



No. 289532

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON, Respondent

v.

DIMITRI REY MANDAPAT, Appellant

---

APPEAL FROM THE SUPERIOR COURT, JUVENILE DIVISION  
OF  
YAKIMA COUNTY  
THE HONORABLE SUSAN L. HAHN

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I. ASSIGNMENTS OF ERROR

1. The court abused its discretion in admitting propensity evidence under ER 404(b). (9/18/09 RP 34).
2. The court erred in concluding that propensity evidence admitted under RCW 10.58.090 was necessary to the State's case, and the probative value outweighed the prejudicial effect. (9/18/09 RP 34).
3. The use of propensity evidence to convict Dimitri Mandapat violated his constitutional due process rights to a fair trial.
4. The state legislature's enactment of RCW 10.58.090 violates the Separation of Powers doctrine of the state constitution.
5. The court erred in granting the State's motion to join the two causes of action.

*ISSUES PERTAINING TO ASSIGNMENTS OF ERROR*

1. Did the trial court abuse its discretion in admitting propensity evidence under ER 404(b) common scheme or plan exception?
2. Did the court abuse its discretion by admitting propensity evidence under RCW 10.58.090?

3. Did the use of propensity evidence to obtain the convictions violate Dimitri Mandapat's constitutional due process rights to a fair trial?
4. Does RCW 10.58.090 violate the separation of powers doctrine of the state constitution?
5. Did the court err when it joined both causes of action in one trial?

## II. STATEMENT OF FACTS

Dimitri Mandapat was a sixteen-year-old high school sophomore in 2008. He did not use drugs or alcohol and was a dedicated track star. CP 115 No. 08-8-00424-5. He was charged by amended information with two counts of rape in the second or alternatively third degree, of two alleged victims, and one count of indecent liberties, on December 7, 2009 in cause number 08-8-00424-5. He was later charged in cause number 08-8-00617-5 of one count of rape in the second or alternatively, third degree of a third alleged victim. CP 50 No. 08-8-00617-5.

Prior to trial, the court held a hearing to determine the admissibility of testimony by each of the complainants as evidence to prove the other based on both ER 404(b) and RCW 10.58.090.

9/18/09 RP 19-35. The court found each complainant's testimony admissible under ER 404(b) common scheme or plan exception. It found the testimony admissible under RCW 10.58.090 because it was probative, had value, and tended to prove something the State needed to prove in its case. 9/18/09 RP 31. The court stated the incidents happened within a short time frame of five weeks, there were no intervening circumstances, the evidence was necessary for corroboration in the cases, there were no prior convictions, and the probative value substantially outweighed the danger of unfair prejudice.

The court pointedly questioned whether the statute was constitutional, as it appeared to relieve the State of the burden of proving every element of the crime for each count. 8/24/09 RP 9; 9/18/09 RP 33. The defense objected to the admissibility of the evidence under ER 404(b) and RCW 10.58.090. 8/24/09 RP 5; 9/18/09 RP 28-29; 1/25/10 RP 4. The court later granted a motion by the State to join both causes of action. CP 64 No. 08-8-00424-5. The defense objected to this as well. 9/30/09 RP 25, 37.

At trial, all three complainants testified. A.D., aged 14 at the time of the incident, testified she was at a restaurant with relatives on the evening of February 2, 2008. She drank alcohol at the

restaurant. 1/25/10 RP 8. Dimitri and two other teens drove to get her and they all went to the home of one of the teens. 1/25/10 RP 9. Dimitri and A.D. watched television while laying on the couch. They kissed and touched one another. A.D. initially told police Dimitri removed her clothing. In testimony she said she was a willing participant and voluntarily removed her pants and underwear to continue the sexual activity. 1/25/10 RP 13.

She said Dimitri laid on top of her and tried to have sexual intercourse with her. They stopped when she said she was unsure because she did not know him very well. 1/25/10 RP 14. He said they could get to know one another and tried to persuade her to continue. She tried to call her cousin on a cell phone but Dimitri hung it up. 1/25/10 RP 14. She testified she said "stop" but Dimitri had intercourse with her. 1/25/10 RP 15. She was unable to get free and his shoulder covered her mouth. 1/25/10 RP 17. It went on for a short time. 1/25/10 RP 16. She reported she yelled because it was painful and when she went to the bathroom noticed she had vaginal bleeding. 1/25/10 RP 18.

She tried to telephone her cousin to come and get her, but Dimitri said he would take her home. 1/25/10 RP 19. He then said, "Suck my dick and I already fucked you." She said no. 1/25/10 RP

20. She was angry with Dimitri as he drove her home. 1/25/10 RP

22. The next day she went with her mother to the hospital for a sexual assault examination. She told the nurse the incident occurred on a bed and she had not had any alcohol that evening.

1/25/10 RP 34. The nurse testified A.D. had a vaginal tear and bruising; she was physically unprepared for intercourse when it happened. The nurse could not diagnose whether A.D. had consented to the sex. 1/25/10 RP 86, 90, 91.

K. M., a second alleged victim, testified Dimitri called her and wanted to meet at the YMCA to work out together on March 5, 2008. K.M.'s father drove her there. 1/25/10 RP 56. Every time she and Dimitri were in the stairwell between gym floors she stated he tried to stick his hand down her pants. She pinched his hand, moved it away and squirmed to get herself out of that position; she did not say "no". 1/25/10 RP 57, 72. He did not get his hand into her pants on the stairwell. 1/25/10 RP 59. He wanted to kiss her but she said no. 1/25/10 RP 60. She said he twice tried to make her touch his penis. 1/25/10 RP 60.

K.M.s father had directed her to stay in the YMCA but she voluntarily left the building with Dimitri. 1/25/10 RP 62. She said they walked and "we were just there and we just started standing

and that's when he tried again, and he tried sticking his hand in my pants." He put his finger in her vagina. 1/25/10 RP 64. K.M. did not say anything "because I was scared but I just – nothing really." 1/25/10 RP 66. She said she did not say anything, "I was just uncomfortable so it's just kind of like I was scared and uncomfortable and I didn't say anything." 1/25/10 RP 67. On direct examination she testified she did not say "no" to Dimitri, but on cross examination she stated she distinctly remembered saying "no". 1/25/10 RP 67,70.

S.J., the third complainant, testified that on March 14, 2008, she and Dimitri were walking to a school building and talking. 1/25/10 RP 78. They stopped to hug and kiss. 1/25/10 RP 79. She said he undid the button on her pants and, "he was just messing around down there and I was just- he didn't- until he did something, I didn't really say anything. I told him to stop but- yeah." 1/25/10 RP 100. She pushed him away but without much force. After he digitally penetrated her vagina she removed his hand and told him she needed to leave. 1/25/10 RP 102. He picked her up and put her on a planter, undid his pants, and asked her to have sex with him. 1/25/10 RP 103. She said "no" and left. 1/25/10 RP 105. S.J. and K.M. reported the incidents to a school counselor

and school resource officer on March 20, 2008. Dimitri was immediately expelled from school.

On March 26, 2008, Dimitri went to the police station to give an interview with officers regarding the accusations by S.J. and K.M. He was unaccompanied by an adult or guardian. There was no objection at trial the statement was coerced or involuntary. 1/25/10 RP 124. Officers questioned him about all three girls. He later testified he was frightened and untruthful when first answering their questions. 1/26/10 RP 194-205.

Dimitri's version of events differs from that offered by each of the girls. He believed both A.D. and S.J. consented to the sexual activity and there was no digital penetration of K.M.

He testified he and A.D. kissed while on the couch and he digitally penetrated her vagina. He asked her if she wanted to go to the bedroom and she said "yes." He carried her there with her legs wrapped around him. 1/26/10 RP 161. Quentin Gibbs, one of the teens who was at the home that evening, testified he saw the two of them kissing on the bed. 1/26/2010 RP 212-213.

A.D. removed her own pants and underwear. 1/26/10 RP 162. He testified she never said "no" but when they began having intercourse she said, "it hurts." He stopped. 1/2610 RP 163. He

denied holding her down with his shoulder. He asked her to perform oral sex on him. She refused. They argued. He drove her home. 1/26/10 RP 165. She kissed him goodbye and later that night they texted and he never had the sense she was angry or upset with him. 1/26/2010 RP 167.

Dimitri testified he met up with K.M. at the YMCA on the evening of the alleged incident and they kissed in the stairwell. 1/26/10 RP 170. She told Dimitri she did not want to kiss him because her father was in the YMCA and would be upset if he saw them. 1/26/10 RP 171. His hands were not fully down her pants in the stairwell. She pinched him, but he thought it was in a friendly way. 1/26/10 RP 172. They went outside together and kissed and hugged. He put his hand inside her workout outfit, but outside of her underwear. He testified he never put his finger in her vagina. 1/26/10 RP 175. She wanted to go back inside the YMCA. He wanted her to stay outside. She said no and pulled him along with her back into the YMCA. 1/26/10 RP 175.

Dimitri testified he had flirted with S.J. for about two weeks prior to the day he asked if he could walk her home. He liked her. 1/26/10 RP 177. While in an alleyway they flirted and kissed. He undid her pants and digitally penetrated her vagina. He said she

rushed to put her pants back up when a car drove by but he undid them again. They kissed for several more minutes. 1/26/10 RP 180. He undid his pants and she rubbed his penis. She told him she had to leave but that she did not want to go. 1/26/10 RP 181. He said she promised to have sex with him the next day. They hugged and kissed goodbye. 1/26/10 RP 182.

Dimitri Mandapat was convicted of two counts of rape in the third degree and one count of rape in the second degree for acts that were alleged to have occurred in February and March of 2008. He was found not guilty of one count of indecent liberties. 2/5/10 RP 4-5.

### III. ARGUMENT

#### I. The Court Abused Its Discretion In Admitting Propensity Evidence Under ER 404(b) Common Scheme Or Plan Exception

Under ER 404(b), *evidence of other crimes, wrongs, or acts by the accused are not admissible to show that it is likely the defendant committed the alleged crime, acted in conformity with the prior bad acts when committing the crime, or had a propensity to commit the crime.* *State v. Lough*, 125 Wn.2d 847, 852-53, 889 P.2d 487 (1995). (Emphasis added). If the State seeks to introduce evidence of other bad acts, it bears a substantial burden

of showing admission is for a purpose other than propensity, such as motive, opportunity, knowledge, identity, absence of mistake or accident, intent, or plan. ER 404(b); *State v. DiVincentis*, 150 Wn.2d 11, 18-19, 74 P.3d 119 (2003). The trial court must begin with the presumption of inadmissibility when considering whether to admit evidence of other bad acts. 150 Wn.2d at 17-18

Interpretation of an evidentiary rule is a question of law, which is reviewed de novo. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). When the trial court has correctly interpreted the rule the decision to admit evidence under ER 404(b) is reviewed for an abuse of discretion. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). Discretion is abused if it is based on manifestly unreasonable or untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Before admitting ER 404(b) evidence, the court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence was sought to be introduced, (3) determine whether the evidence was relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); *Lough*, 125 Wn.2d at 853. The

analysis must be conducted on the record. *State v. Lane*, 125 Wn.2d 825, 832, 889 P.2d 929 (1995).

Despite this plain obligation, perhaps relying on its analysis of admissibility under RCW 10.58.090, the court simply determined admissibility under the ER 404(b) “common scheme or plan” exception. 9/18/10 RP 33. Failure to adhere to the requirements of an evidentiary rule can be considered an abuse of discretion. *Foxhoven*, 161 Wn.2d at 174.

Under *DeVincentis* to establish common design or plan the evidence of prior conduct must demonstrate that the acts are evidence of a single scheme or plan which is used repeatedly to commit separate crimes. The degree of similarity for the admission of the evidence must be substantial. *DeVincentis*, 150 Wn.2d at 19-20.

The court here concluded:

“In our cases here, we have that it didn’t happen at all but we also have for two of them that the issue is consent and *because the issue is consent there is a marked similarity here* and there’ s no denial that it occurred for two of these, but the question is whether it’s consent or not. And so I think it’s admissible under 404(b) as showing common scheme or plan. 9/18/09 RP 34. (Emphasis added).

The court's analysis of substantial similarity showing common scheme or plan was flawed. Washington cases which demonstrate the proper use of ER 404(b) "common scheme or plan" exception contain detailed scenarios of conduct by the accused.

In *Lough*, the court admitted prior acts to show the defendant had devised a plan based upon his knowledge as a paramedic to use a certain drug to sedate and then rape several women. The repetitive nature showed a common plan or scheme under ER 404(b). 125 Wn.2d at 853-56. In *State v. Baker*, prior acts were admitted to show a common plan to sexually assault sleeping children. The defense in *Baker* was accidental touching, so the question was whether the alleged molestation of another child was sufficiently similar to be relevant to rebut that claim and establish non-coincidence. The admitted testimony was necessary to support the child's testimony because the circumstances of the alleged molestation of the sleeping child were similar to the drug-induced state in *Lough*. *State v. Baker*, 89 Wn.App. 726, 734, 950 P.2d 486 (1997).

The *Krause* court properly admitted prior bad acts evidence of uncharged sexual abuse of young boys to show a scheme by the

defendant. The prior acts were proved by a preponderance of the evidence because Krause had confessed to them. His conduct showed a systematic pattern of befriending parents of young boys to gain access to the children. He groomed and later molested the children. *State v. Krause*, 82 Wn.App. 688, 693-98, 919 P.2d 123 (1996), *review denied*, 131 Wn. 2d 1007, 932 P.2d 644 (1997). In *DeVincentis*, the prior acts were admitted to show a scheme by the defendant to meet and create a trusting relationship with preteen girls, desensitize them to his nudity and then molest them. 150 Wn.2d at 16-21.

In each case, common scheme or plan evidence was admissible because it demonstrated a premeditated scheme that was used repeatedly to perpetrate separate but very similar crimes. This is simply not the case here. Moreover, unlike here, the “other acts” evidence was not currently charged by information.

In *State v. Harris*, the defendants appealed their convictions of two counts of rape in the first degree. *State v Harris*, 36 Wn.App. 746, 677 P.2d 202 (1984). The defendants claimed the sex was consensual. In its analysis the appellate court looked at the ways in which a defendant could be prejudiced by joinder, such as inference of criminal disposition and the assemblage of evidence of

various charged crimes charged resulting in guilt, which if considered separately would not be so found. Using the common scheme or plan exception to ER 404(b), the State pointed out the victims voluntarily entered the defendant's car and in both instances the defendants drove them, against their will, to a location where they were then raped. The court specifically found the State's argument that each rape was part of a common scheme or plan was without much merit. Rather, it said the State had fallen into 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.

Dimitri was a sophomore in high school who flirted and went out with high school girls. Each of the complainants freely spent time alone with him and participated in some sexual activity with him. Like *Harris*, the State's theory that each alleged incident involving Dimitri was part of a common scheme or plan is without merit.

The State's intent to "play one off the other and use one in order to find guilty to the other " should not have been allowed.

8/24/09 RP 9. ER 404(b) erroneous admission requires reversal whenever it is reasonably probable the outcome of the trial was

materially affected by the error. *State v. Wilson*, 144 Wn.App. 166, 178, 181 P.3d 887 (2008). The court agreed to consider “[e]vidence of each to find guilt based on not only the testimony relevant to one case but based on the evidence of the other one,...combine them for purposes of the evidence while making separate rulings on each case.” 8/24/09 RP 22. The court’s interpretation of common scheme or plan was error and admission of the testimonial evidence under ER 404(b) constituted an abuse of discretion. *Foxhoven*, 161 Wn.2d at 174.

2. The Trial Court Abused Its Discretion When It Allowed Propensity Evidence Under RCW 10.58.090.

RCW 10.58.090 enacted as a new statute in 2008 allows the State to offer evidence concerning a criminal defendant’s prior sex offenses. It applies only when the defendant is currently charged with a sex offense. Further, it allows prior conduct to be offered to show propensity, without limitation so long as it is not inadmissible under ER 403.

- 1) 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.

(6) When evaluating whether evidence of the defendant's commission of another sexual offense or offenses should be excluded pursuant to Evidence Rule 403, the trial judge shall consider the following factors:

- (a) The similarity of the prior acts to the acts charged;
- (b) The closeness in time of the prior acts to the acts charged;
- (c) The frequency of the prior acts;
- (d) The presence or lack of intervening circumstances;
- (e) The necessity of the evidence beyond the testimonies already offered at trial;
- (f) Whether the prior act was a criminal conviction;
- (g) Whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; and
- (h) Other facts and circumstances.

RCW 10.58.090(6).

The text of the statute places a strong emphasis on a robust balancing test under ER 403. Such evidence should only be admitted if it has significant probative value.

Prior to ruling on the admissibility of the propensity evidence, the court addressed the factors listed above. 9/18/09 RP 31-33. However, the court's analysis was flawed. Most specifically, the court held the evidence was necessary beyond the testimony already offered at trial, stating, "[I] think that goes to the argument that there needs to be corroboration in cases like this and there often isn't and I think that that supports a finding under this test as we look at the probative effective under 403, that it should be admissible. 9/18/09 RP 33.

Each complainant, A.D., K.M. and S.J. were all fourteen years old at the time of the alleged incidents and sixteen years old at the time of trial. Each girl was a competent witness for herself, able to testify as to her own experience. There simply was no need to consider the testimony of one to bolster the credibility of another, unless it was to enable conviction based on character rather than evidence. This case largely turned on witness credibility and the admission of propensity evidence undermined the presumption of innocence, which is the bedrock upon which the criminal justice stands. *State v. Bennet*, 161 Wnn.2d 303, 315, 165 P.3d 1241 (2007).

Equally significant, none of the acts was a “prior act”, that is, they were all currently charged acts, compounding the problem by lowering the beyond a reasonable doubt standard of proof. Indeed, prior to ruling, the court expressed concern stating, “If in fact the State can prove one charge by proving the other using 10.58.090 or 404(b) here, then it just seems to me that the State does not have to prove every element individually because that evidence – evidence of one crime is admissible to prove that the other one occurred...” 8/24/09 RP 9.

There was no requirement for the court to admit such evidence and in this case, it ought not have. It was unnecessary, and shifted the focus to propensity and away from a presumption of innocence.

### 3. The Use of Propensity Evidence To Obtain The Convictions Violated Dimitri's Due Process Right To A Fair Trial.

In Washington, propensity evidence is generally excluded under ER 404(b), which states “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Such evidence is almost inherently prejudicial, and the court must always begin with the

presumption such evidence is inadmissible. *DeVincentis*, 150 Wn.2d at 17-18; *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982).

The use of propensity evidence to prove a crime may violate the due process clause under the Fourteenth Amendment. U.S. Const. Amend. XIV. When determining whether a due process violation has occurred, courts “are to determine only whether the action complained of ... violates those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community's sense of fair play and decency.” *Dowling v. U.S.* 493 U.S. 342, 353, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990). The exclusion of character evidence rule is based on such a “fundamental conception of justice” and the “community's sense of fair play and decency”. *McKinney v. Rees*, 993 F.2d 1378, 1384 (9<sup>th</sup> Cir. 1993).

The Washington legislature enacted legislation that significantly changed the traditional rule of disallowing propensity evidence. Under RCW 10.58.090, if the admission of propensity evidence in prosecutions for sex cases is necessary for conviction, it may be introduced as substantive evidence. As a general rule, propensity evidence has been inadmissible not because it is logically

irrelevant, but because it is legally irrelevant. *State v. Holmes*, 43 Wn.App. 397, 399-400, 717 P.2d 766 (1986). See also 5 Karl B. Tegland, *Washington Practice Evidence and Law* § 401.4 at 218 (4<sup>th</sup> ed. 1999). Now, under the new statute the evidence is admissible to show that the defendant has a propensity to commit sexual crimes, regardless of the strength of the evidence presented in the particular current counts.

In this case, the State introduced evidence of other charged sexual misconduct to prove Dimitri's guilt. In finding him guilty, the Court stated, "And he is a very handsome, charismatic track star. I mean most of Dimitri's problem is he can't take no for an answer. That's kind of what all of this boils down to." 2/5/10 RP 4. Again, "Another case of just not knowing when to stop. Not taking no for an answer." 2/5/10 RP 5. The court based its finding of guilt in part on propensity evidence. A conviction based, even in part, on propensity evidence is not the result of a fair trial. *Garceau v. Woodford*, 275 F.3d 769, 776, 777-78 (9<sup>th</sup> Cir. 2001), *reversed on other grounds* 538 U.S. 202, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003).

4. The State Legislature's Enactment Of RCW 10.58.090 Violates The Separation Of Powers Doctrine Of The State Constitution.

The Washington State Court of Appeals Division I upheld the constitutionality of RCW 10.58.090 in *State v. Gresham*, 153 Wn.App. 659, 223 P.3d 1194 (2009) and *State v. Scherner*, 153 Wn.App. 621, 225 P.3d 248 (2009). Both cases challenged the legitimacy of the statute under, among other things, the violation of the separation of powers doctrine.

RCW 10.58.090 legislative notes state the act is substantive, however, because it alters the rules of admissibility of evidence, it appears instead to be procedural. A substantive law prescribes social norms of conduct and punishments for violations of those norms. A procedural law is concerned with the mechanical operations of the court. *State v. Smith*, 84 Wn.2d 498, 498, 501, 527 P.2d 674 (1974).

Article 4 §1 of the Washington Constitution grants the Washington Supreme Court the sole authority to govern court procedures. RCW 2.04.190 states the Supreme Court "shall have the power to prescribe ... of taking and obtaining evidence." There is, therefore, a question of whether the independence of the judicial branch has been intruded by the legislative branch.

The Washington Supreme Court accepted review of both cases on June 1, 2010. Division III should decline to follow *Gresham and Scherner* until the Washington Supreme Court has made its ruling on the constitutionality of RCW 10.58.090.

5. The Court Erred In Granting The State's Motion To Join The Two Causes Of Action.

CrR 4.3(a) and JuCr 7.9(a) permit two or more offenses of similar character or part of a single scheme or plan to be joined in one trial. Offenses that are properly joined under these rules, may, however be severed "if the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4 and JuCr 7.10.

The failure of the court to sever counts is reversible only upon a showing that the court's decision was a manifest abuse of discretion. *State v. Bythrow*, 114 Wn.2d 713, 790 P.2d 154 (1990). Defendants seeking severance of counts have the burden of demonstrating that a trial involving all counts would so manifestly prejudicial as to outweigh the concerns of judicial economy. *Bythrow* at 718.

Washington courts have recognized that joinder of offenses may prejudice a defendant when:

(1) he may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find.

*State v. Smith*, 74 Wn.2d 744, 755, 446 P.2d 571 (1968) *vacated in part*, 408 U.S. 934, 92 S.Ct. 2852, 33 L.Ed.2d 747 (1972), *overruled on other grounds in State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975).

A court does have discretion in allowing offenses of similar character to be joined in one trial even if not part of a single scheme or plan. The goal, however, is to promote a fair determination of the defendant's guilt or innocence on each offense. CrR 4.4(b).

Using the factors from *Smith* in this case, the court understood it was using the testimony from A.D., K.M. and S.J. to corroborate each story. Additionally, under RCW 10.58.090, there was no question such evidence was being used to infer a criminal disposition on the part of Dimitri. The only issue for the court to decide in two of the alleged rapes was consent. The third allegation (K.M.) the defendant testified it never occurred. Without

the evidence from the other alleged encounters, the court would have only had a credibility issue of "he said- she said".

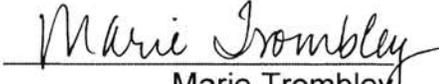
The additional evidence testimony of each girl created the impression, which the court articulated at the disposition hearing, that "Dimitri just could not take no for an answer." The court here cumulated the evidence of all three alleged rapes to find guilt, when if considered separately, it would not so necessarily find.

Defense counsel did object to the joinder of offenses. The trial court instead granted the State's motion and abused its discretion; a reversible error. *See State v. Harris*, 36 Wn.App. 746, 677 P.2d 202 (1984).

#### IV. CONCLUSION

Based on the foregoing facts, evidence, and authorities, appellant Mandapat respectfully urges this court to vacate the judgment of the juvenile court and reverse the convictions.

Respectfully submitted August 2, 2010..

  
Marie Trombley  
Attorney for Appellant  
WSBA # 41410

CERTIFICATE OF SERVICE

I, Marie Trombley, attorney for Appellant Mandapat, do hereby certify under penalty of perjury under the laws of the United States and the state of Washington, that a true and correct copy of the Brief of Appellant was sent by first class mail, postage prepaid on August 2, 2010, to Dimitri Rey Mandapat, JRS # 845-213, B21-7 20311 Old Hwy 9 SW, Centralia, WA 98531, and David B. Trefry, PO Box 4846, Spokane, WA 99220-0846.

A handwritten signature in cursive script, reading "Marie J. Trombley", is written over a horizontal line.

Marie J. Trombley