge, counsel, and the juror were included in the discussion. One potential juror was retained and ultimately served. Two other jurors were excused on consent of the attorneys based on concern regarding their abilities to put aside prior experiences. Williams, 52 A.D.3d at 95-96.

On appeal, Williams alleged a violation of her right to be present at all critical stages of trial based on her absence from the sidebar conferences. The Supreme Court of New York agreed and reversed her

convictions. Williams, 52 A.D.3d at 96. The Court held that the exclusion of a juror – without a knowing, intelligent, and voluntary waiver of the right to be present – requires reversal, even when the juror is excused on consent of counsel. Id. The Court also rejected “the People’s speculative suggestion that the defendant may have been able to hear what was said during the sidebar[.]” Id. at 97 (citation omitted); see also Lewis, 146 U.S. at 372 (“where the [defendant’s] personal presence is necessary in point of law, the record must show the fact.”).

Violation of the defendant’s right to be present at a critical stage of the criminal proceedings requires reversal unless the State can demonstrate the constitutional violation was harmless beyond any reasonable doubt. State v. Rice, 110 Wn.2d 577, 613-14, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910 (1989); State v. Pruitt, 145 Wn. App. 784, 798-799, 187 P.3d 326 (2008). The State cannot make the necessary showing in this case.

Presumably, the only way in which the State could make this showing would be to demonstrate that under no set of circumstances could Ms. Dibbert have served as a juror. But she was juror number 20 and well within the range of individuals ultimately comprising the jury. See RP 379-383 (last individual chosen is juror 63). Moreover, the only indication available from the mostly unrecorded sidebar conferences is that Ms.

Dibbert did *not* think her personal experience would impact her ability to serve in this case. See RP 354. Prejudice is presumed, and the State cannot show that Barr's participation in the process could not have made a difference.

On this alternative ground, Barr's convictions must be reversed and his case remanded for a new trial.

3. THE TRIAL COURT ERRED WHEN IT ADMITTED EVIDENCE OF PRIOR SEXUAL MISCONDUCT UNDER RCW 10.58.090.⁶

RCW 10.58.090 provides:

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 Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403.

RCW 10.58.090(1). The statute provides factors that trial courts should consider in deciding whether the evidence is admissible under ER 403.

RCW 10.58.090(6).

For each of the reasons discussed below, the trial court erred when it admitted evidence of Barr's sexual relationship with N.H. under RCW

⁶ Division One of this Court has upheld the constitutionality of RCW 10.58.090. See *State v. Scherner*, 153 Wn. App. 621, 225 P.3d 248 (2009), review granted, ___ Wn.2d ___ (June 1, 2010); *State v. Gresham*, 153 Wn. App. 659, 223 P.3d 1194 (2009), review granted, ___ Wn.2d ___ (June 1, 2010). Because the Supreme Court has now granted review of

10.58.090.

The improper admission of “bad acts” evidence requires reversal if, within reasonable probabilities, the error affected the outcome at trial. State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). The admission of N.H.’s testimony most certainly had this impact. Without this evidence, the prosecution was faced with challenging circumstances: no one could corroborate R.H.’s allegations of abuse, there were no eyewitnesses to the sex acts she described, Barr denied a sexual relationship, there was an absence of physical evidence demonstrating sexual contact, R.H.’s disclosure was extremely tardy, R.H. failed to accurately describe Barr’s genitals, and R.H. had provided sometimes contradictory versions of events.

But none of these deficiencies mattered once N.H. took the stand and testified to an improper sexual relationship with Barr. So important was N.H. to the State’s case, the deputy prosecutor made her the first trial witness. RP 477. Jurors were told they could consider the similarities between her allegations and those of R.H., and the prosecutor focused on N.H. during closing argument. RP 1181, 1188-1189; CP 96. In fact, the prosecutor expressly used N.H.’s testimony to convince jurors that R.H. also had been sexually abused. RP 1210-1212.

these decisions, their continuing validity is in doubt.

- a. Admitting Propensity Evidence Under RCW 10.58.090 Violates The State And Federal Constitutional Prohibitions Against Ex Post Facto Laws.

Article I, § 10 of the United States Constitution and article 1, § 23 of the Washington Constitution, the ex post facto clauses, forbid the State from enacting any law that imposes punishment for an act that was not punishable when committed, increases the quantum of punishment, or alters the rules of evidence to permit conviction based on less or different evidence than the law required at the time of the offense. Ludvigsen v. City of Seattle, 162 Wn.2d 660, 668-69, 174 P.3d 43 (2007) (citing Calder v. Bull, 3 U.S. (3 Dall.) 386, 1 L. Ed. 648 (1798)).

A law violates the ex post facto clause when it: (1) is substantive, as opposed to merely procedural; (2) is retrospective (applies to events which occurred before its enactment); and (3) disadvantages the person affected by it. State v. Hennings, 129 Wn.2d 512, 525, 919 P.2d 580 (1996) (citing Weaver v. Graham, 450 U.S. 24, 29, 101 S. Ct. 960, 964, 67 L. Ed. 2d 17 (1981); Collins v. Youngblood, 497 U.S. 37, 45, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990)). RCW 10.58.090 violates the prohibition on ex post facto legislation because each of these elements is met. Additionally, the statute dramatically changes the landscape of evidence law to favor the State.

- i. *RCW 10.58.090 Violates the Ex Post Facto Clause Because It Is Substantive, Retrospective, and Disadvantages Barr.*

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

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

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

Second, the statute applies to events that occurred before its enactment. The Legislature specifically stated the statute should apply to

any case tried after its enactment without concern for when the alleged offense may have occurred. Laws 2008, ch. 90 § 3. Barr's alleged offenses occurred between 2002 and 2003, well before the effective date of the statute, June 12, 2008. Thus the statute applies retrospectively.

Finally, RCW 10.58.090 substantially disadvantages Barr. RCW 10.58.090 allows evidence that is not admissible for a more limited purpose under ER 404(b) to be admitted for any purpose whatsoever. The State asked the jurors to use the evidence in this case as bald propensity evidence, expressly using N.H.'s testimony to convince jurors that R.H. also had been sexually abused. RP 1210-1212.

Washington courts have long excluded this class of evidence precisely because that sort of conclusory logic was deemed incompetent, irrelevant, and greatly prejudicial. See *State v. Bokien*, 14 Wash. 403, 414, 44 P. 889 (1896). This incompetent, irrelevant, and greatly prejudicial evidence was used to bolster the credibility of the complaining witnesses in a trial where her belated and sometimes inconsistent reports were the only substantive evidence of guilt. Under the test enunciated in *Hennings*, application of RCW 10.58.090 to offenses committed prior to its enactment violates the ex post facto clause of the United States Constitution.

ii. *RCW 10.58.090 Violates the Ex Post Facto Clause Because It Dramatically Tilts the Playing Field in Favor of the State.*

Laws have been held to violate ex post facto when they permit conviction on the testimony of one person, where two were previously required. See *Carmell v. Texas*, 529 U. S. 513, 516-19, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (1999). *Carmell* involved the repeal of a Texas evidentiary rule requiring corroboration of victims' testimony in rape cases. *Id.* The court discussed at length the *Fenwick* case, in which English law previously requiring two witnesses to convict for treason was changed to require only one. *Id.* at 526-29. Such laws are substantive and disadvantage defendants because they affect the quantum of evidence necessary for a conviction rather than "simply let more evidence in to trial." *Ludvigsen*, 162 Wn.2d at 674.

By contrast, laws that merely expand the permissible universe of witnesses are generally upheld against ex post facto challenges. For example, courts have upheld changes in law that permitted convicts or spouses to testify. *Hopt v. People of Territory of Utah*, 110 U.S. 574, 4 S. Ct. 202, 28 L. Ed. 262 (1884); *State v. Clevenger*, 69 Wn.2d 136, 417 P.2d 626 (1966).

By permitting evidence of prior sex offenses for the purpose of showing criminal propensity, RCW 10.58.090 falls into a third category

somewhere in between the laws directly reducing the amount of proof and those that merely expand the permissible universe of witnesses. On the one hand, RCW 10.58.090 does expand the permissible universe of evidence. But it does more than that. It permits a previously forbidden inference of guilt based on criminal propensity.

This is a far more dramatic change than merely permitting spouses and convicts to give the same type of testimony under the same conditions as other witnesses. Previously, the State would have had to prove Barr's guilt based solely on evidence relevant to the incidents charged in this case. Now, the State's case can be bolstered and the State's witnesses' credibility enhanced by the previously forbidden inference that he has a propensity to commit sex crimes.

This Court should hold RCW 10.58.090 violates the ex post facto clauses because this change tilts the playing field in favor of the State. See City of Seattle v. Ludvigsen, 162 Wn.2d 660, 671, 174 P.3d 43 (2007). The "different evidence" prong of the Calder standard was also at issue in Ludvigsen. Ludvigsen moved to suppress his breath test because at the time of his offense, regulations required the breath testing machine to contain a thermometer certified to national standards. Id. at 664-65. After his offense, the regulations were amended to no longer require the national certification. Id. The court held this change in the rules governing admission of breath

tests violated the ex post facto clause because it permitted conviction on less evidence than was previously required. *Ludvigsen*, 162 Wn.2d at 674.

The concerns expressed in *Ludvigsen* are similarly at play here, and this Court should reach the same result. The court in *Ludvigsen* noted the crucial distinction was between ordinary rules of evidence, which do not fall afoul of the ex post facto prohibition, and substantive changes in the amount of evidence required to sustain a conviction. 162 Wn.2d at 671. In explaining this distinction, the court stated, “Ordinary rules of evidence are procedural and neutral. Though in some cases, the State may benefit from a change in evidence law, such changes are not inherently beneficial to the State.” *Id.* at 671. By contrast, rules that reduce the amount of evidence necessary for a conviction “inherently disadvantage the defendant.” *Id.* Like the repealed thermometer certification requirement in *Ludvigsen*, RCW 10.58.090 inherently and systematically benefits the State and disadvantages defendants by allowing juries to consider criminal propensity in determining guilt.

- b. Even If Application Of RCW 10.58.090 To Barr’s Case Does Not Violate The Federal Ex Post Facto Clause, It Nonetheless Violates The Greater Protections Of Article I, Section 23.

Article I, section 10 of the United States Constitution provides, “No State shall . . . pass any Bill of Attainder, ex post facto law, or Law

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

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

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

Calder v. Bull, 3 U.S. (3 Dall.) 386, 390-91, 1 L. Ed. 648 (1798).

While the fourth category identified in Calder seems to clearly bar retroactive changes in the type of evidence that is admissible, the Supreme Court has concluded, “[o]rdinary rules of evidence do not implicate ex post facto concerns because they do not alter the standard of proof.” Carmell, 529 U.S. at 513. However, the Court had previously distinguished evidentiary laws that applied equally to the State and defendants and those that did not. Thompson v. Missouri, 171 U.S. 380, 387-88, 18 S. Ct. 922, 43 L. Ed. 204 (1898). The Thompson Court held a law permitting the admission of a defendant’s letters to his wife for the purposes of comparing

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

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

Id. This same distinction was made by other states at the time, including Indiana, the inspiration for the Oregon and Washington Constitutions. Therefore, this Court should hold that Washington's ex post facto clause provides broader protection against changes in evidence law that act in a one-sided manner to disadvantage criminal defendants.

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

Dep't of Retirement, 28 Wn. App. 257, 259, 622 P. 2d 1301 (turning to interpretations of the Indiana Constitution to interpret similar, although not identical, provisions of Washington Constitution), review denied, 95 Wn.2d 1019 (1981).

Applying an analysis similar to that set forth in State v. Gunwall,⁷ the Oregon Supreme Court determined the ex post facto protections of the Oregon Constitution are broader than the protections the United States Supreme Court has recognized in the federal Constitution. State v. Fugate, 332 Or. 195, 213, 26 P.3d 802, 813 (2001). Specifically, the Oregon court has interpreted the mirror provisions of the Oregon Constitution's ex post facto clause to prohibit retroactive application of laws that alter the rules of evidence in a manner favoring only the prosecution. Id. Fugate took pains to distinguish that result from changes in evidentiary rules that apply equally

⁷ State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986). Specifically, when determining whether a provision of the Oregon Constitution provides greater protection than the federal constitution, Oregon courts consider the provision's specific wording, the case law surrounding it, and the historical circumstances that led to its creation. Billings v. Gates, 323 Or. 167, 173-74, 916 P.2d 291 (1996); Priest v. Pearce, 314 Or. 411, 415-16, 840 P.2d 65, 67- 69 (1992). By comparison, Gunwall directs a court to consider six nonexclusive factors: the textual language of the state constitution; significant differences in the texts of parallel provisions of the federal and state constitutions; state constitutional and common law history; preexisting state law; differences in structure between the federal and state constitutions; and whether the matter is of particular state interest or local concern. Gunwall, 106 Wn.2d at 61-62.

to both the defense and the prosecution, finding that sort of law of general application was never viewed as resulting in the evil to which the ex post facto clause is addressed. *Id.*

In reaching its conclusion, the Oregon court looked to Indiana's interpretation of its ex post facto protections. *Id.* at 211, 213. Prior to adoption of the Oregon Constitution, the Indiana Supreme Court determined:

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

Id. at 211 (quoting *Strong v. The State*, 1 Blackf. 193, 196 (1822)). Because that interpretation of Indiana's Constitution was available to the framers of the Oregon Constitution when they chose to adopt the language of Indiana's ex post facto clause, the Oregon court interpreted the Oregon provisions as "forbid[ding] ex post facto laws of the kind that fall within the fourth category in *Strong* and *Calder*, viz., laws that alter the rules of evidence in a one-sided way that makes conviction of the defendant more likely." *Eugate*, 332 Or. at 213.

That interpretation of the Indiana Constitution also was available to the framers of the Washington Constitution in 1889. Rather than simply adopt the language of Article I, section 10, the framers instead chose to adopt the language of the Oregon and Indiana Constitutions. By adopting the different language of the Oregon and Indiana Constitutions, logically, the framers of the Washington Constitution did not intend Article I, section 23 to be interpreted identically to the federal ex post facto provision. Robert F. Utter, Freedom And Diversity In A Federal System: Perspectives On State Constitutions And The Washington Declaration Of Rights, 7 U. Puget Sound L. Rev. 491, 496-97 (1984); State v. Silva, 107 Wn. App. 605, 619, 27 P.3d 663 (2001) (decision to use other states' constitutional language indicates the framers did not consider the language of the U.S. Constitution to adequately state the extent of the rights meant to be protected by the Washington Constitution).

In fact, two years after Washington became a state, the Supreme Court cited to Calder as providing "a comprehensive and correct definition of what constitutes an ex post facto law." Lybarger v. State, 2 Wash. 552, 557, 27 P. 449 (1891). Applying an analysis that resembles that of Strong, Lybarger concluded the statute did not violate ex post facto provisions, in part, because "[i]t does not change the rules of evidence to make conviction more easy." 2 Wash. at 560. Lybarger applied precisely the analysis that the

Oregon Supreme Court applied in Eugate.

Aside from the textual differences and differences in the common-law and constitutional history, the United States Constitution is a grant of limited power to the federal government, whereas the Washington Constitution imposes limitations on the otherwise plenary power of the state. Gunwall, 106 Wn.2d at 61. That fundamental difference generally favors a more protective interpretation of the Washington provision. Id. So too does the fact that regulation of criminal trials is a matter of particular state concern. State v. Smith, 150 Wn.2d 135, 152, 75 P.3d 935 (2003), cert. denied, 541 U.S. 909 (2004); State v. Schaaf, 109 Wn.2d 1, 13-14, 743 P.2d 240 (1987); see also Moran v. Burbine, 475 U.S. 412, 434, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986) (case did not warrant federal intrusion into the criminal process of states).

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

c. The Enactment Of RCW 10.58.090 Violates The Separation Of Powers Doctrines Of The State And Federal Constitutions.

Even if this Court finds the evidence of a prior sex offense was admissible under the statutory criteria of RCW 10.58.090 and that admission did not violate ex post facto prohibitions, it should nevertheless reverse Barr's convictions because the statute is an unconstitutional intrusion upon the Court's rule-making authority by the Legislature. The statute changes the very nature of a trial for a defendant charged with a sex offense by allowing the State to generate otherwise inadmissible evidence of prior sex offenses. This amounts to a violation of the Court's inherent authority to govern court procedures.

i. *The State and Federal Constitutions Prevent One Branch of Government From Usurping the Powers and Duties of Another.*

One of the fundamental principles of the American constitutional system is that the governmental powers are divided among three departments--the legislative, the executive, and the judicial--and that each is separate from the other.

Carrick v. Locke, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994) (citing State v. Osloond, 60 Wn. App. 584, 587, 805 P.2d 263 (1991)). The separation of powers doctrine is recognized as deriving from the tripartite system of government established in both constitutions. See, e.g., Const. Arts. II, III, and IV (establishing the legislative department, the executive, and judiciary);

U.S. Const. Arts. I, II, and III (defining legislative, executive, and judicial branches); Carrick, 125 Wn.2d at 134-35 (“the very division of our government into different branches has been presumed throughout our state’s history to give rise to a vital separation of powers doctrine”).

The fundamental principle of the separation of powers is that each branch wields only the power it is given. State v. Moreno, 147 Wn.2d 500, 505, 58 P.3d 265 (2002). This separation ensures the fundamental functions of each branch remain inviolate. Carrick, 125 Wn.2d at 135; In the Matter of the Salary of the Juvenile Director, 87 Wn.2d 232, 239-40, 552 P.2d 163 (1976). Separation of powers principles are violated when “the activity of one branch threatens the independence or integrity or invades the prerogatives of another.” Moreno, 147 Wn.2d at 505-06 (internal quotation marks omitted).

ii. *The Washington Constitution Vests the Supreme Court With Sole Authority to Adopt Procedural Rules.*

Article 4, section 1 of the Washington Constitution vests the Washington Supreme Court with the sole authority to govern court procedures. City of Fircrest v. Jensen, 158 Wn.2d 384, 394, 143 P.3d 776 (2006), cert. denied, 549 U.S. 1254 (2007); State v. Fields, 85 Wn.2d 126, 129, 530 P.2d 284 (1975). “[T]here is excellent authority from an historical

as well as legal standpoint that the making of rules governing procedure and practice in courts is not at all legislative, but purely a judicial, function.” State ex rel. Foster-Wyman Lumber Co. v. Superior Court for King County, 148 Wash. 1, 4, 267 P. 770 (1928).

More recently, the plurality in Jensen explained that “the judiciary’s province is procedural and the legislature’s is substantive.” Jensen, 158 Wn.2d at 394. The Court concluded that evidentiary rules straddle the substantive and procedural domains and thus may be promulgated both by the judiciary and the legislature. Id.

Given this shared power, the Court moved on to consider which branch controls if the two are in conflict. The first principle is that “[w]hen a court rule and a statute conflict, the court will attempt to harmonize them, giving effect to both.” Id. However, “[w]hen there is an irreconcilable conflict between a court rule and a statute concerning a matter related to the court’s inherent power, the court rule will prevail.” Id.

Thus, when a court rule and a statute conflict, the nature of the right at issue determines which one controls. State v. W.W., 76 Wn. App. 754, 758, 887 P.2d 914 (1995). If the right is substantive, then the statute prevails; if it is procedural, then the court rule prevails. Id.

iii. *If RCW 10.58.090 Is a Procedural Rule, Its Enactment Violates the Separation Of Powers Doctrine.*

The legislative notes following RCW 10.58.090 claim the act is substantive. Laws 2008, ch. 90, §1. If that is the case, then as argued above the retroactive application of that substantive change violates the Ex Post Facto provisions of the federal and state constitutions. In the alternative, if defining the bounds of the admissibility of evidence and the permissible inferences to be drawn from that evidence is a procedural function lying at the heart of the judicial power, then the Legislature's effort to alter the rules of admissibility violates the Separation of Powers doctrine.

Substantive law "prescribes norms for societal conduct and punishments for violations thereof." Jensen, 158 Wn.2d at 394 (quoting State v. Smith, 84 Wn.2d 498, 501, 527 P.2d 674 (1974)). By contrast, practice and procedure relates to the "essentially mechanical operations of the courts" by which substantive law is effectuated. Id. RCW 10.58.090 does not prescribe societal norms or establish punishments. It does not create, define, or regulate a primary right. Instead, it alters the mechanism by which those substantive rights and remedies are determined by allowing admission of otherwise inadmissible evidence and permitting juries to draw otherwise impermissible inferences based on criminal propensity.

As discussed above, Barr was prejudiced by application of this unconstitutional law in his case. If this Court determines that application did not violate ex post facto prohibitions because it is procedural, then the Legislature did not have authority to enact it, and the statute is void. *Jensen*, 158 Wn.2d at 394; *State v. Thorne*, 129 Wn.2d 736, 762, 921 P.2d 514 (1996) (“Legislation which violates the separation of power doctrine is void.”). Barr therefore requests this Court reverse his convictions.

d. RCW 10.58.090 Is An Unconstitutional Violation Of The Washington Constitution’s Fair Trial Guarantee.

The Washington right to jury trial incorporates broader protection than its federal counterpart because it codifies the understanding of state rights at the time. *City of Pasco v. Mace*, 98 Wn.2d 87, 96, 653 P.2d 618 (1982) (article 1, section 21 of Washington’s constitution preserves the right to jury trial “as it existed at common law in the territory at the time of its adoption”).

The Washington Constitution’s jury trial right is comprised of two provisions. Article I, section 21 provides that “[t]he right of trial by jury shall remain inviolate.” Article I, section 22 provides that “[i]n criminal prosecutions the accused shall have the right to trial by an impartial jury.” “[T]he right to trial by jury which was kept ‘inviolable’ by our state constitution [is] more extensive than that which was protected by the federal constitution when it was adopted in 1789.” The state jury trial right “preserves the right as it existed at common law in the territory at the time of [our constitution’s] adoption.”

State v. Recuenco, 163 Wn.2d 428, 444, n. 4, 180 P.3d 1276 (2008) (Fairhurst, J., dissenting) (internal citations omitted) (citing Mace, 98 Wn.2d at 99).

The understanding that a fair trial must be free from propensity evidence predates the federal Constitution: "The rule against using character evidence to show behavior in conformance therewith, or propensity, is one such historically grounded rule of evidence. It has persisted since at least 1684 to the present." McKinney v. Rees, 993 F.2d 1378, 1381 (9th Cir.), cert. denied, 510 U.S. 1020 (1993). By transgressing this fundamental aspect of a constitutionally guaranteed fair trial, RCW 10.58.090 violates Barr's state constitutional fair trial protections.

4. INADEQUATE JURY INSTRUCTIONS VIOLATED BARR'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY BECAUSE THEY EXPOSED HIM TO MULTIPLE PUNISHMENTS FOR THE SAME OFFENSE.

The trial court was required to clearly instruct the jury that it could not convict Barr more than once on the basis of a single act. The instructions given failed to do so and subjected Barr to double jeopardy. One of Barr's two convictions must be vacated.

"The right to be free from double jeopardy . . . is the constitutional guarantee protecting a defendant against multiple punishments for the same offense." State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417

(2007); Wash. Const. art. I, § 9; U.S. Const. amend. V. A defendant's right to be free from double jeopardy is violated if instructions do not make it manifestly apparent to the jury that the State is not seeking to impose multiple punishments for the same offense. State v. Berg, 147 Wn. App. 923, 931, 198 P.3d 529 (2008).

Although Cruse's attorney did not object to the instructions, this issue can be raised for the first time on appeal because it involves a manifest error of constitutional magnitude. Berg, 147 Wn. App. at 931; see also State v. Ellis, 71 Wn. App. 400, 404, 859 P.2d 632 (1993) (similar claim considered despite lack of objection).

This Court reviews challenges to jury instructions de novo, within the context of the instructions as a whole. Berg, 147 Wn. App. at 931. "Jury instructions must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror." Borsheim, 140 Wn. App. at 366 (citation and internal quotation marks omitted). The jury instructions in Barr's case do not satisfy this standard.

Borsheim and Berg control the outcome here. In Borsheim, this Court held that where multiple counts of sexual abuse are alleged to have occurred within the same charging period, an instruction that the jury must find "separate and distinct" acts for convictions on each count is required. Borsheim, 140 Wn. App. at 367-368. In the absence of such an instruction,

a defendant is exposed to multiple punishments for the same offense in violation of his right to be free from double jeopardy. *Id.* at 364, 366-67. The *Borsheim* court vacated three of the defendant's four child rape convictions for this instructional omission. *Id.* at 371. More recently, this Court in *Berg* followed *Borsheim* in vacating a child molestation conviction based on the same omission. *Berg*, 147 Wn. App. at 937, 944.

Barr's case is the same as *Borsheim* and *Berg* in dispositive respects. As in those cases, multiple crimes were alleged to have occurred within the same charging period. *Borsheim*, 140 Wn. App. at 367; *Berg*, 147 Wn. App. at 934. Neither the single "to convict" instruction in *Borsheim* nor the multiple "to convict" instructions in *Berg* – or any other instructions in those cases – specified each count was based on an act separate and distinct from that charged in another count, thereby exposing each defendant to multiple punishments for the same crime, based on the same act. *Borsheim* 140 Wn. App. at 367; *Berg*, 147 Wn. App. at 935. Similarly, the instructions in *Barr*'s case are missing this critical language.

Berg and *Borsheim* distinguished *State v. Ellis*, which rejected an argument that jury instructions allowed jurors to use the same underlying act to convict the defendant on more than one count. *Berg*, 147 Wn. App. at 933 (citing *State v. Ellis*, 71 Wn. App. 400, 859 P.2d 632 (1993)). *Ellis* was distinguishable because the trial court in that case gave separate "to convict"

instructions for each count, the instruction for one of two identically charged counts explicitly stated that the act underlying that count had to have occurred "on a day other than [the other count]," *and* the two other identically charged counts alleged that the charged act occurred during a different time period. *Berg*, 147 Wn. App. at 933-936 (quoting *Ellis*, 71 Wn. App. at 401-02).

Although the court provided a separate "to convict" instruction for each count in *Barr's* case, this was also true in *Berg*. *Berg*, 147 Wn. App. at 934. The more salient fact is that none of the instructions indicated each count had to involve a different act and, as just noted, both charged counts involved the identical time period. In contrast to *Ellis*, it was therefore critical that jurors be instructed they must base their verdicts on "separate and distinct acts for each count."

Barr's jury did receive a unanimity instruction. For each molestation charge, jurors were told, "You must unanimously agree that the same act of sexual contact has been proven beyond a reasonable doubt." CP 90, 92. But this did not cure the problem. The trial court in *Borsheim* also gave a unanimity instruction:

There are allegations that the Defendant committed acts of rape of child on multiple occasions. *To convict the Defendant, one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a*

reasonable doubt. You need not unanimously agree that all the acts have been proved beyond a reasonable doubt.

Borsheim, 140 Wn. App. at 364 (emphasis in original).

Although this unanimity instruction adequately informed jurors that they had to be unanimous on the act that formed the basis for any given count, the instruction failed to protect against double jeopardy. *Id.* at 367, 369. In Ellis, the trial court gave a unanimity instruction stating "you must unanimously agree that at least one particular act has been proved beyond a reasonable doubt for each count." Ellis, 71 Wn. App. at 406 (emphasis added). The Borsheim unanimity instruction did not "convey the need to base each charged count on a 'separate and distinct' underlying event" because it did not contain the "for each count" language used in Ellis. Borsheim 140 Wn. App. at 367.

A unanimity instruction in Berg likewise failed to protect the defendant from double jeopardy:

The State alleges that the defendant committed acts of child molestation in the third degree on multiple occasions. To convict the defendant on any count of child molestation in the third degree, one particular act of child molestation in the third degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved beyond a reasonable doubt. You need not unanimously agree that the defendant committed all the acts of child molestation in the third degree.

Berg, 147 Wn. App. at 934-935 (emphasis added).

The State in *Berg* argued this unanimity instruction adequately protected Berg from double jeopardy because it contained the "on any count" language. *Id.* at 936. This Court rejected the State's argument because, unlike in *Ellis*, Berg's "to convict" instructions did not contain language distinguishing the counts. *Id.* at 16-17. Barr's "to convict" instructions likewise fail to distinguish the counts and his convictions are not saved by the unanimity language.

In *Borsheim* and *Berg* the jury also was instructed, "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." *Borsheim* 140 Wn. App. at 364; *Berg*, 147 Wn. App. at 935. Barr's jury received a similar instruction. *See* CP 84. This instruction, even read with the jury instructions as a whole, is still insufficient to guard against double jeopardy because it fails to adequately inform the jury that each crime requires proof of a different act. *Borsheim* 140 Wn. App. at 367; *Berg*, 147 Wn. App. at 935-936.

In response, the State may attempt to argue that because the trial deputy noted during closing argument that there were separate acts of molestation, jurors likely knew they should base each count on a separate act. *See* RP 1190 (prosecutor notes "at least two separate distinct acts" of digital and oral penetration); RP 1192 (refers to "two separate crimes"); RP

1217 (“two discreet separate occasions”). Assuming such an argument, it fails.

In Berg, the State contended the defendant was adequately protected from double jeopardy because the prosecution presented evidence of separate acts to support both charges and told jurors during closing that they had to agree on two particular acts. Berg, 147 Wn. App. at 935. This Court rejected the argument because the double jeopardy violation resulted from omitted language in the instructions, not the State's proof or the prosecutor's arguments. Id. Evidence or argument presented at trial cannot remedy a double jeopardy violation caused by deficient instructions. Id.

Furthermore, “[t]he jury should not have to obtain its instruction on the law from arguments of counsel.” Id. (quoting State v. Aumick, 126 Wn.2d 422, 431, 894 P.2d 1325 (1995)). “Rather, it is the judge's province alone to instruct the jury on relevant legal standards.” Id. at 935-936 (quoting State v. Clausing, 147 Wn.2d 620, 628, 56 P.3d 550 (2002)); see also State v. Kier, 164 Wn.2d 798, 813, 194 P.3d 212 (2008) (“election” in closing insufficient to cure double jeopardy violation because jurors are told to rely on evidence and court’s instructions rather than counsel’s arguments).

One of Barr's molestation convictions must be vacated to avoid a double jeopardy violation.

5. BARR'S SENTENCE EXCEEDS THE AUTHORIZED STATUTORY MAXIMUM.

The court sentenced Barr to concurrent 120-month terms on each count of child molestation. The court then added 36 months' community custody. CP 17. Barr's offenses are class B felonies, subject to a maximum 120-month prison term. See RCW 9A.44.086(2); RCW 9A.20.020(1)(b). The combination of Barr's prison and community custody exceed this limitation.

The Supreme Court recently addressed this very scenario:

when a defendant is sentenced to a term of confinement and community custody that has the potential to exceed the statutory maximum for the crime, the appropriate remedy is to remand to the trial court to amend the sentence and explicitly state that the combination of confinement and community custody shall not exceed the statutory maximum.

...

In re Brooks, 166 Wn.2d 664, 675, 211 P.3d 1023 (2009).

Under Brooks, this Court should remand to the sentencing court for clarification and modification of the judgment and sentence to ensure Barr's total sentence does not exceed 120 months.

D. CONCLUSION

By conducting a portion of jury voir dire outside the public's presence and Barr's presence, the trial court violated Barr's right to a public trial and his right to be present for all critical stages of the case. These violations require that his convictions be reversed and the case remanded for a new trial.

RCW 10.58.090 is unconstitutional. The admission of evidence that Barr committed crimes against N.H. denied Barr a fair trial and also requires reversal of his convictions.

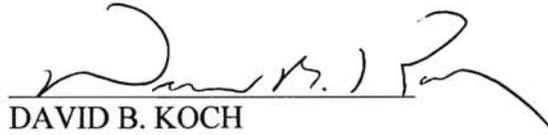
The court's failure to instruct jurors that each conviction must be based on a "separate and distinct act" resulted in a violation of double jeopardy. One of Barr's two convictions must be vacated on this ground.

Finally, Barr's sentences exceed the authorized maximum penalties. The judgment must be clarified.

DATED this 25th day of June, 2010.

Respectfully submitted,

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Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
vs.)	COA NO. 28697-5-III
)	
PAUL BARR,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 25TH DAY OF JUNE, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KEVIN EILMES
YAKIMA COUNTY PROSECUTOR'S OFFICE
128 NORTH 2ND STREET, ROOM 211
YAKIMA, WA 98901

[X] PAUL BARR
DOC NO. 326713
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 25TH DAY OF JUNE, 2010.

x *Patrick Mayovsky*