

SUPREME COURT NO. 84148-9-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

Vs.

MICHAEL GRESHAM,
AND ROGER SCHERNER,

Petitioner.

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

The Honorable Richard D. Eadie

SUPPLEMENTAL BRIEF OF
PETITIONER ROGER SCHERNER

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I. NATURE OF CASE

Petitioner Roger Scherner seeks reversal of his conviction for three counts of Child Molestation in the First Degree. Mr. Scherner challenges the constitutionality of RCW 10.58.090, a legislative amendment to ER 404(b), used in Mr. Scherner's trial to introduce evidence that Mr. Scherner had a propensity to molest children and was, therefore, likely guilty of the crimes charged.

II. ISSUES PRESENTED FOR REVIEW

1. Whether RCW 10.58.090 violates the Due Process Clause, the Separation of Powers Doctrine, and is an unconstitutional *ex post facto* law.
2. Whether evidence of decades old prior acts of sexual misconduct for which Mr. Scherner was never charged were alternatively admissible under the "common scheme or plan" exception to ER 404(b).

III. STATEMENT OF THE CASE

Roger Scherner is an 80-year-old man with no prior history of either criminal conviction or arrest. RP 236-245. In 2007 in King County, Washington, Mr. Scherner was charged with three counts of Child Molestation in the First Degree CP 130-31. The crimes were alleged to have occurred five years earlier and the complaining witness was Mr. Scherner's then 13-year old granddaughter. CP 130-131, CP 5-6.

Fourteen months after charges were filed against Mr. Scherner, Washington legislators enacted RCW 10.58.090, amending ER 404(b).¹ CP 187-188. During Mr. Scherner's trial, the trial court, relying on RCW 10.58.090, allowed the prosecutor to present testimony from four adult women who claimed that they had been molested by Mr. Scherner when they were children 20 to 40 years earlier. RP 105-132². Consistent with the absence of any statutory limitation in RCW 10.58.090 as to how such evidence could be used once admitted, the prosecutor argued to Mr. Scherner's jury that evidence Mr. Scherner previously molested other children demonstrated a pattern in Mr. Scherner's behavior, that "he is a child molester" and was, therefore, likely guilty of having molested his granddaughter. See, RP 1021-1022, RP 1011.

Mr. Scherner was convicted on all three counts. CP 236-245.

¹ RCW 10.58.090 was approved by the Legislature on March 20, 2008 and took effect on June 12, 2008. Mr. Scherner's trial began in July 2008.

² Relying on RCW 10.58.090, Mr. Scherner's trial evolved into several "mini-trials" involving the four prior misconduct witnesses. Evidence presented at trial by the prosecutor included, but was not limited to, photographs of how the four women looked decades earlier when they were children (RP 65), how different members of Mr. Scherner's extended family had referred to him as a "pedophile" in the past (RP 622), the emotions experienced by some of prior misconduct witnesses after learning Mr. Scherner had been accused of molesting his granddaughter or after hearing that other witnesses claimed that they too had been molested by Mr. Scherner as children (RP 631, RP 683-684), and, whether or not it had been difficult decades earlier for the prior misconduct witnesses to inform boyfriends or husbands they had been molested by Mr. Scherner (RP 667).

IV. ARGUMENT

A. RCW 10.58.090 Violates the Due Process Clause:

Both the State and Federal Constitutions declare that a person shall not be deprived of life, liberty, or property without due process of law. U.S. Const. Amends 5, 14; Wash. Const. Art.1, §3.³ An individual's liberty interest and his right to a fair and unbiased trial is a fundamental part of due process. *United States v. Salerno*, 481 U.S. 739, 750, 95 L.Ed.2d 697, 107 S.Ct. 2095 (1987); see also, *In re Winship*, 397 U.S. 358, 363, 90 S. Ct. 1068 (1970) (the presumption of innocence is an important part of due process).

The legislative amendment to ER 404(b), codified in RCW 10.58.090, violates due process in three ways: First the statute allows jurors to convict based on the defendant's past propensity to commit sex crimes and concomitantly erodes the presumption of innocence; second, the statute requires the trial court to relinquish its role of impartiality and admit evidence based on the court's determination of whether the evidence is necessary for one party to win at trial; and, finally, the statute is unconstitutionally vague.

³ ...nor shall any state deprive any person of life, liberty, or property, without due process of law... U.S. Const, Amend. 14. "No person shall be deprived of life, liberty, or property, without due process of law." Art. I, §3, Wash. Const.

The legal prohibition against determining a person's guilt by relying on "propensity" evidence is centuries old.⁴ The use of pure propensity evidence to determine guilt, as is allowed under RCW 10.58.090, violates the very foundation of due process and undermines the jury's conceptual ability to meaningfully presume the accused innocent.⁵

Division One below concluded that, so long as the trial judge conducts an ER 403 analysis when deciding whether to admit prior misconduct evidence, no due process violation occurs even when jurors convict based on the defendant's propensity to commit crimes like those for which he is on trial. *State v. Scherner*, 153 Wn. App. 621, 654 (2009). However, the concept of legal relevance has, since its inception, been used to ensure that the accused received a fair trial - it was never intended as a loophole around the centuries old prohibition against convicting a person

⁴ See, *McKinney v. Rees*, 993 F. 2d 1378, 1380-81 (9th Cir. 1993) (the rule against using character evidence to show propensity has persisted since at least 1684).

⁵ *Spencer v. Texas*, 385 U.S. 554, 574, 87 S.Ct. 648, 658 (1967) (introduction of prior offenses for "no purpose other than to show criminal disposition would violate the Due Process Clause.."); *Old Chief v. United States*, 519 U.S. 172, 181 (1997) ('Although . . . 'propensity evidence' is relevant, the risk that a jury will convict for crimes other than those charged-or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment-creates a prejudicial effect that outweighs ordinary relevance'); and see, *State v. Cox*, 07-2083, WL1727654, __ N.W. 2d __ (Iowa 4-30-2010).

based on his or her past propensity to commit particular types of crimes.⁶ The Iowa Supreme Court, in *State v. Cox*,⁷ recognized that principle recently when it declared that Iowa's version of RCW 10.58.090 violated the defendant's right to due process.

The Iowa statute at issue in the *Cox* case, like RCW 10.58.090, qualified the admission of prior misconduct evidence in sex offense cases by requiring that the trial court perform an ER 403 analysis.⁸ After examining federal decisions interpreting the Federal Rules, as Division One did here, the *Cox* court considered the history behind the prohibition against convicting a person based on propensity evidence and observed that there was "no rationale for treating sex crimes differently than all other offenses" and that a "fundamental concept to American jurisprudence," and a "concomitant to the presumption of innocence, is

⁶ E.g., when determining the probative value against the danger of unfair prejudice, in a doubtful case, "[t]he scale must tip in favor of the defendant and the exclusion of the evidence." *State v. Myers*, 49 Wn. App. 243, 247, 742 P.2d 180 (1987); see also, *State v. Bartholomew*, 101 Wn.2d 631, 641 (1984).

⁷ *State v. Cox*, 07-2083, WL1727654, __ N.W. 2d __ (Iowa 4-30-2010).

⁸ Iowa Code §701.11(1): In a criminal prosecution in which a defendant has been charged with sexual abuse, evidence of the defendant's commission of another sexual abuse is admissible and may be considered for its bearing on any matter for which the evidence is relevant. This evidence, though relevant, may be excluded if the probative value of the evidence 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. This evidence is not admissible unless the state presents clear proof of the commission of the prior act of sexual abuse.

that a the defendant must be tried for what he did, not who he is.” *State v. Cox*, 07-2038, p. 17-18 (Iowa 4-30-2010) (citations omitted). The *Cox* court concluded that to do otherwise would violate the due process rights of the accused. See, *State v. Cox*, 07-2083 at p. 18. The same reasoning applies to RCW 10.58.090.

Section RCW 10.58.090 also violates due process because it requires the trial court to relinquish its role of impartiality. Section RCW 10.58.090(6)(e) mandates that the trial court consider “The necessity of the [prior misconduct] evidence beyond the testimonies already offered at trial” when determining whether to admit evidence of the defendant’s prior acts of misconduct. The legislature adopted RCW 10.58.090 in order to increase the chances that persons accused of sex offences would be convicted at trial.⁹ Consistent with that legislative purpose, the “necessity of the evidence” referenced in the statute is unquestionably the necessity of the evidence to the prosecutor in order to secure a conviction.

The net result of requiring the trial court to evaluate whether one party - here, the prosecutor - needs prior misconduct evidence in order to

⁹ “We need to allow for admission of evidence that did not result in conviction because the nature of [sex] offenses often result in no charges being filed and no convictions”. House Bill Report, SB 6933, 3-5-08, p.4. “In the recent trial in King County of *State v. Darboe*, the jury could not reach a verdict after a trial where the judge, under ER 404(b), excluded evidence of prior sexual misconduct that was similar to that for which he was charged. This is an example of why ER 404(b) should be changed as it applies to trials of sex offenses.” Senate Bill Report, SB 6933, 3-5-08, p.3.

win, places the traditionally neutral trial judge in a position where she or he must push down on one side of the scales of justice if it appears that the prosecutor's evidence may be otherwise insufficient to secure a guilty verdict. That type of "scale tipping" runs contrary to our legal system's prohibition against the trial judge entering the "fray of combat" or "assuming the role of counsel" and violates the due process requirement that trial judges remain neutral and unbiased. See, *State v. Ryan Ra*, 142 Wn. App. 868, 884-885, 175 P.3d 609 (2008).¹⁰ By requiring the trial court to abandon its role of impartiality and to make decisions based on what's best for one party to a litigation, RCW 10.58.090 violates due process.¹¹

Similarly, evidentiary schemes like RCW 10.58.090 that require the trial court to admit or exclude evidence depending on a judicial predetermination of the strength or weakness of one party's case, violate

¹⁰ And see, *State v. Perala*, 132 Wn. App. 98, 112-113, 130 P.2d 852 (2006) ("...a judicial proceeding is valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing") (citations omitted).

¹¹ Division One below summarily addressed the problem created by requiring the trial judge to evaluate the necessity of the evidence when determining its admissibility by noting that FRE 414 and rules similar to RCW 10.58.090 from various other jurisdictions had thus far withstood constitutional challenge. *Scherner* at 653-654. However, unlike RCW 10.58.090, neither FRE 414 nor any of the other examples relied on by Division One involved a rule that required the trial court to calculate the "necessity of [misconduct] evidence" in order for one of the litigants to win as part of determining the admissibility of that evidence.

due process and are unconstitutional. *Giles v. California*, __ U.S. __, 128 S. Ct. 2678, 2692-2693, 171 L.Ed 2d 488 (2008). The *Giles* court also observed that court rules and constitutional protections should not be “crime specific,” declaring that the law cannot, for example, have one Confrontation Clause for domestic violence cases and one Confrontation Clause for all other cases. *Giles*, 128 S.Ct. at 2692-93. Likewise, Washington’s Rules of Evidence should not have one rule of relevance for sex offense cases and one rule of relevance for all other cases.

Finally, because RCW 10.58.090 fails to provide explicit standards to prevent arbitrary and discriminatory enforcement, the statute it is unconstitutionally vague and, therefore, violates due process. *State v. Rhodes*, 92 Wn.2d 755, 758, 600 P.2d 1264 (1979); *Spokane v. Fischer*, 110 Wn.2d 541, 543, 754 P.2d 1211 (1988).

Section 10.58.090(6) requires the trial court consider eight enumerated factors when determining whether evidence of uncharged acts of sexual misconduct should be admitted at trial. However, as Mr. Scherner’s trial judge demonstrated, the statute fails to include explicit standards to prevent arbitrary enforcement, leaving the trial judge in Mr.

Scherner's case to simply ignore some of the statutorily mandated factors.¹²

Additionally, as noted above, RCW 10.58.090(6)(e) requires the court to consider the "necessity of the evidence beyond the testimonies already offered at trial." However, the statute fails to provide any guidance as to exactly when and how the decision of "necessity" ought to be made.¹³

Because RCW 10.58.090 does not provide "explicit standards to prevent arbitrary enforcement," it is unconstitutionally vague.

As noted herein, Mr. Scherner's due process rights were violated by application of RCW 10.58.090.

¹² E.g., when considering RCW 10.58.090(6)(d) - the presence or lack of intervening circumstances - the trial court stated, "You tell me exactly what that means. RP 110. I am not sure exactly what the legislature had in mind on that, but as I take it, I think they are talking about a big hole between one act and another,..."RP110-111. The trial court then announced, with no factual basis, that the 20 year gap in allegations against Mr. Scherner must have meant he didn't have "access" to children during that period. RP 115-17. When considering RCW 10.58.090(6)(b) - closeness in time of the prior acts to the acts charged - in Mr. Scherner's case there was a 20 year gap- the trial court stated, "I am not exactly sure how the closeness of time of the prior acts to the act charged should be considered. I am more affected by the persistence of similar acts." RP109-110.

¹³ In Mr. Scherner's case, the trial court made the decision to admit misconduct evidence prior to trial without having heard any "testimony already offered at trial." Instead, the trial court determined prior to trial that the prosecutor needed the evidence because the credibility of the complainant's accusation might be called into question due to her significant delay in reporting the alleged offense. RP 111.

B. The Legislative Amendment to ER 404(b) “Invades the Prerogatives” of the Judicial Branch and Therefore Violates the Separation of Powers Doctrine.¹⁴

Article IV, §1 of Washington’s Constitution grants the judicial branch the authority to create and adopt those rules of procedure necessary to govern the essential mechanical operation of the courts. Article IV, WASH CONST; and see, RCW 2.04. 190 (affirming the power of the courts to prescribe the form for taking and obtaining of evidence). When the court promulgates a rule pursuant to its granted authority, “all laws in conflict therewith shall be and become of no further force and effect.” RCW 2.04.200¹⁵. RCW 10.58.090 plainly conflicts with both the plain language of ER 404(b), adopted decades ago by the judiciary, and with the longstanding judicial prohibition against using propensity evidence to convict a defendant.

Despite the Separation of Powers, the three branches of government are not “hermetically sealed”, and some overlap must occasionally exist. *State v. Ryan*, 103 Wn.2d, 165, 178, 691 P.2d 197

¹⁴ The Separation of Powers Doctrine is violated “when the activity of one branch of government threatens the independence or integrity or invades the prerogatives of another. See, *State v. Ramos*, 149 Wn. App 266, 271, 202 P.3d 383 (2009) (citations omitted).

¹⁵ See also, *State v. Pollard*, 66 Wn. App.779, 784, 834 P.2d 91 (1992) (determining that ER 1101 prevails over conflicting statute); *State v. Templeton*, 148 Wn.2d 193, 217, 683 P. 2d 1079 (2002) (procedural rule of the court regarding right to counsel supersedes conflicting legislation).

(1984). For example, ER 802 in Title VIII of Evidence Code plainly provides that amendments to the hearsay rules may be made by “either statute or court rule.”¹⁶ However, even in those instances where this court has allowed the legislature to supplement a court rule, it does so only after performing its own independent analysis of the legislative offering, not simply because the legislature deemed the amendment desirable or necessary. *State v. Long*, 113, Wn.2d 266, 272, 778 P.2d 1027 (1989).¹⁷

Division One below conceded that RCW 10.58.090 presents an apparent conflict with ER 404(b). See, *State v. Gresham*, 153 Wn. App. 659, 667, 223 P. 3d 1194 (2009). Accordingly, Division One attempted to harmonize the conflicting rules, reasoning that RCW 10.58.090 should just be considered as an extension of the “lustful disposition” exception to ER 404(b). *State v. Scherner*, 153 Wn. App. at 646-47. However, that

¹⁶ Unlike Title VIII, Title IV, the evidence code section governing relevance and which is at issue here, contains no grant of authority allowing the legislature to supplement the rules of evidence. To the contrary, the Supreme Court “...has clearly stated it has not relinquished its power to determine the relevancy and thus admissibility of certain types of evidence. *State v. Long*, 113 Wn. 2d at 272.

¹⁷ The Court of Appeals in both *Scherner* and *Gresham* relied on *City of Fircrest v. Jensen*, 158 Wn. 2d 384, 143 P. 3d 776 (2006) and *State v. Long*, 113 Wn. 2d 266, 778 P.2d 1027 (1989), as examples of when the legislature has been allowed to supplement the evidence code. Both cases addressed matters affecting driving and DUI evidence. As the *Long* court made clear, since the legislature creates and regulates rules relating to the privilege of driving, legislative amendment affecting those issues should be given greater credence. *Long*, 113 Wn. 2d at 272; also *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983). Rules of relevance, unlike issues related to driving, have never been the bailiwick of the legislature.

reasoning ignores the long line of cases that note the significant distinction between admitting prior misconduct evidence involving any person other than the victim named in the charges at issue. See, *State v. Ray*, 116 Wn.2d 531, 547, 806 P. 2d 1220 (1991).

Evidence Rule 404(b), by its very terms, cannot be harmonized with RCW 10.58.090. The legislature enacted RCW 10.58.090 because of dissatisfaction with the results reached when Washington judges complied with ER 404(b) in sex offense trials.¹⁸ In order to alleviate their dissatisfaction, the legislature simply created and enacted its own version of ER 404(b), trampling over the longstanding ER 404(b) prohibition against using propensity evidence to convict the accused. Furthermore, even though RCW 10.58.090 allows the trial court to evaluate the prejudicial effect of prior misconduct evidence when determining its admissibility, Washington's judiciary still opposed RCW 10.58.090 and declared that if ER 404(b) was to be amended, it should be amended through the regular court rule making process. See, Senate Bill Report, SB 6933, p. 3.¹⁹ The legislature passed the amendment anyhow.

¹⁸ See p. 6, fn 9, supra.

¹⁹ ...the judiciary is opposed to the Legislature making this change to ER 404(b) and feels that the proper forum and procedure for consideration of such an important and consequential change in the evidence rules is the court rule making process. There is not enough time at the end of this short legislative session for adequate discussion and debate about such an important change in our criminal justice system. Senate Bill SB6933. P. 3.

ER 404(b) is a lawfully enacted court rule. The legislative version of ER 404(b) cannot be harmonized with the pre-existing judicial version of the rule. The legislative amendment to ER 404(b) contained in RCW 10.58.090 violates Separation of Powers.

C. RCW 10.58.090 Violates the Prohibition against *Ex Post Facto* Laws:²⁰

The Washington State Constitution declares that "[n]o. . . *ex post facto* law. . . shall ever be passed." CONST. Art. I, §23. See also U.S. CONST. Art. I, §10. The seminal *ex post facto* case in the U.S. and the case relied on below by Division One is *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 1 L. Ed. 648 (1798).

The *Calder* court identified four categories of laws that constitute an *ex post facto* violation.²¹ RCW 10.58.090 violates the 4th *Calder* category because by allowing jurors to consider evidence of the defendants propensity to commit sex crimes when deciding the

²⁰ Preliminarily, "[t]o fall within the *ex post facto* prohibition, a law must be retrospective - that is 'it must apply to events occurring before its enactment'. . . ." *State v. Aho*, 137 Wn.2d 736, 741-742, 975 P.2d 512 (1999) (citations omitted). Neither the appellate court nor the prosecutor dispute the fact that RCW 10.58.090 applied retroactively to Mr. Scherner.

²¹ "1st Every law that makes an action done before the passing of the law and which was innocent when done, criminal; and punishes such action. 2nd Every law that aggravates a crime, or makes it greater than it was when committed. 3rd Every law that changes the punishment and inflicts greater punishment than the law annexed to the crime when committed. 4th Every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender." *Calder*, 43 U.S. (3 Dall.) at 390 (emphasis added).

defendant's guilt, the new law "alter[ed] the legal rules of evidence [to receive] less or different testimony than the law required at the time of the commission of the offence, in order to convict the offender." See, *Calder*, 3 U.S. (3 Dall.) at 390.

In interpreting the "in order to convict the offender" language of the fourth *Calder ex post facto* category the U.S. Supreme court stated:

A law reducing the quantum of evidence required to convict an offender is as grossly unfair as, say, retrospectively eliminating an element of the offense, increasing the punishment for an existing offense, or lowering the burden of proof....

Carmell v. Texas, 529 U.S. 513, 525, 120 S. Ct. 1620, 1632-33, 146, L. Ed. 2d 577 (2000); relied on below in *State v. Scherner*, 153 Wn. App. at 637-38.

The legislative amendment to ER 404(b) reduces the quantum of evidence required to convict. A defendant cannot legally be convicted of a crime unless the prosecution presents that quantum of evidence necessary to prove guilt beyond a reasonable doubt. *Victor v. Nebraska*, 511 U.S. 1, 5, 114 S. Ct. 1239 (1994). The law has never given the quantum of evidence necessary to meet the "beyond a reasonable doubt" threshold a specific numerical designation. Even so, research has repeatedly confirmed the common sense notion that after learning of a defendant's prior criminal activity jurors reduce the quantum of evidence

they require in order to convict.²² Similarly Washington jurors, after learning that a defendant charged with a sex crime has history of committing sex crimes, accompanied by argument from the prosecution that the defendant's propensity to commit sex crimes should be considered when deciding whether the prosecution has proven the current charge against the defendant beyond a reasonable doubt, will likewise reduce the quantum of proof needed to convict. Section 10.58.090 altered the legal rules of evidence so jurors received different testimony than the law required at the time of the commission of the offence thereby reducing the quantum of evidence needed to convict. The legislative amendment to ER 404(b), as it applies to Mr. Scherner, is an *ex post facto* law.

Division One below additionally asserted that RCW 10.58.090 did not violate the Ex Post Facto clause because it was an "ordinary rule of evidence" and:

²² See e.g. Eisenberg, Theodore and Hans, Valarie, "The Effect of a Prior Criminal Record on the Decision to Testify and On Trial Outcomes, Cornell Legal Studies Research Paper No. 07-012 (August 8, 2007), <http://ssrn.com> (data from over 300 criminal trials, confirms that jurors lessen the evidentiary threshold necessary to convict where defendants have criminal history. *Id.* p. 30-31); Green and Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 *Law & Hum Behav.* 67, (1995) (mock jury study demonstrating that jurors are more likely to convict after learning the defendant had prior criminal history): See also, Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 *Ohio St. L.J.* 575, 581-82 (1990); Kalven Jr. and Hans Zeisel, *THE AMERICAN JURY* (Univ. Of Chicago Press, 1970 Ed.) at.396-397. And see, William Marcantel, *Protecting Predator or Prey? The Missouri Supreme Court's Refusal to Allow Past Sexual Misconduct as Propensity Evidence*, 74 *Mo. L.Rev.* 211 (2009).

...ordinary rules of evidence, for example, do not violate the [*Ex Post Facto*] Clause. Rules of that nature are ordinarily evenhanded, in the sense that they may benefit either the State or the defendant in any given case.

State v. Scherner, at p. 10. (Citing to *Carmell v. Texas*, 529 U.S. at 533 n.33.)

However, RCW 10.58.090 cannot accurately be described as an “ordinary” rule of evidence in that it is neither “evenhanded,” nor will it benefit “either the State or the defendant in any given case.” The stated purpose behind RCW 10.58.090 is to increase the likelihood that prosecutors will secure convictions of defendants in sex offense trials when evidence of a defendant’s prior sexual misconduct exists.²³ Admitting evidence of prior sexual misconduct will always benefit the prosecution and will never benefit the defendant. RCW 10.58.090 cannot be categorized as an “ordinary” rule of evidence for purposes of determining the *ex post facto* violation.

The legislative amendment to ER 404(b), as it applied to Mr. Scherner, violates the prohibition against *ex post facto* laws.

²³ “We need to allow for the admission of evidence that did not result in conviction...” House Bill Report re: RCW 10.58.090. See p. 5, fn.5 *supra*.

D. The Decades old prior acts of sexual misconduct for which Mr. Scherner was never charged were not alternatively admissible under the “common scheme or plan” exception to ER 404(b).

When determining the admissibility of “prior bad acts” evidence, the trial court must always begin with the presumption that such evidence is inadmissible. See, *State v. Fisher*, 165 Wn.2d 727, 744, 202 P.3d 937 (2009). In order to admit prior misconduct evidence of under the “common scheme or plan,” exception to ER 404(b), the proponent must present “substantial proof” either that the defendant devised a single plan and repeatedly used it to perpetuate separate but very similar acts, or, that the defendant’s prior acts constitute parts of a larger, overarching criminal plan in which the prior acts are causally related to the crime charged. *State v. DeVincentis*, 150 Wn.2d 11, 19, 74 P.3d 119 (2003). Random similarities are not enough. *Id.* at 18. Further, the degree of similarity between the prior acts and the crime at issue must be substantial. *Id.* The mere fact that a defendant engaged in prior sex crimes is insufficient to prove a “common scheme or plan.” See *State v. Lough* 125 Wn.2d 847, 862-863, 889 P.2d 847 (1995).

In Mr. Scherner’s case, the four prior misconduct witnesses described events that were not distinct from those acts that generally exist in the vast majority of child molestation incidents. Nor was there any evidence produced establishing that the acts described by the prior

misconduct witnesses were part of a larger, overarching criminal plan causally related to the molestation of Scherner's granddaughter two decades later.

In addition, under RCW 10.58.090, once prior sexual misconduct evidence is admitted, there is no limitation on the use to which the jury can put that evidence while the same evidence admitted under ER 404(b) requires that the trial court give the jury an instruction limiting the purpose for which the evidence can be considered. E.g. *State v. Wilson*, 144 Wn. App. 166, 177, (2008); *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). In Mr. Scherner's case, the trial court declined to provide a limited use instruction. RP 612-614. Instead, Mr. Scherner's trial judge provided an instruction proffered by the prosecutor that addressed prior misconduct evidence admitted pursuant to RCW 10.58.090.²⁴ Rather than limit jurors as to how prior misconduct evidence could be used, that instruction advised jurors that prior misconduct evidence could be used for

²⁴ "In a criminal case in which the defendant is accused of an offense of sexual assault or child molestation, evidence of the defendant's commission of another offense or offenses of sexual assault or child molestation *is admissible and may be considered for its bearing on any matter to which it is relevant*. However, evidence of a prior offense on its own is not sufficient to prove the defendant guilty of the crime charged in the Information. Bear in mind as you consider the evidence at all times, the government has the burden of proving that the defendant committed each of the elements of the offense charged in the Information. I remind you that the defendant is not on trial for any act, conduct, or offense not charged in the Indictment" (emphasis added) CP 263, RP 617.

“its bearing on any matter to which it is relevant.”²⁵ CP 263, RP 617.

The evidence of prior acts of sexual misconduct in Mr. Scherner’s case was not admissible under the limited “common scheme or plan” exception to ER 404(b). In addition, the trial court did not provide an instruction to jurors informing them that the prior misconduct evidence was being offered for the limited purpose of showing a common scheme or plan on the part of the accused.

V. CONCLUSION

Although Roger Scherner was never charged or convicted with any acts of prior misconduct, at trial his trial for child molestation 4 witnesses testified in broad detail that between 20 and 40 years ago they had been molested by Mr. Scherner. Pursuant to RCW 10.58.090, a legislative amendment to ER 404(b) enacted after Scherner had already been charged, the prior misconduct evidence was offered in court in order to show that Roger Scherner was likely guilty of molesting his granddaughter

²⁵ Nothing in the trial courts instruction advises jurors they cannot use evidence of Mr. Scherner’s prior sexual misconduct as a factor when deciding whether or not the prosecutor proved beyond a reasonable doubt that he committed the crimes charged in the Information. In fact, at trial the prosecutor characterized Mr. Scherner as a “child molester,” and argued to jurors that they could use evidence of his prior sexual misconduct with other children as a factor in deciding whether or not he molested his granddaughter. See RP RP 1011, 1021-1022. Accordingly, the only “limit” arising from the instruction presented by the trial court would be to prohibit jurors from convicting Scherner where the *only* evidence presented against him at trial was evidence of prior sexual misconduct with persons other than the named victim.

based upon a past history of having engaged in child molestation. The legislative amendment to ER 404(b) violates the Due Process Clause, violates the Separation of Powers Doctrine, and violates Equal Protection. In addition, the prior misconduct evidence was not admissible under the more traditional "common scheme or plan" exception to ER 404(b). Accordingly, Mr. Scherner's convictions should be reversed.

RESPECTFULLY SUBMITTED this 22th day of July, 2010.



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