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NO. 58004-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CHARLES MOMAH,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 JAN 23 PM 4:26

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL J. TRICKEY

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES</u>	1
B. <u>STATEMENT OF THE CASE</u>	3
1. PROCEDURE	3
C. <u>ARGUMENT</u>	25
1. BECAUSE THE TRIAL COURT NEVER CLOSED THE COURTROOM TO PRESS OR SPECTATORS DURING JURY VOIR DIRE, MOMAH'S RIGHT TO A PUBLIC TRIAL WAS NOT VIOLATED.	25
2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING THE TESTIMONY OF THREE ER 404(b) WITNESSES.....	30
3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING SEVERANCE.....	37
4. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN PREVENTING CROSS- EXAMINATION OF WHETHER HEATHER PHILLIPS HAD HAD SEX WITH OTHER DOCTORS.....	42
5. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING A MISTRIAL WHEN VICTIM BURNS VIOLATED A MOTION IN LIMINE.	44

6. MOMAH HAS FAILED TO PROVE HIS CLAIM
THAT THE STATE CONCEALED EVIDENCE
THAT A CIVIL ATTORNEY IMPROPERLY
INFLUENCED WITNESSES IN THE CASE. 50

D. CONCLUSION 52

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

In re Personal Restraint of Orange, 152 Wn.2d 795,
100 P.3d 291 (2004)..... 26, 29

State ex rel. Carroll v. Junker, 97 Wn.2d 12,
482 P.2d 775 (1971)..... 32

State v. Bone-Club, 128 Wn.2d 254,
906 P.2d 325 (1995)..... 26, 29

State v. Brightman, 155 Wn.2d 506,
122 P.3d 150 (2005)..... 26, 29

State v. Bythrow, 114 Wn.2d 713,
790 P.2d 154 (1990)..... 39

State v. Demery, 144 Wn.2d 753,
30 P.3d 1278 (2001)..... 32, 42

State v. Descoteaux, 94 Wn.2d 31,
614 P.2d 179 (1980)..... 43

State v. DeVincentis, 150 Wn.2d 11,
74 P.3d 119 (2003)..... 31, 32, 36, 37

State v. Easterling, 157 Wn.2d 167,
137 P.3d 825 (2006)..... 26, 29

State v. Escalona, 49 Wn. App. 251,
742 P.2d 190 (1987)..... 49

State v. Gregory, ___ Wn.2d ___,
147 P.3d 1201 (2006)..... 44

State v. Hanna, 123 Wn.2d 704,
871 P.2d 135 (1994)..... 49

<u>State v. Hentz</u> , 32 Wn. App. 186, 647 P.2d 39 (1982).....	39
<u>State v. Hopson</u> , 113 Wn.2d 273, 778 P.2d 1014 (1989).....	48
<u>State v. Hudlow</u> , 99 Wn.2d 1, 659 P.2d 514 (1983).....	42
<u>State v. Johnson</u> , 124 Wn.2d 57, 873 P.2d 514 (1994).....	49
<u>State v. Kalakosky</u> , 121 Wn.2d 525, 852 P.2d 1064 (1993).....	39
<u>State v. Krause</u> , 82 Wn.2d 668, 919 P.2d 123 (1996).....	31
<u>State v. Kroll</u> , 87 Wn.2d 829, 558 P.2d 173 (1976).....	41
<u>State v. Lewis</u> , 130 Wn.2d 700, 927 P.2d 235 (1996).....	48
<u>State v. Lough</u> , 125 Wn.2d 847, 889 P.2d 487 (1995).....	31, 32, 36, 37
<u>State v. Luvene</u> , 127 Wn.2d 690, 903 P.2d 960 (1995).....	48, 50
<u>State v. Roberts</u> , 21 Wn. App. 830, 611 P.2d 1297 (1980).....	43
<u>State v. Robinson</u> , 38 Wn. App. 871, 691 P.2d 213 (1984).....	39
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	39, 48
<u>State v. Thompson</u> , 88 Wn.2d 518, 564 P.2d 315 (1977).....	38

State v. Young, 89 Wn.2d 613,
574 P.2d 11 71 (1978)..... 43

Statutes

Washington State:

RCW 9A.44.020 2, 43, 44
RCW 10.73.060..... 38

Rules and Regulations

Washington State:

CrR 4.3..... 38
ER 404 *passim*

A. ISSUES

1. If the trial court closes the courtroom to the public, specific findings must be made stating the reasons for the closure and whether alternatives to closure were considered. Here, at no time during jury voir dire did the trial court close the courtroom. On the first day of jury selection part of the individual voir dire was done in a room adjoining the main presiding courtroom where the large main group of jurors were assembled. The parties did not seek closure and the court never excluded the public. Was the court required to enter findings which would have been required if closure had been ordered? Was the defendant's right to a public trial violated when the trial court never closed the courtroom to the public?

2. A trial court, in its discretion, may admit ER 404(b) evidence when a defendant committed acts similar to the charged crimes, and the charged crimes were individual manifestations of a commonly used scheme or plan. The probative value of the ER 404(b) evidence must substantially outweigh its prejudicial effect. Here, the trial court permitted testimony from three ER 404(b) witnesses whom the defendant had sexually abused in his medical office, in markedly similar manners to the four charged counts. In

order to avoid undue prejudice to the defendant, the trial court excluded the testimony of many other proposed ER 404(b) witnesses. Did the trial court properly exercise its discretion when it admitted the testimony of the three ER 404(b) witnesses?

3. Multiple offenses may be joined for trial if they are of the same character or part of a common scheme or plan. Here, the four sexual assault charges against the defendant were properly joined for trial; each charge involved the sexual abuse of the defendant's patients while they were being treated in his medical office. If severance had been granted, the severed counts would likely have been admissible, along with other common scheme or plan witnesses, under ER 404(b). Did the trial court properly exercise its discretion when it denied severance of counts?

4. A trial court has discretion to limit the scope of cross-examination to prevent questioning on irrelevant matters. Under RCW 9A.44.020, the defense may not question a witness regarding prior sexual history unless the acts sought to be admitted involved the accused, and unless the defendant makes a formal motion, supported by affidavit, explaining why such evidence is relevant and admissible. Here, the defense did not comply with the requirements of RCW 9A.44.020 when it sought to cross-examine a

witness regarding alleged sex acts with doctors other than the defendant. Did the trial court properly exercise its discretion when it excluded such irrelevant and improper questions?

5. The trial court, because it is in the best position to observe the effect of a violation of a motion in limine, is accorded wide latitude in ruling on a mistrial motion. Here, a witness violated a motion in limine by mentioning the death of her infant daughter and the reason for the death of her mother. The trial court ordered the improper testimony stricken, and instructed the jury that the defendant had nothing to do with the death of the witness's baby. When, under the circumstances of this case, the violation of the motion in limine did not likely affect the jury verdict, did the trial court properly exercise its discretion by denying a mistrial?

B. STATEMENT OF THE CASE

1. PROCEDURE

Charles Momah was charged with the crime of Rape in the Third Degree in Count I (victim Heather Phillips), Indecent Liberties in Count II (victim Shellie Siewert), Indecent Liberties in Count III (victim Carman Burnetto), and Rape in the Second Degree in Count IV (victim Rena Burns). CP 421-24. Momah was also

charged with Violation of a Healthcare False Claims Act in Counts V, VI and VII, but those charges were severed prior to trial. CP 274, 421-24.

Momah was tried by jury before King County Superior Court Judge Michael J. Trickey, and convicted as charged on Counts I-IV. CP 427-30. On February 6, 2006, Judge Trickey imposed standard range sentences totaling 245 months. CP 593-602. Momah timely appealed. CP 619-34. By agreement, the severed counts alleging Violation of the Healthcare False Claims Act were held in abeyance pending the final resolution of Momah's appeals in the sexual assault counts. CP 612-15.

2. SUBSTANTIVE FACTS

Charles Momah, a gynecologist, sexually abused numerous patients at his offices in Burien and Federal Way, Washington. Momah abused his position of trust with women who were vulnerable and had sought him out for treatment. The sexual abuse occurred when Momah performed physical examinations.

COUNT I

Heather Phillips was single and 20 years old when she first saw Momah in 2001. 21RP 38, 51.¹ She had a two-year-old son. 21 RP 38-39. She found Momah in the phone book and went to see him because she was suffering pelvic pain. 21RP 51-53. She was also addicted to prescription drugs. 21RP 43-50. Momah was aware that she was addicted to drugs and continued to prescribe narcotics for her. 21RP 59, 67, 73-75. Phillips saw Momah on a regular basis between 2001 and August 12, 2003, the day she was raped. 21RP 42, 59. When Phillips had an office visit, Momah would typically perform a pelvic ultrasound and manual examination, and he almost always prescribed drugs. 21RP 59.

As the physician-patient relationship progressed and Phillips saw Momah more often, he started to become flirtatious and unprofessional. 21RP 79. He asked Phillips out and wanted her to meet him at hotels. 21RP 75. Momah had her phone numbers and would call Phillips on her cell phone and at home. 21RP 80. Phillips would tell Momah that she would meet him, but then not

¹ There are 35 volumes of the verbatim report of proceedings. A complete listing is contained in Appendix A.

show up, and she never did go out with him or allow him into her apartment. 21RP 81-83, 96-99, 115-18.

As time went on, the physical examinations Momah performed changed. During the ultrasound he would not wear gloves, the examinations got longer, and there were no nurses in the room. 21RP 129. However, because he kept prescribing medications for her, Phillips continued to see him. 21RP 130.

On August, 2, 2003, Heather Phillips told Ellen Ursino, a physician's assistant at Auburn Emergency, that her OBGYN in Federal Way was giving inappropriate care, having her come in two or three times a week for ultrasounds, and would call her at work and at home asking her out on dates, making her extremely uncomfortable. 24RP 125-29. Earlier, in 2001, Phillips had told Dr. Kevin Martin, a physician at Auburn Family Medical Center, that Momah had been performing ultrasounds as often as weekly, and had made social and sexual advances toward her. 24RP 167-68, 174.

Heather Phillips saw Momah for the last time on August 12, 2003. 21 RP 42, 146. She had called him in order to get an emergency contraceptive and a narcotics prescription. 21RP 146. Phillips had had unprotected sex with her boyfriend, Rick Gardner,

the night before, and wanted a morning-after pill. 21RP 146. Momah agreed to meet her after hours at his office in Federal Way. 21RP 42, 147-48. He arrived at his office at about 5:30 p.m., unlocked the door, turned off the alarm, went to his office, and wrote Phillips prescriptions for an emergency contraceptive, as well as for percocet and valium. 21RP 52. He said that he needed to do an ultrasound examination. 21RP 152.

Phillips went to the exam room, undressed, put on a gown, and waited for Momah. 21RP 154. Momah then did an ultrasound vaginal examination and a manual examination. 21RP 155-56. Phillips was on the examining table with her feet in stirrups. 21RP 157-58. The manual examination, which usually lasted only a minute or two, went on for an extended period of time and Momah was not wearing gloves. 21RP 156. He massaged her clitoris for 30 seconds or a minute. 21RP 160. Phillips asked Momah what he was doing, but he did not respond. 21RP 160. He then unzipped his pants and said, "I know you want this." 21RP 161. Momah's pants were down, he had an erection, and he pinned her down by his weight (over 300 pounds) and then penetrated her. 21RP 162-64. He was bent over and leaning on top of her, and she told him to stop. 21RP 163. Momah said

nothing. 21RP 164. Momah kissed her on the mouth, but she did not kiss him back. 21RP 154. Momah penetrated her for five or ten minutes and then ejaculated. 21RP 164-65. He then told her to get dressed. 21RP 165.

Phillips cleaned herself with her underwear, got dressed, gathered her belongings, and began to leave. 21RP 166. Before she left, Momah asked her if they could do that again sometime. 21RP 166. He also said that if she told anyone, he would have her son taken away. 21RP 166. Phillips was afraid that Momah could have her son taken away if she went to the police because she was addicted to prescription drugs. 21RP 167. Phillips then left the office. 21RP 167.

Phillips went to Rick Gardner's workplace in Auburn and told him what had happened. 21RP 168. She wanted to go to a hospital and to report the incident, but thought her son would be taken away and debated what to do. 21RP 168. Gardner encouraged her to go to the hospital. 21RP 168. After filling the prescriptions that Momah had written, she went to Auburn Hospital and Gardner met her there. 21RP 170. After debating whether or not to go inside, she finally went in and saw a nurse, Bonnie Courtier. 21RP 172; 24RP 135.

When Heather Phillips spoke to Bonnie Courtier, she appeared depressed. 24RP 140. She told Courtier she had sat out in the car for 45 minutes before she came in because she did not think anyone would believe her. 24RP 141. At times she curled up in a fetal position in the exam room. 24RP 141. Phillips related that Momah had been doing a pelvic examination, dropped his pants, put his penis in her vagina while he was on top of her, and she could not get him off her. 24RP 143. She said she had gone to Momah's office to see if he would write a prescription for the morning-after pill because she had had unprotected sex the night before and the pharmacy would not give her the pills because of an insurance issue . 24RP 145-46. Phillips said that Momah told her he would meet her at his office even though it was after hours. 24RP 146. When he was doing the vaginal ultrasound, he did a manual examination and Phillips did not feel that what he was doing was right. 24RP 146. Momah then pulled his pants down, had vaginal sex, and ejaculated. 24RP 146.

The personnel at Auburn Hospital did a pelvic exam on Phillips, and collected DNA and hair samples. 21RP 173. Phillips' back hurt from the rape, and bruises later developed. 21RP 173-

74. The police arrived and took a statement from her. 21RP 176.
She then went home with Rick Gardner. 21RP 176.

Phillips later went to St. Francis Hospital in Federal Way because her back continued to hurt. 21RP 177-78. Dr. Lisa Ward, an emergency room physician at St. Francis, treated Phillips. 24RP 103-06. Phillips described Momah's sexual assault. 24RP 106-07. Dr. Ward saw bruises on the small of her back; the police were contacted, and photographs were taken of the bruises. 20RP 80; 21RP 178-80; 24RP 110-12.

Phillips asked Dr. Ward if there was anything that could be done about Momah, and Ward told her about the Washington State Medical Board of Examiners. 24RP 108. Phillips reported Momah to the Medical Board. 21RP 182.

Rick Gardner had been dating Phillips for about eight months at the time of the rape. 23RP 55. He testified that Phillips came to his workplace at the Auburn Fred Meyer Pharmacy. 23RP 57. She was visibly distressed, emotional, and on the verge of crying. 23RP 58, 60. After telling Gardner that she had been raped by her doctor, Phillips asked what she should do. 23RP 58, 60. Gardner told her that she needed to go to the hospital to be examined. 23RP 58. Later he met her at Auburn Hospital, where

she was interviewed by the police. 23RP 59, 162. When Phillips was interviewed by the police, she was crying and holding her stomach in obvious abdominal pain. 23RP 161.

Megan Inslee, a forensic scientist with the Washington State Crime Lab, examined Heather Phillips' underpants and the DNA evidence. 23RP 122. The DNA of Charles Momah was found in the sample from Phillips' vaginal exam at Auburn General Hospital. 23RP 13, 164. Momah's DNA was also found on Phillips' underpants. 23RP 130, 164.

COUNT II

Shellie Siewert was employed as a Metro bus driver and needed treatment for bleeding and severe cramping that were affecting her ability to work. 16RP 18, 26. She found Momah's name in the Yellow Pages. 16RP 19-23. He performed an initial examination. 16RP 23. He told Siewert that her ovaries had cysts, and recommended surgery. 16RP 23. Momah did the surgery in his Federal Way office in October, 2002. 16RP 18-29. Following surgery, Siewert was given a series of shots to stop her menstrual cycle and to assist in healing. 16RP 31. However, when Siewert returned to work, she injured herself again, and returned to see Momah in his Burien office. 16RP 34.

Momah directed Siewert to an examination room; no one else was present. 16RP 34. Siewert was naked from the waist down, on a table and in stirrups. 16RP 35. Momah put his fingers inside her and then began rubbing her clitoris. 16RP 36-37. Momah touched her clitoris in a round circular pressing motion, and Siewert pulled back because it was uncomfortable and made her feel uneasy. 16RP 38. This angered Momah and he told Siewert to get dressed. 16RP 38. Siewert went home. She was horrified, shocked and angry. 16RP 40. While she returned to Momah's office for two more shots that she had paid for, she never returned for further treatment. 16RP 42-46. On her follow-up visits, Siewert took her daughter with her to the examination room. 16RP 47.

After the incident where Momah had fondled her clitoris, Siewert did not tell anyone about it, including her daughter and her boyfriend, because she was embarrassed. 16RP 50-51. She later contacted the Department of Health, after other women had come forward with allegations against Momah. 16RP 53-56. She also gave a statement to the Federal Way Police Department. 16RP 58.

COUNT III

Carmen Burnetto was a patient of Momah's from the end of 2001 to the beginning of 2003. 17RP 24. In 2001 she was trying to

conceive with her boyfriend and wanted to make sure she would not have any problems. 17RP 24. She did not have a gynecologist at the time and found Momah's name in the phone book. 17RP 25.

On the first few visits Burnetto felt uncomfortable with Momah. 17RP 37. Momah would ask inappropriate questions, including the kind of men she went with, the sexual positions she would use, and whether she dated black men. 17RP 40. Momah told her that black men liked women built like she was, "thick and full of big titties." 17RP 40. Momah repeatedly asked Burnetto out. 17RP 41.

Momah would talk about her body parts, saying that she had a "pretty pussy." 17RP 42, 44. Momah made that comment during a visit when Burnetto's cousin, Amy Forgey, was present in the examination room. 17RP 44. Momah asked Siewert whether her cousin's pussy was as pretty as hers. 17RP 45. Burnetto was shocked at Momah's talk. 17RP 45. After they left, Burnetto and her cousin discussed what Momah had said. 17RP 45-46, 156.

Over time, the physical examinations changed. 17RP 48. Momah would insert the ultrasound wand more often, and would move it around, going in and out instead of just right to left. 17RP 49. It became worse during each examination. 17RP 49, 77.

One time Burnetto went out to lunch with Momah. 17RP 53. He kept asking her out, and she finally agreed. 17RP 53. Momah offered to buy her furniture, and picked her up outside her house. 17RP 56. After going to a restaurant for lunch, they went to a furniture store, but did not buy anything. 17RP 57. Nothing romantic happened during the lunch, although Momah tried to touch her leg under the table at the restaurant. 17RP 58. He then took Burnetto home, but did not go inside her house. 17RP 58-59. On a subsequent occasion, Momah came to the house with his brother, and they did come inside, but nothing occurred. 17RP 61. Burnetto never had sex with Momah, nor any kind of romantic or intimate relationship. 17RP 61, 119-20.

Burnetto finally spoke up and told Momah that what he was doing was wrong. 17RP 61-62. This was prior to any media coverage of Momah's abuse of his patients. 17RP 62. When Burnetto told Momah what she thought and that she was going to tell what had occurred, Momah reacted by telling her that no one would believe her because he was a doctor and she was just "a crazy." 17RP 62, 70. Burnetto did not call the police because she thought she would not be believed. 17RP 63. Instead, she

demanded money from Momah, who gave her several hundred dollars. 17RP 63.

COUNT IV

Rena Burns, a certified nursing assistant who worked at Valley Medical Center, saw Momah in March of 2003 for in vitro fertilization ("IVF"). 17RP 171. Burns had had her tubes tied when she was younger, and she and her husband were trying to have a child. 17RP 171. Burns had been through unsuccessful surgery to reconnect her tubes, and Momah claimed that he had been able to rebuild tubes when other doctors could not. 17RP 61-63.

During an examination, Momah groped and fondled Burns' right breast. 18RP 64. This was completely unlike any other breast examination Burns had ever had. 18RP 65. He also performed unusual maneuvers with the ultrasound wand, using it in an in-and-out fashion, unlike a normal examination. 18RP 69. Momah also inappropriately questioned Burns about her sexual preferences, positions, and whether she engaged in oral and anal sex. 18RP 70-71. At one point during the physical examination, Momah touched her clitoris for ten or fifteen minutes. 18RP 72-73. He took his gloves off, saying he needed to feel her vagina without gloves. 18RP 74-75.

After the physical examination, Momah called Burns on her cell and home phones and claimed that he could get her pregnant. 18RP 79. Because Burns felt his examination was inappropriate, she wrote a letter to the Department of Health stating what had occurred. 18RP 80.

Momah kept calling Burns, wanting her to come back to his office. 18RP 81. Because he continued to maintain that he could make it possible for her to become pregnant, she returned for a second exam. 18RP 82. Again, Momah conducted a manual vaginal examination, touching her clitoris. 18RP 83. The ultrasound examination was also done in a similar fashion to the first exam. 18RP 83-84.

Because Momah said that he could repair her tubes, Burns opted for surgery, rather than proceed with the costly IVF. 18RP 85. The surgery was unsuccessful, and Momah said that her tubes could not be repaired. 18RP 90. Momah said that she would need IVF but, contrary to earlier assurances, said he did not do IVF. 18RP 90-91. Burns eventually went to see another specialist. 18RP 92.

Ricky Burns, Rena Burns's husband, became aware that his wife had been abused by Momah when he saw her writing a letter

to the Department of Health. 18RP 146-47. This was prior to any news broadcast relating to Momah's abuse of his patients. 19RP 147-48. Ricky Burns also testified that his wife was angry because Momah had misled her about whether he could do IVF, and because she had had to go through a needless surgery to attempt to repair her tubes. 19RP 164.

ER 404(b) WITNESSES

In a pretrial hearing, the State offered the testimony of 17 witnesses, all patients of Momah, who had been abused by him. The State argued that Momah's pattern of abusing his patients was a commonly used scheme or plan. 8RP 5-83. Judge Michael Trickey, after analyzing the offers of proof relating to the ER 404(b) witnesses, allowed the State to present the testimony of three of the seventeen witnesses: Karen Perry, Cheryl Wood, and Cheryl Reich. 8RP 83-92; 9RP 8-23. The court found that Momah's acts with the three women were sufficiently similar to the charged counts that their testimony fell within the commonly used scheme or plan exception under ER 404(b). 8RP 83-92; 9RP 8-23.

Karen Perry (married name Karen Terry) had two children, ages eleven and sixteen, at the time she testified in Momah's trial. 16RP 158. Because of a bad experience during labor with her first

child, she was looking for a doctor to help her manage pain during the pregnancy and delivery of her youngest child. 16RP 117. This was at the end of 1993. 16RP 117. Perry saw Momah between early 1993 and 2003. 16RP 118. After the birth of her second child, she saw Momah three to six times a year initially, and more often in later years. 16RP 121. Over time, she became dependent on pain medication. 16RP 121.

Momah would perform regular physical examinations and procedures on Perry. 16RP 124-25. As time went on, the examinations became sexually uncomfortable for her. 16RP 125. During one examination, when no one else was in the room, Momah placed his fingers inside her, and also touched her clitoris. 16RP 137-40. Momah's actions triggered an orgasm, and she asked him to stop. 16RP 143. After she left the office she called her sister from the parking lot, and told her what had happened. 16RP 144-45.

During the time she saw Momah, he would tell her that he could raise her children and they would make beautiful babies together. 16RP 143. Once he invited her out to a bar, but she declined. 16RP 153-54, 59. This occurred when she was having trouble with her first husband, and Momah was aware she was

going through a separation. 16RP 153. When Perry became aware of other women who had come forward after being abused by Momah, she contacted the authorities and gave a statement to a Federal Way detective. 16RP 156-57.

Cheryl Wood was Momah's patient beginning in 1996. 19RP 175. She saw him when she was attempting to get pregnant and was having fertility problems. 19RP 175. She was also suffering extreme pelvic pain from a prior surgery. 19RP 178. During the first several years of her physician-patient relationship there were no problems, although she was not comfortable with Momah's breast examinations. 19RP 181-82.

During 1997, Momah began asking Wood if she wanted to "be with him." 19RP 184. When she asked if he meant in a sexual way, Momah replied that he did. 19RP 184. She said absolutely not. 19RP 184. She had a fiancé at the time. 19RP 184.

In 2000, Momah began telling Wood how pretty she was, that she was his favorite patient, and asking her if she wanted to go out. 19RP 185-86. During one examination, he asked her if he could put his penis inside her. 19RP 187. There were sexual comments on other occasions. 19RP 190. Wood continued to see

Momah because he would prescribe pain medication and promised her IVF. 19RP 190.

Momah told Wood that he wanted to have a child with her, and a couple of times said he wanted to marry her. 19RP 191. His offer to do IVF had a big impact on Wood because she so badly wanted a child. 19RP 191. Although Momah continued to ask her out on dates, she never went out with him. 19RP 192.

One time during a physical examination, Momah had two fingers inside Wood and began to rub her clitoris. 19RP 193-94. On another occasion, he became physically aggressive and asked her to have sex with him, but she refused. 19RP 194. When she got up to put her pants on, he bear-hugged her and began kissing her all over. 19RP 194. She struggled to get away, and he twisted her arm, causing a bruise. 19RP 194. She subsequently filed a lawsuit against Momah. 19RP 195.

Cheryl Reich began seeing Momah in 1999 when she and her husband were trying to have a child. 24RP 36. Reich also suffered from chronic fatigue syndrome and fibromyalgia, and was taking drugs for those conditions. 24RP 37. She went to Momah because he was willing to treat and prescribe drugs for both

conditions. 24RP 39. Momah held himself out as a fertility specialist. 24RP 40.

Reich had 15 to 20 appointments with Momah over the years, including two surgeries. 24RP 41. At the end of 2002 and the beginning of 2003 she began to question his professionalism. 24RP 43. Momah began asking her about her sexual relationship with her husband, going into unnecessary intimate details. 24RP 45. He asked her whether she engaged in oral sex and whether she had orgasms. 24RP 45-47. He began to tell her that she needed sex on a regular basis and suggested she have an affair with him. 24RP 46-48. She told him she was not interested, and the suggestion shocked her. 24RP 48-49. He persisted in asking her to have an affair, but she kept telling him she was not interested. 24RP 50-51.

Momah began calling Reich at home, asking her to have an affair. 24RP 51-52, 55. When she would come to his office for an examination, he would speak to her in a very low tone if he was saying anything sexual in nature. 24RP 54-55. Momah asked her out three or four times, but she never saw him outside the office and was not interested. 24RP 56. When she became aware of

Momah's abuse of other patients, she contacted the authorities.
24RP 60-66.

EXPERT WITNESS

Dr. Judith Jacobsen, an experienced gynecologist, testified regarding normal procedures during a gynecological examination. 19RP 119-47. Generally, a manual examination takes only about thirty seconds to a minute. 20RP 138. Gloves are typically worn. 20RP 141-42. A staff member should be in the room during the examination, unless the patient does not want an assistant present. 20RP 144. According to Dr. Jacobsen, there is no medically recognized treatment or diagnostic purpose for pulling the ultrasound wand out and then putting it back in time and again. 20RP 147. In her teaching of residents, she tells them to make every effort to avoid touching the clitoris during the examination. 20RP 159-60. There is no medically recognized purpose for inserting fingers in and out, over and over again. 20RP 162. There is generally no reason to do a breast exam simultaneously with a vaginal exam. 20RP 164. If a breast exam is done, it should not be done in the method used by Momah. 20RP 163-64. Unless a physician is treating a sexual disease, there is no reason to ask about oral sex. 20RP 155.

MOMAH'S TESTIMONY

Charles Momah testified at trial and denied all the charges against him. He claimed that Heather Phillips made suggestive advances to him and wanted to have sex. 26RP 23-26. He said he had consensual sex with her in his office and at a hotel. 26RP 26-31. He admitted having sex with her on August 12, 2003, claiming that she had called him and wanted to meet him in his office. 26RP 36-40. He claimed he did not use protection because Heather Phillips did not want him to. 26RP 40.

Momah said he treated Shellie Siewert for abdominal pain and excessive vaginal bleeding. 25RP 153. He denied ever touching her clitoris during any examination. 25RP 160. He also said that Siewert never expressed any dissatisfaction with his treatment of her. 25RP 160.

Momah claimed that he had consensual sexual intercourse with Carmen Burnetto. 25RP 197-200. He said the sex occurred in the bedroom of her house. 25RP 198-200. He denied ever telling her that she had a "pretty pussy." 25RP 202. He did tell her once that she was "pretty pushy" and he did not like that. 25RP 202. He denied ever touching her clitoris, or thrusting the ultrasound wand in and out of her vagina during physical examinations. 25RP 203.

He also said he never had his gloves off when he examined her.
25RP 203.

Momah said he attempted a tubal reversal on Rena Burns, and claimed that he did everything properly during the physical examinations. 25RP 105-24. He denied ever touching her clitoris, or using the ultrasound wand in an inappropriate fashion. 25RP 124-30. He denied ever claiming that he could perform IVF on her. 25RP 134. He also denied ever having any discussion with her about oral sex or anal sex, or whether she had orgasms with her husband. 25RP 44-45.

Momah said he treated Karen Perry for pelvic pain and abdominal bleeding. 25RP 169. He denied ever touching her inappropriately during any examination. 25RP 170-74.

Momah treated Cheryl Wood for pelvic pain, abdominal bleeding, and ovarian cysts. 26RP 180. He tried to repair her fallopian tubes, but the surgery did not work. 25RP 181. He denied ever telling her that he could do IVF on her. 25RP 184. While he made jokes of a sexual nature, he denied ever touching her clitoris during any physical exam. 25RP 187-89.

Momah treated Cheryl Reich for chronic fatigue syndrome and an irregular menstrual cycle, pelvic pain and recurring ovarian

cysts. 25RP 203-04. He denied any improper behavior, and claimed that Reich simply became upset when she learned her husband was cheating on her with somebody at work. 26RP 19.

Momah testified that his office was searched on September 10, 2003, and that was the last date he practiced medicine because he was suspended. 26RP 46.

C. ARGUMENT

1. BECAUSE THE TRIAL COURT NEVER CLOSED THE COURTROOM TO PRESS OR SPECTATORS DURING JURY VOIR DIRE, MOMAH'S RIGHT TO A PUBLIC TRIAL WAS NOT VIOLATED.

Momah claims that because a portion of the individual jury voir dire occurred in chambers, his right to a public trial was violated. However, at no point during the proceedings did the trial court exclude any members of the public or the press who might have wished to view any portion of the jury voir dire. Neither the trial court nor the parties believed that the courtroom had been closed, and the trial court was acutely aware that the defendant was entitled to a public trial at all times. Because there was no ruling excluding any member of the public from observing jury voir dire, Momah's claim that his right to a public trial was violated should be rejected.

A defendant has a right to a public trial under Article I, section 22 of the Washington Constitution. It is well-settled that a trial court may not close any portion of a defendant's trial to the public or the press unless it first engages in a five-step consideration for public trial closure motions. State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). The right to a public trial includes the jury selection process. In re Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004); State v. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005). The right to a public trial also extends to pretrial hearings. State v. Bone-Club; State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006).

King County Superior Court Judge Michael J. Trickey, the trial judge in Momah's case, was acutely aware of the defendant's right to a public trial. On several occasions Judge Trickey referred to the fact that Momah had a right to a public trial, and that the media or anyone else could observe the trial at any time. 10RP 5, 93-94; 15RP 2-4.

Due to the amount of publicity in Momah's case, a large number of prospective jurors were called. 11RP 3. They were initially taken to the large King County presiding courtroom, E-942. 10RP 79-80. There is no formal jury room in the presiding

courtroom, and there was discussion about how to accomplish jury voir dire with the large number of prospective jurors. 10RP 80-86.

On October 10, 2005, a panel of about 100 jurors was sworn in and given a jury questionnaire to fill out in the presiding courtroom. 11RP 4. There was a discussion about how to accomplish individual jury voir dire since there was no jury room in the presiding courtroom. 11RP 4-7. The jury then proceeded to fill out the questionnaires in E-942. 11RP 10-18.

On October 11, 2005, the parties reconvened in the presiding courtroom. 12RP 8. After some jurors were excused for hardship, individual voir dire took place in an adjoining chambers room connected to E-942. 12RP 19-20. A number of jurors were questioned individually in that room. 12RP 19-106.

On October 12, 2005, after a number of jurors had been excused and the jury pool was smaller in size, the court reconvened in its regular courtroom, C-813. Since there was a jury room in C-813, the main group of jurors was placed in the jury room while further individual voir dire occurred in open court. 13RP 11-154. The following day, October 13, jury voir dire continued in Judge Trickey's regular courtroom, C-813. 14RP 1-196.

At no time did the trial court close the courtroom for any purpose, either during jury voir dire or any other portion of the trial. At no time, either on the motion of the party or on motion of the court, did the court order spectators or family members or anybody who wished to watch any part of the proceedings, including voir dire, to leave the courtroom. Indeed, the trial court was fully aware of the requirements for an open trial and scrupulously protected Momah's right to a public trial.

The fact that on one day individual voir dire took place in chambers and the presiding courtroom was used as the jury room does not constitute a closure of the proceedings to the public. While it is unclear if any spectators observed individual voir dire that occurred in the room connected to E-942, there was nothing that prevented anyone who so desired from watching.

Furthermore, there was no de facto closure of the courtroom simply because individual voir dire was held in a room connected to the main presiding courtroom. While the door was closed, this was necessary to keep the answers given by the jurors from being heard by the other panel members. Virtually all rooms of the courthouse, whether jury rooms or courtrooms, have doors that are closed during court proceedings. A spectator can open the door of

the courtroom and could have opened the door where individual voir dire occurred if they wished to observe individual voir dire. Judge Trickey never closed his courtroom, and was thus not required to evaluate the Bone-Club factors that would have been relevant only if the court had closed the proceedings.

All of the Washington cases and the cases relied on by Momah on appeal involve specific rulings by trial judges that excluded either the public, the press, or family members from a portion of a trial. Under those circumstances, of course, a trial court is required to consider a number of factors before closing the courtroom. None of those considerations applies in Momah's case because Judge Trickey never at any time ordered that his courtroom be closed to the public. It is readily apparent that none of the parties ever believed that any kind of courtroom closure had occurred. Momah's attempt to equate what occurred on the first day of individual jury voir dire with Bone Club, Orange, Brightman, or Easterling should be rejected. Momah's right to a public trial was not violated, and he is not entitled to a new trial.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING THE TESTIMONY OF THREE ER 404(b) WITNESSES.

Momah contends that the ruling by the trial court permitting Karen Perry, Cheryl Wood, and Cheryl Reich to testify under the common scheme or plan exception of ER 404(b) permitted erroneous propensity evidence. However, the trial court scrupulously analyzed the proffered evidence in light of binding authority from the Washington State Supreme Court, and properly concluded that Momah's acts committed against these three women were sufficiently similar to the charged crimes, which could naturally be explained as individual manifestations of an identifiable plan. Thus, the ER 404(b) evidence was relevant to the issue of whether or not the charged crimes occurred. Furthermore, the trial court properly concluded that the testimony of the three witnesses was more probative than prejudicial, and a limiting instruction was given to the jury. Considering the crimes for which Momah was charged and the similar actions he took toward other similarly situated women, the trial judge did not abuse his discretion in allowing testimony from three of the seventeen women whom the State offered as ER 404(b) witnesses.

ER 404(b)² provides that prior misconduct is not admissible to show that a defendant has a propensity to commit a crime. However, crimes or misconduct other than the acts charged may be admitted to prove the existence of a scheme or plan of which the charged offenses are manifestations. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995); State v. DeVincentis, 150 Wn.2d 11, 21, 74 P.3d 119 (2003); State v. Krause, 82 Wn.2d 668, 693-97, 919 P.2d 123 (1996). The admission of evidence of a common scheme or plan requires substantial similarity between the prior bad acts and the charged crime. Such evidence is relevant when the existence of the crime is at issue. Lough, 125 Wn.2d at 860; DeVincentis, 150 Wn.2d at 21.

A trial court may admit evidence that a defendant committed markedly similar acts of misconduct against similar victims under similar circumstances if the proof of such plan is (1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more

² ER 404(b): Evidence of other crimes, wrongs, or acts is not admissible to prove the character of the person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

probative then prejudicial. Lough, 125 Wn.2d at 852. A trial court's decision to admit or exclude evidence under ER 404(b) is reviewed for an abuse of discretion. Lough, 125 Wn.2d at 856; DeVincentis, 150 Wn.2d at 17. Judicial discretion is abused if the court's decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 97 Wn.2d 12, 26, 482 P.2d 775 (1971). A trial court abuses its discretion only if no reasonable person would adopt the view espoused by the trial court. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001).

Judge Trickey conducted an extensive pretrial hearing relating to the admission of ER 404(b) evidence in Momah's case. 8RP 12-92; 9RP 8-23; 15RP 5-14. The State presented offers of proof from 17 potential ER 404(b) witnesses. 8RP 5-6; Pretrial Ex. Nos. 1-2; Supp. CP ___, (sub. no. 92(a), State's Motion to Admit 404(b) Evidence, filed 9-28-05).

Judge Trickey carefully applied the requirements for the introduction of common scheme or plan evidence as set forth in Lough and DeVincentis. He correctly recognized that the common scheme or plan evidence in this case involved a single plan used repeatedly to commit separate but similar crimes, which may be

admissible if the State establishes a sufficiently high level of similarity. 8RP 84-85. After examining the nature of the evidence regarding both the charged and ER 404(b) evidence, Judge Trickey found that Momah, a licensed physician, was using his position as a physician in a relationship with a patient to engage in sexualized activity within the context of his office, a situation where the women thought they would be safe and that they would be treated. 8RP 87. The court found that the patients assumed that there was a position of trust and that they acquiesced in that trust. 8RP 87.

The court admitted the testimony of Karen Perry, who said that Momah rubbed her clitoris during an examination, asked her out and said that he wanted to father her children. 8RP 88. The court also noted Ms. Perry's dependence on Momah to provide drugs, similar to some of the charged victims. 8RP 88-89. Momah's inappropriate sexual conduct in an intimate area was a manifestation of his plan to molest vulnerable patients in an office setting. 8RP 88-89.

Judge Trickey also permitted the State to present the testimony of Cheryl Wood. Momah had massaged her clitoris, asked her if he could put his penis inside her, and if she wanted to

have his baby. 8RP 89. Medication and drug usage were also part of Cheryl Wood's case. 8RP 89; 9RP 12-18.

The trial court also permitted the testimony of Cheryl Reich, who was particularly vulnerable because of her chronic fatigue and fibromyalgia, and the fact that she was on Prozac. 8RP 89. Momah asked her to have an affair, and engaged in extensive inappropriate discussions of intimate details of her sex life. 8RP 89; 9RP 8.

Judge Trickey recognized the danger of unfair prejudice if the State were permitted to call a large number of ER 404(b) witnesses, and refused to permit other women to testify regarding Momah's conduct with them. 8RP 90. The court also concluded that the other proffered witnesses did not share enough similar characteristics to the charged crimes. 8RP 90. Furthermore, the court refused to allow any of Momah's employees to testify regarding ER 404(b) evidence. 8RP 89-90.

Judge Trickey accepted the parties' stipulation that the statements of the ER 404(b) witnesses could be used as an offer of proof, and that live testimony was not required. 15RP 5-6. The trial court found that the probative value of the three ER 404(b) witnesses permitted to testify substantially outweighed the danger

of unfair prejudice or confusion of the issues, and that it was not needlessly cumulative. 15RP 10-11.

Following Judge Trickey's ruling, the defense decided that they did not want an oral limiting instruction regarding the testimony of the ER 404(b) witnesses. 15RP 13-14. However, at the conclusion of the trial, the court gave the jury a written instruction limiting the jury's consideration of the ER 404(b) evidence. Court's Instr. No. 22, CP 457. The instruction limited the jury's consideration of such evidence to whether a common scheme or plan existed. If so, the jury may, but was not required, to use the existence of the plan in determining whether or not the charged crimes occurred. The court told the jury in the instruction that they could not use such evidence to prove character. The trial court also correctly defined the term "common scheme or plan". Court's Instr. No. 22, CP 457.

The trial testimony of the charged victims and the ER 404(b) witnesses clearly establishes sufficient similarities between the charged victims and the witnesses. All seven women were treated in Momah's office and all were, to a greater or lesser extent, vulnerable and dependent on his care. They all experienced inappropriate physical examinations; many were solicited for sexual

acts, and all had their trust violated by Momah. Judge Trickey's ruling permitting the State to call the three ER 404(b) witnesses fully complied with the dictates of Lough and DeVicentis. Furthermore, Judge Trickey recognized the danger of unfair prejudice from allowing great numbers of other witnesses to testify, and limited the testimony to the three women who had been abused by Momah in a remarkably similar fashion to the charged victims. Finally, the trial court gave a written limiting instruction. It cannot be said that no reasonable trial judge would have ruled as did Judge Trickey regarding the ER 404(b) evidence.

Momah also asserts that, because some of the testimony of some of the ER 404(b) witnesses concerned incidents that occurred several years prior to the charged counts, their testimony should have been excluded. However, in Lough the testimony of the ER 404(b) witnesses involved acts committed by the defendant (spiking their drinks with drugs) ten years prior to the charged conduct. In DeVincentis, the similar acts (wearing bikini underwear and soliciting a massage from a ten-year-old) were committed fifteen years prior to the charged case. It is the degree of similarity between the charged crime or crimes and the prior conduct, rather

than the time between the acts, that is of paramount importance.
Lough, 125 Wn.2d at 858.

Finally, Momah argues that Lough should be overruled. However, eight years after Lough was decided, the Washington Supreme Court in DeVincentis specifically declined to overrule Lough. DeVincentis, 150 Wn.2d at 25. This court is obviously bound by Lough and DeVincentis, and the invitation to overrule those cases must be declined.

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING SEVERANCE.

Momah claims that the trial court erred in denying his motion to sever counts. However, the trial court did not abuse its discretion in ordering that Momah be tried by the same jury for the four sexual offenses that occurred in his office. The charges were similar in nature, occurred during the same general time frame and in the same location, and the evidence of each count would likely have been cross-admissible even if severance had been granted. The concern for judicial economy far outweighed the benefit of a separate trial for each count in Momah's case.

Joinder of offenses is governed by CrR 4.3 and RCW 10.73.060. CrR 4.3 does not supersede RCW 10.73.060 and they are consistent. State v. Thompson, 88 Wn.2d 518, 525, 564 P.2d 315 (1977). RCW 10.73.060 states:

When there are several charges against any person, or persons, for the same act or transaction, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments or informations, the whole may be joined in one indictment, or information, in separate counts; and, if two or more indictments are found, or two or more informations filed, in such cases, the court may order such indictments or informations to be consolidated.

Similarly, CrR 4.3(a) provides:

Two or more offenses may be joined in one charging document, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:

- (1) Are of the same or similar character, even if not part of a single scheme or plan; or
- (2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

The four counts charged against Momah were properly charged in one information. The crimes were of the same or similar character and, as earlier discussed, were each manifestations of a single scheme or plan to molest women patients. The cases were unquestionably properly joined.

Washington courts have long favored a broad joinder rule. State v. Robinson, 38 Wn. App. 871, 881, 691 P.2d 213 (1984); State v. Hentz, 32 Wn. App. 186, 189, 647 P.2d 39 (1982). Liberal joinder comports with the "important public policy of conserving judicial and prosecutorial resources." Hentz, 32 Wn. App. at 189. The failure of the trial 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, 717-18, 790 P.2d 154 (1990). Additionally, the defendant bears the burden to demonstrate that a trial involving multiple counts would be so manifestly prejudicial as to outweigh concern for judicial economy. Bythrow, 114 Wn.2d at 722; State v. Russell, 125 Wn.2d 24, 66, 882 P.2d 747 (1994).

In ruling on a motion to sever counts, the trial court must consider (1) the strength of the State's evidence on each count; (2) the clarity of the defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial. State v. Russell, 125 Wn.2d at 63; State v. Kalakosky, 121 Wn.2d 525, 852 P.2d 1064 (1993).

Severance was properly denied in Momah's case. Not only were the counts properly joined for trial, all of the charges involved sexual offenses that took place in Momah's offices over the same general time period. The improper sexual touchings, unconsented penetrations, sexually suggestive banter, and general behavior of the defendant were remarkably similar in each of the charged counts. Furthermore, the defenses presented were denial of any improper sexual activities, or consensual intercourse. Momah was able to argue and present evidence pertaining to his claims, and thoroughly cross-examine the victims in each case regarding the allegations against him.

The analysis of the admissibility of the ER 404(b) witnesses' testimony would not have changed whether Momah was tried jointly or separately for each count. The evidence of the ER 404(b) witnesses would have been just as relevant and admissible whether or not severance had been granted. Furthermore, if severance had been granted, the testimony of the other three victims in the charged counts would also have been admissible under ER 404(b). Thus, the need for judicial economy outweighed any potential prejudice to Momah in the joining of the four counts for trial.

Judge Trickey instructed the jury that a separate crime was charged in each count, that they must decide each count separately, and that their verdict on one count should not control the verdict on any other count. Court's Instr. No. 18, CP 453. The jury is presumed to have followed the court's instruction. State v. Kroll, 87 Wn.2d 829, 837, 558 P.2d 173 (1976).

After Judge Trickey made his ruling regarding the ER 404(b) witnesses, the court denied severance of the charged counts relating to the sexual abuse. 9RP 79; 15RP 11. In denying severance, the court recognized that count I, third degree rape involving Heather Phillips, was somewhat different from counts II, III and IV. 15RP 11. The trial court found, however, that the alleged sexual intercourse with Heather Phillips occurred in Momah's office while she was a patient and was sufficiently similar to permit joinder. 15RP 12.

Momah has failed to demonstrate that a trial involving multiple counts was so manifestly prejudicial as to outweigh the concern for judicial economy. Even if severance had been granted, the testimony involving the other charged counts and the ER 404(b) witnesses would in any event likely have been admissible. Momah has not demonstrated that no reasonable trial judge would have

ruled as did Judge Trickey on the issue of severance. There was no abuse of discretion by the trial court when it denied Momah's motion to sever counts.

4. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN PREVENTING CROSS-EXAMINATION OF WHETHER HEATHER PHILLIPS HAD HAD SEX WITH OTHER DOCTORS.

Momah claims that he should have been allowed to cross-examine Heather Phillips to ask whether she had had consensual sex with other physicians. The trial court properly exercised its discretion to exclude this irrelevant evidence, which violated the rape-shield statute and was not relevant regarding whether or not Phillips had consensual sex with Momah.

The trial court has wide discretion to determine the admissibility of evidence, and the decision whether to admit or exclude evidence will not be reversed on appeal unless the appellate court can establish that the trial court abused that discretion. Demery, 144 Wn.2d at 758. The admissibility of evidence of past sexual conduct is within the sound discretion of the trial court. State v. Hudlow, 99 Wn.2d 1, 17-18, 659 P.2d 514 (1983). The scope of cross-examination is within the discretion of

the trial court and will not be disturbed unless there is a manifest abuse of discretion. State v. Young, 89 Wn.2d 613, 574 P.2d 11 71 (1978); State v. Descoteaux, 94 Wn.2d 31, 614 P.2d 179 (1980); State v. Roberts, 21 Wn. App. 830, 834, 611 P.2d 1297 (1980). Evidence that is not relevant is not admissible. ER 402.

In the context of impeachment of a victim in a rape case, RCW 9A.44.020 limits inquiry into a rape victim's prior sexual background, unless the evidence concerns past behavior between the perpetrator and the victim and consent is claimed. RCW 9A.44.020(2). Furthermore, if a defendant seeks to admit such evidence, he must file a written pretrial motion containing an offer of proof of the relevancy of the evidence of past sexual behavior, and must file supporting affidavits regarding the offer of proof. RCW 9A.44.020(3)(a) and (b). If the court finds the offer of proof to be sufficient, the court then conducts a hearing out of the presence of the jury. RCW 9A.44.020(3)(c). At the conclusion of such hearing, the court must make findings whether the evidence is relevant on the issue of consent and whether the probative value outweighs prejudice, and whether the exclusion would result in the denial of substantial justice to the defendant. RCW 9A.44.020(3)(d).

Momah did not satisfy any of the requirements under RCW 9A.44.020 for the introduction of evidence that Heather Phillips had had sex with other physicians. Thus, there was no evidentiary basis to admit such testimony and the trial court properly ruled that she could not be cross-examined on that subject. 21RP 63. See State v. Gregory, ___ Wn.2d ___, 147 P.3d 1201, 1215-18 (2006).

Heather Phillips was cross-examined very extensively and aggressively at trial. 21RP 197-201; 22RP 13-99; 23RP 28-53. Momah was hardly deprived of a defense when his request to cross-examine Heather Phillips on irrelevant and prejudicial matters pertaining to her private life was rejected by the trial court. Judge Trickey did not abuse his discretion in limiting cross-examination of Heather Phillips.

5. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING A MISTRIAL WHEN VICTIM BURNS VIOLATED A MOTION IN LIMINE.

Momah contends that the trial court should have granted a mistrial when Rena Burns, during aggressive cross-examination, gave unresponsive answers relating to the date of her mother's death and the death of one of her children. The trial court ordered

the testimony stricken and the jury was instructed to disregard Burns's responses. Judge Trickey, who was in the best position to observe the effect of the violations of the motion in limine, denied a motion for a mistrial. The court did not abuse its discretion in denying the mistrial motion.

Prior to the testimony of Rena Burns, the issue of her memory of the events during a pretrial interview with the defense was addressed. 17RP 11-18, 147-48. The court ruled that the State would be permitted to elicit from Ms. Burns the fact that her mother died a few weeks prior to the taking of one of her statements. 17RP 147. The court also ruled that the State could elicit testimony that she had had embryos inserted shortly before giving an earlier statement. 17RP 147. References to the delivery of her children and the death of one of her children, and the particulars of her mother's final illness, were excluded. 17RP 147-48.

Ms. Burns testified at length and underwent very aggressive cross-examination. 17RP 159-79; 18RP 61-96; 19RP 12-16, 17-62. During a break in cross-examination, the trial court adhered to its ruling excluding the fact that one of her children had died and the details of her mother's final illness. 19RP 64. Cross-

examination then resumed, and continued in an aggressive and extended manner. 19RP 86-110. During one exchange, when Burns was pressed about the timing of events in a statement she had given, she responded that she could remember the date her daughter was born and the date her son had died. 19RP 109. She contrasted those dates with her recall of the day that she was sexually assaulted. 19RP 110.

The court found that Burns had violated the motion in limine by mentioning the fact that her son had died. 19RP 113. The defense then moved for a mistrial. 19RP 113. The court denied the motion for a mistrial, finding that, to a certain extent, the answer was invited because the witness had been repeatedly pushed regarding specific dates and details. 19RP 114. Judge Trickey then instructed the jury to disregard Burns's comment. The court instructed the jury:

The portion of Ms. Burns's answer just before noon break about the death of her infant son is stricken. You must disregard that statement in its entirety as it relates to her infant son. You are further instructed that Ms. Burns gave birth to twins in October of 2004, and that her infant son died shortly thereafter. This death had nothing whatsoever to do

with Doctor Momah. It is not related to any civil suit or criminal charges which have been brought against him.

19RP 121.

Following the court's admonition, cross-examination continued. At one point, during recross-examination, defense counsel asked Ms. Burns about her mother dying at the end of July, and whether an interview she had given the defense was correct. 19RP 134-35. Burns responded, "There could be dates or times that maybe are not exactly right. I mean, just because my mother died on July 31 of this year—my mother had a massive brain aneurysm at the time I was being implanted with embryos." 19RP 136. In response to the defense objection, Judge Trickey then informed the jury:

Ms. Burns, again, this last portion of her statement is stricken. You are to disregard the last statement of the witness, ladies and gentlemen. Ask another question.

19RP 136.

Defense counsel then further questioned Burns about whether anything in her statement was incorrect because her mother had died, and she responded that she could not say that was the case. 19RP 137.

The decision to deny a request for a mistrial lies within the sound discretion of the trial court, and it will not be disturbed absent a manifest abuse of discretion. Russell, 125 Wn.2d at 86; State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). Great deference must be given to the ruling of the trial court on a mistrial motion. State v. Luvane, 127 Wn.2d 690, 701, 903 P.2d 960 (1995). An appellate court is limited to determining whether a trial irregularity, when viewed against the backdrop of all the evidence, so prejudiced the defendant that nothing short of a new trial can ensure that the defendant will be tried fairly. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989); Lewis, 130 Wn.2d at 707. When a trial court denies a motion for a mistrial, that denial will be overturned only if there is a substantial likelihood that prejudice affected the jury's verdict. Russell, 125 Wn.2d at 85.

In light of the extensive direct and cross-examination of Rena Burns, and Judge Trickey's strong admonitions to the jury to disregard the improper comments of the witness, there is little likelihood that the jury's verdict was affected. Judge Trickey ordered that the offending testimony be stricken and instructed the jury to disregard it, specifically stating that Momah had nothing to do with the personal circumstances of the witness. The jury is

presumed to follow the curative instructions. State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994); State v. Hanna, 123 Wn.2d 704, 711, 871 P.2d 135 (1994).

Momah relies on State v. Escalona, 49 Wn. App. 251, 742 P.2d 190 (1987) to argue that a mistrial should have been granted, and that he is entitled to reversal. Escalona was charged with second degree assault while armed with a knife. Prior to trial, the court granted a defense motion in limine to exclude any mention of or reference to Escalona's prior conviction for the same crime. Nevertheless, the only witness against Escalona blurted out that the defendant had a record and had previously stabbed someone. Under those circumstances, the trial court's admonition to disregard the comment was not likely to cure the error. The jury had been informed that Escalona had committed the exact same type of crime for which he was charged.

Escalona involved a far different situation from the testimony of Rena Burns in Momah's case. The fact that she mentioned two instances in her personal background that should not have been placed before the jury had nothing to do with whether or not Momah had committed the charged crime. That determination was made by the jury in light of her extensive testimony regarding the crime,

Momah's denials, and the evaluation by the jury of all the other evidence in the case, including the ER 404(b) witnesses. There was little likelihood that the violation of this motion in limine impacted the verdict in Momah's case.

Judge Trickey was in the best position to observe the effect of the violations of the motion in limine. His decision to strike the testimony and instruct the jury to disregard Burns's answers was sufficient to cure any prejudice. Great deference must be given to the decision by Judge Trickey to deny the mistrial. Luvene, 127 Wn.2d at 701. It cannot be said that no reasonable trial judge would have denied the mistrial motion. There was no abuse of discretion.

6. MOMAH HAS FAILED TO PROVE HIS CLAIM THAT THE STATE CONCEALED EVIDENCE THAT A CIVIL ATTORNEY IMPROPERLY INFLUENCED WITNESSES IN THE CASE.

Momah claims that a civil attorney, Harish Bharti, who represented some of the witnesses in Momah's case, had been sanctioned in a Pierce County civil suit involving other alleged victims, and had improperly influenced the testimony of witnesses in that unrelated case. Although Momah offers no proof that Bharti

was ever found to have improperly influenced any witness who testified in this case, he nevertheless asserts that Bharti must have done so and that the State had an obligation to investigate the attorney and to turn over any favorable information. However, Momah offers nothing more than speculation to support his claim.³

Because Momah has failed to offer anything more than speculation that Mr. Bharti improperly influenced any witness in this case, this claim should be rejected. There is no proof whatsoever that the State was in possession of any exculpatory information that was not turned over to Momah during the lengthy discovery process in his case. Furthermore, the fact that Mr. Bharti represented some of the witnesses in the case was well known, and his involvement was explored by counsel during questioning of the witnesses.

Momah's claim that Mr. Bharti should be considered part of the prosecution "team" merely because he represented several

³ Momah sought to have this court take judicial notice of the Findings of Fact and Conclusions of Law entered by a Pierce County trial judge in a civil action in which Dennis Momah and Charles Momah were parties. The State objected. Momah's motion to take judicial notice was denied on November 16, 2006 by Commissioner Susan Craighead. Momah has filed a motion to modify Commissioner Craighead's ruling; that motion had not been decided by the time of this brief.

witnesses in civil litigation is absurd. This claim of error is wholly without merit, and should be rejected.

D. CONCLUSION

Judge Trickey never at any time closed the courtroom during jury voir dire in Momah's case. He properly exercised his discretion regarding ER 404(b) rulings, severance, the scope of cross-examination regarding the private sexual background of a witness, and when he denied a mistrial after a motion in limine was violated. Judge Trickey was scrupulously fair to both parties in the case. Momah's convictions should be affirmed.

DATED this 24 day of January, 2007.

Respectfully submitted,

NORM MALENG
King County Prosecuting Attorney

By: Lee D. Yates
LEE D. YATES, WSBA #3823
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

APPENDIX A

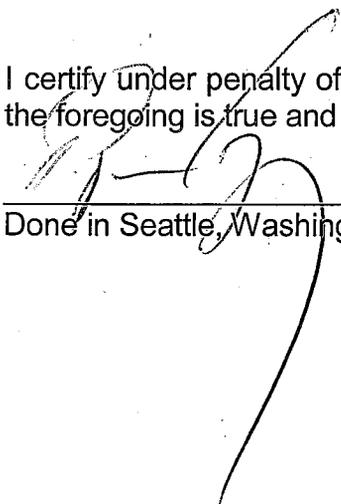
INDEX TO VERBATIM REPORT OF PROCEEDINGS

Volume 1	December 16, 2004
Volume 2	February 8, 2005
Volume 3	April 8, 2005
Volume 4	May 27, 2005
Volume 5	September 12, 2005
Volume 6	September 22, 2005
Volume 7	October 3, 2005
Volume 8	October 4, 2005
Volume 9	October 5, 2005
Volume 10	October 6, 2005
Volume 11	October 10, 2005
Volume 12	October 11, 2005
Volume 13	October 12, 2005
Volume 14	October 13, 2005
Volume 15	October 17, 2005
Volume 16	October 18, 2005
Volume 17	October 19, 2005
Volume 18	October 20, 2005
Volume 19	October 24, 2005
Volume 20	October 25, 2005
Volume 21	October 26, 2005
Volume 22	October 27, 2005
Volume 23	October 31, 2005
Volume 24	November 1, 2005
Volume 25	November 2, 2005
Volume 26	November 3, 2005
Volume 27	November 7, 2005
Volume 28	November 8, 2005
Volume 29	November 9, 2005
Volume 30	November 10, 2005
Volume 31	December 8, 2005
Volume 32	December 14, 2005
Volume 33	February 6, 2006
Volume 34	March 3, 2006
Volume 35	March 31, 2006

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Sheryl Gordon McCloud, the attorney for the appellant, at 1301 Fifth Avenue, Suite 3401, Seattle, WA 98101-2605, containing a copy of the Brief of Respondent, in STATE V. CHARLES MOMAH, Cause No. 58004-3-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Done in Seattle, Washington

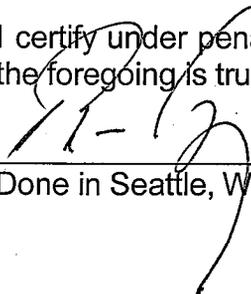
1-23-2007
Date

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STATE OF WASHINGTON
2007 JAN 23 PM 4:26

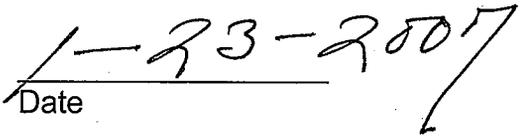
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jeffrey L. Fisher, the attorney for the appellant, at 2600 Century Square, 1500 Fifth Avenue, Seattle, WA 98101-1688, containing a copy of the Brief of Respondent, in STATE V. CHARLES MOMAH, Cause No. 58004-3-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Done in Seattle, Washington



Date