

NO. 66214-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

FRANK BORDERS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HELEN HALPERT

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether this Court should apply its reasoning in State v. Scherner to this case and hold that RCW 10.58.090 is not unconstitutional.

2. Whether the trial court exercised its discretion properly under either RCW 10.58.090 or ER 404(b) when it admitted one of Borders' three prior sexual assaults after finding it was "strikingly similar" to the charged offenses.

3. Should this Court affirm the trial court's discretionary ruling to prohibit evidence of S.C.'s historical drug abuse when it was irrelevant to whether the State proved that Borders raped S.C.

4. Has Borders failed to show that the prosecutor misstated evidence in closing argument when the prosecutor merely asked the jury to draw a reasonable inference from the evidence.

B. STATEMENT OF THE CASE

1. BORDERS' RAPE OF J.P.

In the summer of 2007, J.P. was homeless. 12RP 77-81.¹ J.P. spent her days at Angeline's, a shelter for women, and her nights at various shelters. 12RP 79. In 2007, and at the time of trial, J.P. was a crack cocaine addict. 12RP 80.

One summer evening, J.P. was on her way to an area known as the "jungle" to smoke crack with some friends.² 12RP 84. Borders, whom J.P. did not know, invited her to smoke crack with him. 12RP 88-89, 102.

¹ The State adopts Borders' designation of the verbatim report of proceedings. See Br. of Appellant at 3 n.1.

² The "jungle" parallels South I-5. One access point is a trail at 8th and Dearborn. 11RP 130-33.

The man introduced himself as “Frank.”³ 12RP 90. J.P. did not think that it was unwise to go with a stranger to smoke crack, her only thought was that she wanted to smoke crack. 12RP 91-92.

When they stopped on a trail, J.P. thought it was to smoke crack; however, Borders told her to remove her clothes. 12RP 95. J.P. said no. 12RP 95. Borders grabbed her by the throat with both of his hands so quickly that J.P. never saw him coming. 12RP 95-96. She thought that Borders might kill her; he is very strong and larger than J.P. 12RP 97-98. J.P.’s only thought was to survive. 12RP 98, 100. After J.P. told Borders that she would do whatever he wanted, he stopped choking her. 12RP 95, 99.

Borders unzipped his pants and told J.P. to give him a “blow job.” 12RP 99. J.P. knelt and Borders put his penis in her mouth. 12RP 99. Borders, however, was unable to get an erection. J.P. pleaded with Borders; she said this is not getting us anywhere, can we please just leave. 12RP 100. Borders zipped up his pants and they walked out of the jungle. 12RP 100.

J.P. did not call the police because she thought nothing would come of it—people do not pay much attention to what happens to drug addicted homeless people, especially one who went off with a stranger to

³ At trial, J.P. identified the defendant as “Frank.” 12RP 86-87.

smoke crack. 12RP 103, 105, 109. The night she was raped, J.P. never did get to smoke crack with Borders. 12RP 137.

2. BORDERS' RAPE OF S.C.

In 2007, S.C. was homeless; sometimes she lived with her daughter, Flaime, but mostly she stayed at Angeline's shelter for women. 13RP 115-17. On December 7, 2007, Arthur Borders, the defendant's brother, snuck S.C. into his mother's house for the night.⁴ 14RP 19, 21. Arthur's mother, his brothers Donny and Frank, and his sister, Vickie, were all there. 13RP 121-22. S.C. and Arthur had known each other for about three years. 13RP 118.

The following morning, S.C. left to walk to a store to buy beer for herself and Arthur. 13RP 119. Borders had left about 30 minutes earlier. 13RP 134. S.C. and Borders crossed paths. Borders asked S.C. for a crack pipe, but S.C. said that she did not have one. 13RP 135-36. Borders grabbed S.C. by the throat; he had his bicep and forearm around her neck. 13RP 139-40. Borders dragged S.C. from the street into the men's bathroom in Pratt Park. 13RP 141-42.

Borders told S.C. to sit on the toilet. He unzipped his pants, which frightened S.C., and told her to put his penis in her mouth. 13RP 146-48. S.C. tried to resist, but Borders struck her face and head very hard

⁴ For clarity, the State will refer to Borders' brother as Arthur. No disrespect is intended.

open-handedly and with his fists and then forced his penis in her mouth. 13RP 146-48, 176, 182. About 30 seconds later, Borders dropped his baggie of crack and his pipe. When he bent down to pick up his stuff, S.C. fled. 13RP 149-51. S.C. ran to Arthur's mother's house and told Arthur that Borders had just raped her. 13RP 154. They called 911. 13RP 154; 14RP 19-20, 32.

When Seattle Police Officer Steven Leonard arrived, he saw that S.C. was crying, distraught and visibly afraid. 11RP 41-46. S.C. told him that Borders had raped her in the men's room at Pratt Park. 11RP 47-50. Leonard broadcasted a description of Borders. 11RP 49-50. Leonard then arranged for medics to transport S.C. to Harborview. 11RP 59.

About 10 minutes after Borders' description had been broadcasted, police officers located him in the vicinity of Pratt Park. 11RP 134-37. The officers arrested Borders. 11RP 143. Borders had blood on his hands. 11RP 146, 148; 14RP 50.

3. THE INVESTIGATION, CHARGES AND THE TRIALS.

On December 10, 2007, Seattle Police Department Detective Kevin Grossman was assigned to investigate Borders' rape of S.C. 14RP 167, 171. Grossman was unable to locate S.C. until October 16, 2008 (in the intervening time, the case was inactivated and Borders was

released from custody). 14RP 177-84. After Grossman took a recorded statement from S.C., the State filed a charge of second degree rape against Borders.⁵ 14RP 185; CP 1, 83.

During his investigation, Grossman learned that Borders had three prior victims of sexual assaults: S.G., M.H. and C.D. 1RP 31-32.

On March 16, 2009, Grossman created a flyer with Borders' photograph and caption, "Have you been victimized by this person?" 1RP 33; 15RP 13-14. He distributed the flyer to Angeline's shelter for women because he knew that Borders' rape of S.C. may have been associated with the shelter (and S.C. had told him that at least two other women with whom she had contact at Angeline's had been victimized by Borders). 1RP 32; 15RP 14-17. The following day, J.P. called. 15RP 19. Despite having immediately recognized the photograph on the flyer as being Frank, the man who had raped her, J.P. still did not want to report the rape.⁶ 12RP 105-10. J.P. discussed the flyer and her rape with a couple of women at the shelter and some members of the staff, all of whom encouraged J.P. to call the police—if not for herself, for all of the other vulnerable women who Borders might victimize. 12RP 108-13. J.P.

⁵ Initially, the State charged Borders with attempted second degree rape. Before trial, the State amended the charge to second degree rape.

⁶ Although the photograph on the flyer had been taken about two years after Borders raped J.P. and Borders' appearance had changed slightly, J.P.'s recognition of Borders was instantaneous. 12RP 108, 111-12.

called Grossman that day. He took a recorded statement from her. 12RP 111-13.

On June 2, 2009, the prosecutor who had been assigned the case in which S.C. was the victim, did a “meet and greet” with J.P., as is standard before sexual assault charges are filed. 12RP 35-36. During the conversation, the subject of Borders’ description arose (although the prosecutor knew that J.P. had identified Borders from the flyer). 12RP 38-39. The prosecutor accessed Borders’ jail records and showed J.P. one or two photographs of Borders. 12RP 39-44. When J.P. saw the photographs, she said, ““That’s him.”” 12RP 44. J.P. said that when she saw the photograph she was “absolutely positive” that it was of the same man who had raped her.⁷ 12RP 117-19.

The State charged Borders with second degree rape against J.P. The trial court declined to sever the count involving S.C. from the charge involving J.P. 3RP 101-02; CP 136.

Before the first trial, the State made an offer of proof with regard to Borders’ prior offenses against S.G. and M.H. 2RP 137-45, 156-57. The court denied the State’s motion to introduce Borders’ prior sex

⁷ In a CrR 3.6 hearing about whether the identification procedure should be suppressed, the trial court ruled that while the procedure was suggestive, it was not impermissibly so. CP 148-49.

offenses pursuant to RCW 10.58.090. 3RP 102-03. The court found that the prior offenses were more prejudicial than probative. 3RP 103.

The jury was unable to reach a unanimous verdict as to either count. The court declared a mistrial. 4RP 28-34; CP 127-34.

Prior to the retrial, the State made a motion for reconsideration of the trial court's ruling that excluded the evidence of Borders' prior offenses. CP 297-356. The court heard testimony from three of Borders' prior victims, M.H., S.G. and L.M. 10RP 2-62. For the reasons discussed in detail below, the court admitted the evidence of Borders' sexual assault of S.G. See § C.1, infra.

The jury convicted Borders of both second degree rapes as charged. CP 233-34. This appeal follows.

C. ARGUMENT

1. **THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF BORDERS' PRIOR SEX OFFENSE.**

Borders claims that the trial court erred in admitting the evidence of one of his prior sex offenses under RCW 10.58.090.⁸ Without any discussion of the trial court's analysis of the relevant factors, vis-à-vis S.G., Borders merely asserts that the court erred. Br. of Appellant at 6-7, 19-20. He argues that the "inherently prejudicial" testimony by S.G.

⁸ For reasons discussed below, the court ruled that only the incident involving S.G. would be admissible at trial. 10RP 107-10.

weighed against admission of Borders' prior sexual assault. Br. of Appellant at 20. This claim is without merit. After carefully reviewing all of the relevant factors, the court concluded that the probative value of the substantially similar offense as the crimes charged outweighed the prejudicial effect. 10RP 103-10. The trial court acted well within its discretion in admitting evidence of Borders' prior sex offense.

This Court reviews a trial court's decision whether to admit evidence under RCW 10.58.090 for an abuse of discretion. State v. Scherner, 153 Wn. App. 621, 656, 225 P.3d 248 (2009), review granted, 168 Wn.2d 1036 (2010).⁹ An abuse of discretion occurs only when no reasonable person would have ruled as the trial court did. State v. Atsbeha, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001).

Under RCW 10.58.090, in a sex offense case, evidence of the defendant's commission of another sex offense is admissible subject to the court's balancing of factors under ER 403. RCW 10.58.090(1). Under the statute, the court must consider the following non-exclusive factors when deciding whether to exclude evidence of the defendant's other sex offenses under ER 403:

- (a) The similarity of the prior acts to the acts charged;

⁹ The Supreme Court heard oral argument in Scherner on March 17, 2011.

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

RCW 10.58.090(6).

Individual factors are not dispositive. As this Court has noted:

RCW 10.58.090 does not instruct the court on how to weigh the articulated factors. It only states the trial court must consider all of the factors when conducting its ER 403 balancing test. The ultimate decision on admissibility or exclusion remains with the court.

Schnerer, 153 Wn. App. at 658.

Here, after the court found that the State had proved by a preponderance of the evidence that Borders committed sexual offenses against M.H., C.D., S.G. and L.M., the court expressly weighed the factors, as statutorily required. 10RP 103-10. The record reveals that the court, after weighing the consequences of admission, made a “conscious

decision” to admit the evidence because the probative value of the evidence outweighed any unfair prejudice. 10RP 107-10. See State v. Tharp, 96 Wn.2d 591, 597, 637 P.2d 961 (1981). The trial court’s conclusion was a reasoned decision and not an abuse of discretion.

First, as the trial court noted, the evidence of Borders’ prior rape of S.G. was significantly similar. 10RP 108. Although the charged offenses involved oral intercourse and Borders digitally and vaginally raped S.G., all three victims were vulnerable—S.G., now and at the time of the incident, was confined to a wheelchair, and S.C. and J.P. were drug addicts. 10RP 108. In all three incidents, Borders choked his victims. 10RP 108. The court noted that although rape by its very nature involves force, this was a particular type of force against a particular type of victim: uniquely vulnerable women. 10RP 108.

The trial court also found that the evidence of Borders’ rape of S.G. would have likely been admissible under ER 404(b) as evidence of a common scheme or plan.¹⁰ 10RP 108 (citing State v. Williams, 156 Wn. App. 482, 234 P.3d 1174, review denied, 170 Wn.2d 1011 (2010)). In Williams, the defendant was convicted of one count of first degree rape

¹⁰ “[C]ommon scheme or plan is established by evidence that the defendant committed ‘markedly similar acts of misconduct against similar victims under similar circumstances.’” State v. Lough, 125 Wn.2d 847, 856, 889 P.2d 487 (1995) (quoting People v. Ewoldt, 7 Cal.4th 380, 399, 27 Cal. Rptr. 2d 646, 867 P.2d 757 (1994)).

(victim A.M.) and, in a separate incident, one count of first degree rape and one count of second degree assault with sexual motivation (victim K.W.).¹¹ 156 Wn. App. at 487. Williams consumed drugs or alcohol with A.M. and K.W. Afterward, Williams strangled A.M. and K.W. into unconsciousness and he then raped each woman. Id. at 488. The trial court permitted the State to introduce evidence of Williams' prior rape (where he had smoked marijuana with the victim, strangled her into unconsciousness and then raped her) as evidence of a common scheme. Id. at 488-89. The trial court in Williams concluded that the prior rape conviction "showed a common scheme involving similar victims (women of a similar age, involved with drugs) and a similar method of attack (promise of drugs, attacked from behind with a forearm across the throat, strangled into unconsciousness during the rape)." Williams, at 491.

As in Williams, Borders raped similar victims with a similar method of attack. The trial court here found that the significant similarities of Borders' offenses weighed heavily toward admissibility of his prior rape of S.G.¹² 10RP 108.

¹¹ The second degree assault merged with the first degree rape; therefore, the assault conviction was vacated. Williams, 156 Wn. App. at 493-95.

¹² The trial court ruled that joinder of the charged offenses was appropriate because the sex offenses were strikingly similar and showed a common scheme and plan: both women were engaged in drug-seeking behavior, Borders choked both women and he raped them in relatively isolated locations. 3RP 99-100. Borders has not challenged this ruling on appeal.

With respect to the closeness in time between the prior act and the current offenses, the court noted the passage of time (about 24 years). However, during the vast majority of the time, Borders was confined either at Western State Hospital or by the Department of Corrections. 10RP 108. Moreover, RCW 10.58.090, like the corresponding federal rules (Fed. R. Evid. 413, 414), contains no time limit beyond which prior sex offenses are inadmissible. The federal courts have repeatedly held that prior sex offenses committed decades earlier were admissible.¹³

In State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003), the Washington Supreme Court similarly held that evidence of the defendant's prior sex offense, occurring 15 years earlier, was admissible under ER 404(b) in the defendant's trial for rape. Despite the lapse in time, the court held that the evidence of the prior misconduct was relevant to show that he had previously victimized another girl in a markedly similar way under similar circumstances. 150 Wn.2d at 13; see also State v. Sexsmith, 138 Wn. App. 497, 505, 157 P.3d 901 (2007) (finding that a "significant lapse of time" between the markedly similar abuse of the charged victim

¹³ See United States v. Kelly, 510 F.3d 433, 437 (4th Cir. 2007) (rejecting argument that prior sex offense was inadmissible because it occurred more than 20 years ago); United States v. Benally, 500 F.3d 1085 (10th Cir. 2007) (affirming admission of testimony of two victims sexually assaulted 40 years earlier and a third victim sexually assaulted 21 years earlier), cert. denied, 128 S. Ct. 1917 (2008); United States v. Gabe, 237 F.3d 954, 959-60 (8th Cir. 2001) (upholding district court's admission of evidence of sexual molestation committed 20 years earlier).

and the prior victim is not a “determinative factor in the analysis”), review denied, 163 Wn.2d 1014 (2008). Consistent with these authorities, the trial court properly found that this factor was not dispositive. 10RP 108.

The frequency of the prior acts supported the admission. The evidence established at least four prior acts of sexual misconduct, not including Borders’ rough sex with a prostitute.¹⁴

There were no intervening circumstances between Borders’ prior rape of S.G. and his rapes of S.C. and J.P. that undermined the probative value of this evidence. In fact, Borders failed to successfully complete treatment in a sexual psychopathy program, as ordered by the court at sentencing for Borders’ assault on S.G. The sentencing court thus revoked Borders’ suspended sentence and ordered him back to prison.¹⁵ 10RP 109. Borders raped an intimate partner, L.M., in 2004. 10RP 37-62, 105-06. And, in 2008, Borders continued to have rape fantasies and to masturbate to those fantasies. 1RP 10-21; 2RP 16-19; 10RP 106-07, 109.

The court discussed with counsel the necessity of the evidence. As the State pointed out, here, as is typical in most rape cases, the primary

¹⁴ As part of the CrR 3.5 hearing, Mary Floyd, a community corrections officer, testified that Borders sought help from her on June 25, 2002. Borders admitted to having sex with a prostitute; he said that it was “rough” but not rape. 3RP 60-62.

¹⁵ See CP 327, 330-56. The hearing also involved Borders’ 1980 conviction for vaginally raping and choking C.D. (King County Cause No. 80-1-04858-5). C.D. died before trial began on the current charges. The evidence of the rape was admitted only to show the longevity of Borders’ sexual assaults. 10RP 63-66.

evidence against Borders was S.C.'s and J.P.'s testimony. CP 311-12. There were no other witnesses to the crimes and no forensic evidence. The only direct evidence against Borders was S.C.'s and J.P.'s testimony, which put their credibility, a critical element in the case, squarely at issue. See Scherner, 153 Wn. App. at 658 (affirming trial judge's determination that the probative value of the testimony from Scherner's four prior victims, the only direct evidence against Scherner, outweighed the danger of unfair prejudice.). "Generally, courts will find that probative value is substantial in cases where there is very little proof that sexual abuse has occurred, particularly where the only other evidence is the testimony of the child victim."¹⁶ Sexsmith, 138 Wn. App. at 506. Relying on the Russell¹⁷ and Sexsmith line of cases, the trial court said that this factor weighed heavily in favor of admissibility. 10RP 109.

Borders' sexual assault of S.G. resulted in a conviction for assault in the second degree. CP 324-25. However, at sentencing, Judge

¹⁶ The trial court ruled that RCW 10.58.090 is not limited to testimony of children, especially where the victims are vulnerable people—a point conceded by the defense. 10RP 86, 109.

¹⁷ State v. Russell, 154 Wn. App. 775, 225 P.3d 478 (2010), reversed on other grounds, 171 Wn.2d 118 (2011). In Russell, the trial court admitted evidence of the defendant's on-going pattern of sexual abuse against the victim, before and after the charged event, as evidence of the defendant's lustful disposition. Russell, at 784. RCW 10.58.090 took effect after the verdict in Russell's trial. Id. at 786 n.5.

Ishikawa stated, “[T]his was a sexual assault, not simply an assault.”

CP 329. Judge Ishikawa ordered Borders into Western State Hospital’s sexual psychopathy program. During the revocation hearing, Judge Ishikawa reiterated that this was a “sexual assault” of a “particularly vulnerable” victim. CP 347. After the trial judge in this case heard S.G.’s testimony, the court agreed that Borders’ assault on S.G. was a sexual offense. 10RP 109.

Finally, the trial court did not abuse its discretion in finding that the probative value of the evidence outweighed any prejudicial effect. 10RP 110. Because the State’s primary case rested on the testimony of S.C. and J.P., credibility was the central issue. The trial court had the benefit of presiding over the first trial and had a clearer understanding of the need for the evidence. 10RP 110. At the first trial, the court excluded the evidence because of the court’s concern that S.G.’s disability (she was wheelchair-bound at the time of the rape and still uses a wheelchair), created a great potential for prejudice. 10RP 110. However, during pretrial hearings in the retrial, the court had the benefit of having seen and heard S.G., who came across as a strong-willed and competent person and certainly not an object of pity, although significantly disabled. 10RP 110. The court accordingly concluded that the relevance and probative value of

Borders' rape of S.G. outweighed the danger of unfair prejudice.

10RP 110.

The court reached the opposite conclusion after carefully weighing the factors in the incident involving M.G. Significantly, the court determined that admission of the evidence would have “relatively little additional probative value” once the court admitted evidence of Borders' rape of S.G. 10RP 110. Although the court said that factors (a) – (d) weighed toward admissibility, factors (e) and (f) weighed in favor of exclusion, especially given that M.G.'s current memory differed in substantial ways from her initial statement to the police officers.¹⁸

10RP 110. The court said that it would be impossible for the defense to cross-examine M.G. concerning the accuracy of her current memory without eliciting “highly, highly prejudicial evidence” of her prior version of the rape. The court accordingly excluded the evidence. 10RP 110.

After weighing the probative value of the evidence of Borders' rape of L.M. against the danger of unfair prejudice, the court ruled that the offense was so different from the charged offenses and the offenses involving M.G. and S.G., it had little probative value. 10RP 106.

Consequently, the court excluded the evidence. 10RP 106.

¹⁸ Approximately 20 years after Borders raped M.H., she was in an automobile accident that affected her memory and her mobility (M.H. is wheelchair-bound). 10RP 11, 18, 110-11.

Borders' argument on appeal underscores the trial court's determination regarding the necessity of the evidence. Borders acknowledges that the State faced challenging circumstances, including a variety of inconsistent statements by S.C. and a "suggestive identification procedure" that called into question J.P.'s identification of Borders as her rapist. Br. of Appellant at 20. It is precisely because S.C.'s and J.P.'s credibility were squarely at issue that the trial court weighed the "necessity" factor in favor of admissibility.¹⁹

In sum, Borders' challenge should be denied. Given the court's careful analysis of RCW 10.58.090 apropos M.G., S.G. and L.M., the court acted well within its discretion in admitting evidence of one of Borders' prior rapes. Moreover, Borders fails to show that the evidence was *unfairly* prejudicial. See Sexsmith, 138 Wn. App. at 506.

2. BORDERS HAS NOT ESTABLISHED THAT RCW 10.58.090 IS UNCONSTITUTIONAL.

Borders argues that RCW 10.58.090 is unconstitutional. As a general principle applicable to all of Borders' constitutional claims, this Court must presume that RCW 10.58.090 is constitutional. State v. Lanciloti, 165 Wn.2d 661, 667, 201 P.3d 323 (2009). Borders bears the

¹⁹ Borders speculates that the first jury deadlocked because the trial court initially excluded the evidence. Br. of Appellant at 20. Borders' musings are mere speculation and, as such, are unpersuasive.

burden of showing the statute is unconstitutional beyond a reasonable doubt. State v. Shafer, 156 Wn.2d 381, 387, 128 P.3d 87 (2006).

Specifically, Borders argues that RCW 10.58.090 violates the federal and state ex post facto clauses, the state separation of powers clause, and “state constitutional fair trial protections.” Br. of Appellant at 21-38. This Court has previously rejected these claims. Scherner, 153 Wn. App. 621; State v. Gresham, 153 Wn. App. 659, 223 P.3d 1194 (2009), review granted, 168 Wn.2d 1036 (2010).²⁰ Borders does not discuss either of these decisions beyond citing the cases in a footnote and questioning the validity of the decisions simply because the supreme court granted review. Br. of Appellant at 19 n.12. For the reasons set forth in Scherner and Gresham, this Court should reject Borders’ claims and affirm his conviction.

a. RCW 10.58.090 Does Not Violate The Ex Post Facto Clauses.

Borders argues that the admission of evidence under RCW 10.58.090 violated the federal and state ex post facto clauses. The United States and Washington Constitutions both contain ex post facto clauses. U.S. CONST. ART. 1, § 10²¹; CONST. ART. I, § 23.²² “The ex post facto

²⁰ The Washington Supreme Court heard oral argument in Gresham on March 17, 2011.

²¹ “No state shall . . . pass any . . . ex post facto law.”

²² “No . . . ex post facto law . . . shall ever be passed.”

clauses prohibit states from enacting any law that (1) punishes an act that was not punishable at the time the act was committed, (2) aggravates a crime or makes the crime greater than it was when committed, (3) increases the punishment for an act after the act was committed, and (4) changes the rules of evidence to receive less or different testimony than required at the time the act was committed in order to convict the offender.”²³ State v. Angehrn, 90 Wn. App. 339, 342-43, 952 P.2d 195 (1998) (citing Collins v. Youngblood, 497 U.S. 37, 42, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990)).

Borders claims that the admission of evidence under RCW 10.58.090 in his trial violated this fourth category. However, few rules of evidence have been found to fall under this category. The Washington Supreme Court has held that a new rule of evidence that allows for the admission of previously prohibited witness testimony does not violate the ex post facto clause.

²³ Both the United States Supreme Court and the Washington Supreme Court have repeatedly endorsed the analytical framework articulated in Calder v. Bull, 3 U.S. 386, 1 L. Ed. 648 (1798), for analyzing ex post facto violations. See Scherner, 153 Wn. App. at 635. Borders attempts to alter the applicable framework by relying on State v. Hennings, 129 Wn.2d 512, 919 P.2d 580 (1996), a case that is inapposite. Br. of Appellant at 21-23. At issue in Hennings was an amendment to a restitution statute, not a rule of evidence. Hennings, in turn, cites Weaver v. Graham, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981), which addressed a Florida statute altering the computation of a prisoner’s “good time,” and Collins v. Youngblood, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990), which addressed a Texas statute that allows an appellate court to reform an improper verdict that assesses a punishment not authorized by law.

In State v. Clevenger, 69 Wn.2d 136, 141, 417 P.2d 626 (1966), Clevenger was charged with committing incest and indecent liberties on his three-year-old daughter. His wife was permitted to testify based on an amendment to the spousal privilege statute, passed after the commission of the crime, which created an exception for crimes committed against one's child. The Washington Supreme Court rejected Clevenger's ex post facto challenge to the amended statute, explaining:

[A]lterations which do not increase the punishment, nor change the ingredients of the offence [sic] or the ultimate facts necessary to establish guilt, but - leaving untouched the nature of the crime and the amount or degree of proof essential to conviction - only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury, can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offence [sic] charged.

69 Wn.2d at 142 (quoting Hopt v. Utah, 110 U.S. 574, 590, 4 S. Ct. 202, 28 L. Ed. 262 (1884)).

Similarly, in State v. Slider, 38 Wn. App. 689, 688 P.2d 538 (1984), the Court of Appeals upheld the admission of child hearsay under the recently enacted child hearsay statute, RCW 9A.44.120. The court held that the application of the statute did not run afoul of the ex post facto

clauses because the statute “did not increase the punishment nor alter the degree of proof essential for a conviction[.]” Id. at 695; see also State v. Ryan, 103 Wn.2d 165, 179, 691 P.2d 197 (1984) (rejecting ex post facto challenge to child hearsay statute).

In contrast, the Supreme Court found that a statutory amendment, which applied retroactive to the amendment’s effective date, violated the ex post facto clause. See Carmell v. Texas, 529 U.S. 513, 120 S. Ct. 1620, 146 L. Ed. 2d 477 (2000). Carmell involved the defendant’s sexual assault of his step-daughter between 1991 and 1995 when the victim was 12 to 16 years old. Before 1993, sexual assaults against child victims over 14 years old could be proved either by testimony from the victim alone if the victim reported within six months of the assault, or with corroboration if the victim reported more than six months post-assault. The 1993 amendment to the statute removed the corroboration requirement. Carmell, 529 U.S. at 516-19. Under the facts of the case, the Supreme Court found that the State’s evidence would have been insufficient prior to the 1993 amendment, because the victim’s testimony was uncorroborated. Thus, the quantum of evidence necessary to convict the defendant was less than previously required, putting the defendant’s case squarely within the fourth category of circumstances which violated the ex post facto clause. Id. at 531.

The Washington Supreme Court similarly found a violation of the ex post facto clause in Ludvigsen v. City of Seattle, 162 Wn.2d 660, 174 P.3d 43 (2007). The court concluded that amendments to the Washington Administrative Code (WAC) effectively reduced the quantum of evidence necessary to convict a defendant of driving while intoxicated. Under the relevant municipal ordinance, the City was required to prove the defendant failed a valid breath test. A 2004 amendment to the WAC relieved the City of a previous requirement that, in order to establish a valid breath test, it prove that the breath test machine's thermometer had been properly certified. Addressing an ex post facto challenge to this amendment, the court framed the issue as "whether the WAC amendments changed ordinary rules of evidence or changed the evidence necessary to convict Ludvigsen of a DWI." Id. at 671-72. The court concluded that the amendments had changed the evidence necessary for a conviction:

[U]nder the per se prong, the validity of the breath test is a part of the prima facie case the government must prove. The City redefined the meaning of a valid test and thereby changed the meaning of the crime itself.... The subsequent change reduced the quantum of evidence to establish a prima facie case and to overcome the presumption of innocence.

Id. at 672-73 (footnotes omitted).

Borders complains that RCW 10.58.090 is not even-handed; "it dramatically tilts the playing field in favor of the state." Br. of Appellant

at 24-26. But that is not the test for determining an ex post facto violation. If it were, the changes to the spousal privilege statute at issue in Clevenger and the child hearsay statute at issue in Ryan would have run afoul of the ex post facto clauses. In both cases, the new statutes serve to permit testimony that would undoubtedly favor the State in criminal cases. RCW 10.58.090 did not reduce the quantum of evidence necessary to establish a prima facie case. The elements of the crime remain the same, and the quantum of proof required to satisfy those elements remains the same. It is similar to the statutory amendments at issue in Clevenger and Slider; it allows for the testimony of witnesses who otherwise might not have been permitted to testify.

Consistent with the above authorities, this Court recently rejected an ex post facto challenge to RCW 10.58.090. In Gresham, the Court explained:

RCW 10.58.090 does not alter the facts necessary to establish guilt, and it leaves unaltered the degree of proof required for a sex offense conviction. It only makes admissible evidence that might otherwise be inadmissible. For this reason, RCW 10.58.090 is like the statute at issue in Clevenger: the State still has to prove beyond a reasonable doubt all the elements of the charged crime—here, child molestation in the first degree—regardless of whether evidence was admitted under RCW 10.58.090. Because RCW 10.58.090 does not alter the quantum of

evidence necessary to convict, it does not violate the constitutional prohibitions against ex post facto laws.

153 Wn. App. at 673; see also Scherner, 153 Wn. App. at 635-43.

Borders does not discuss Gresham or Scherner, let alone show that they were wrongly decided. He has failed to establish that admission of evidence under RCW 10.58.090 violated the ex post facto clauses.

b. The State Ex Post Facto Clause Does Not Provide Greater Protection Than The Federal Clause.

Borders next argues that the ex post facto clause in article I, section 23 of the Washington State Constitution provides greater protection than the ex post facto clause in the United States Constitution. Br. of Appellant at 27-32. However, the state constitutional provision is worded virtually identically to its federal counterpart, and Washington courts have never interpreted it differently. This Court should reject Borders' claim that the admission of evidence under RCW 10.58.090 violated the state constitution's ex post facto clause.

To determine whether a state constitutional provision provides greater protection than its federal counterpart, the court considers the six nonexclusive factors identified in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). The six factors are: (1) the state provision's textual language; (2) significant differences between the federal and state texts; (3) state constitutional and common law history; (4) existing state law;

- (5) structural differences between the federal and state constitutions; and
- (6) matters of particular state interest or local concern. Id. at 61-62.

An examination of the Gunwall factors does not support Borders' claim that the ex post facto clause in article I, section 23 provides greater protection than the federal clause. With respect to the first and second factors, the language of the two provisions is virtually identical. The federal ex post facto clause provides that "[n]o State shall... pass any Bill of Attainder, ex post facto Law or Law impairing the Obligation of Contracts." U.S. CONST. ART. 1, § 10. The Washington State Constitution similarly states that "[n]o bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed." CONST. ART. I, § 23. The only difference is the addition of the word "ever" in the State version. That word does not create any difference between the two clauses since there is no exception to the prohibition against ex post facto laws in the federal version of that clause. Furthermore, the Washington Supreme Court has held that where language of the state constitution is similar to that of the federal constitution, the state constitutional provision should receive the same definition and interpretation given to the federal provision. In re Detention of Turay, 139 Wn.2d 379, 412, 986 P.2d 790 (1999).

With respect to the third and fourth factors, state constitutional and common law history and existing state law, Washington courts have never interpreted the state *ex post facto* clause differently from its federal counterpart. Early in the state's history, the court looked for guidance to United States Supreme Court decisions concerning *ex post facto* claims. See Lybarger v. State, 2 Wash. 552, 557, 27 P. 449 (1891) (“As to the question whether or not the law now in force . . . is an *ex post facto* law we will quote and abide by the classified definition of Chief Justice Chase in Calder v. Bull.”).

Over the last 100 years, the Washington courts have regularly cited the United States Supreme Court's interpretation of the federal *ex post facto* clause when considering claims brought under article I, section 23. State v. Ward, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994); State v. Edwards, 104 Wn.2d 63, 70, 701 P.2d 508 (1985); Johnson v. Morris, 87 Wn.2d 922, 923-28, 557 P.2d 1299 (1976). Washington caselaw provides no support for Borders' claim that the state constitutional provision is interpreted more broadly.

The fifth Gunwall factor, the differences in structure between state and federal constitutions, does not support a broader interpretation of the state constitutional provision. Both the federal and state *ex post facto*

clauses were intended to be restrictions on a *state's* power to enact certain laws.

The sixth Gunwall factor requires consideration of whether the matter is of particular state or local concern. The goals of the ex post facto clauses of both constitutions appear to be equally important, locally and nationally.

In his Gunwall analysis, Borders relies primarily upon an Oregon decision, State v. Fugate, 332 Or. 195, 26 P.3d 802 (2001). In Fugate, the Oregon Supreme Court held that the Oregon State Constitution's ex post facto clause was violated by retroactive application of "laws that alter the rules of evidence in a one-sided way that makes conviction of the defendant more likely." Fugate, 332 Or. at 213. In so holding, the court acknowledged that its decision was inconsistent with the decisions of the United States Supreme Court concerning the ex post facto clause. Id. As authority for its different interpretation, the Oregon court relied upon an 1822 decision by the Indiana Supreme Court, Strong v. State, 1 Blackf. 193 (Ind. 1822).

However, a review of Strong reveals that it provides no support for interpreting the Washington constitution's ex post facto clause differently from the federal counterpart. The issue in Strong was not a change in the rules of evidence but whether a change in punishment – from stripes

(whipping) to confinement in the State prison – constituted an ex post facto violation. The Indiana Supreme Court noted that an ex post facto violation could occur when the law “retrench[ed] the rules of evidence, so as to make conviction more easy.”²⁴ Id. But, as support for this proposition, the court cited federal caselaw.

When the Indiana Supreme Court later considered an ex post facto challenge to a new rule of evidence, it did not cite Strong, but looked to federal caselaw for guidance. Marley v. State, 747 N.E.2d 1123, 1130 (Ind. 2001). Consistent with Washington caselaw, the Indiana Supreme Court recognized that the ex post facto clause was not violated by a change to a rule of evidence that allowed for the testimony of witnesses who previously would not have been permitted to testify. Id.

Accordingly, Fugate and relevant Indiana caselaw do not support a broader interpretation of the Washington State Constitution’s ex post facto clause. The Oregon court’s decision was based upon dicta from an 1822 Indiana decision, and that portion of the Indiana decision was, in turn, based upon federal caselaw. Because Borders has provided no persuasive evidence that the framers of the Washington State Constitution intended that the ex post facto clause have a different meaning than its federal counterpart, this Court should hold that the admission of the evidence

²⁴ The court did not discuss what it meant to “make conviction more easy.”

under RCW 10.58.090 does not violate article I, section 23 of the State Constitution.

c. The Legislature's Enactment Of RCW 10.58.090 Does Not Violate The Separation Of Powers Doctrine.

Borders argues that the legislature's enactment of RCW 10.58.090 violates the separation of powers doctrine. This Court also rejected this claim in Gresham and Scherner, and Borders does not address or distinguish those decisions. The Court should once again reject this argument.

The doctrine of separation of powers comes from the constitutional distribution of the government's authority into three branches. State v. Moreno, 147 Wn.2d 500, 505, 58 P.3d 265 (2002). The purpose of the doctrine is to prevent one branch of government from aggrandizing itself or encroaching upon the "fundamental functions" of another. Id. (citing Carrick v. Locke, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)). "Though the doctrine is designed to prevent one branch from usurping the power given to a different branch, the three branches are not hermetically sealed and some overlap must exist." City of Fircrest v. Jensen, 158 Wn.2d 384, 393-94, 143 P.3d 776 (2006). "The question to be asked is not whether two branches of government engage in coinciding activities, but rather

whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.” Carrick, 125 Wn.2d at 135.

The courts have long recognized the legislature’s authority to enact rules of evidence.²⁵ The Washington Supreme Court has recognized that “rules of evidence may be promulgated by both the legislative and judicial branches.” Fircrest, 158 Wn.2d at 394. The court has acknowledged that its own authority to enact rules of evidence derives, in part, from a statute, RCW 2.04.190, and has held that “[t]he adoption of the rules of evidence is a legislatively delegated power of the judiciary.” Id. To this day, numerous statutes supplement the Rules of Evidence on various issues.²⁶ The legislature has enacted a number of statutes that relate particularly to evidence and testimony in sex offense cases.²⁷

Since the enactment of the evidence rules, the courts have repeatedly rejected claims that the legislature’s enactment of an evidentiary rule violated the separation of powers. In State v. Ryan, supra, the Washington Supreme Court rejected the claim that the legislature’s

²⁵ See State v. Sears, 4 Wn.2d 200, 215, 103 P.2d 337 (1940) (the legislature has the power to enact laws which create rules of evidence); Slider, 38 Wn. App. at 695-96 (“Our Supreme Court has also recognized (implicitly) the Legislature’s authority to enact evidentiary rules when it analyzed the rape shield statute.”).

²⁶ See, e.g., RCW 5.45.020 (business records); RCW 5.46.010 (copies of business and public records); RCW 5.60.060 (evidentiary privileges); RCW 5.66.010 (admissibility of expressions of apology, sympathy, fault).

²⁷ RCW 9A.44.020 (rape shield); RCW 9A.44.120 (child hearsay statute); RCW 9A.44.150 (child witness testimony concerning sexual or physical abuse).

enactment of the child hearsay statute, RCW 9A.44.120, violated the separation of powers. In doing so, the court held that “apparent conflicts between a court rule and a statutory provision should be harmonized, and both given effect if possible.” *Id.* at 178. See also Fircrest, 158 Wn.2d at 396-99 (finding that the Legislature did not invade the prerogative of the courts, or violate the separation of powers doctrine, when it enacted a statute that provided that breath tests were admissible if the State satisfied a certain threshold burden).

Here, the legislature, which retains authority to enact rules of evidence, did not invade the prerogative of the courts by enacting RCW 10.58.090. The statute carves out a narrow exception to ER 404(b), a rule that already contains numerous other exceptions. The statute provides that the trial court still has discretion to exclude the evidence after applying balancing factors under ER 403. The statute can be harmonized with the existing evidence rules, and the court can give effect to both. As this Court noted when rejecting the claim that the legislature’s enactment of RCW 10.58.090 violated the separation of powers:

In sum, RCW 10.58.090 evidences the legislature’s intent that evidence of sexual offenses may be admissible, subject to the modified ER 403 balancing test. But the legislation also leaves the ultimate decision on admissibility to the trial courts based on the facts of the cases before them. This is consistent with past legislative amendments to the rules of

evidence and does not infringe on a core function of the judiciary.

Scherner, 153 Wn. App. at 648; see also Gresham, 153 Wn. App. at 665-70. The Court should reject Borders' separation of powers challenge to the statute.

d. RCW 10.58.090 Does Not Violate Borders' State Constitutional Right To A Jury Trial.

In a brief argument citing little authority, Borders claims that RCW 10.58.090 is unconstitutional because it violates "state constitutional fair trial protections." Br. of Appellant at 37-38. The Court should reject this claim; the state constitutional right to a jury trial does not prohibit the admission of evidence under RCW 10.58.090.

Borders claims that the state constitutional right to a jury trial, set forth in Const. art. I, §§ 21 and 22, prohibits the admission of evidence under RCW 10.58.090. He cites to one *federal* decision, McKinney v. Rees, 993 F.2d 1378 (9th Cir. 1993) as supporting this claim. In McKinney, the Ninth Circuit did not render any opinion about the scope of the Washington State constitutional right to a jury trial. Instead, the court held that the trial court improperly admitted evidence about the defendant's previous possession of knives and that "the erroneous admission of propensity evidence rendered McKinney's trial fundamentally unfair in violation of the Due Process Clause." 993 F.2d at

1385. Borders has not made a due process claim, and this Court has rejected a due process challenge to RCW 10.58.090. Scherner, 153 Wn. App. at 651-53.

Perhaps because the weight of authority is against him on a due process challenge, Borders has characterized his argument as implicating the state constitutional right to a jury trial. Yet no caselaw supports that notion that the right to a jury trial protects a defendant against the admission of certain evidence. This claim is without merit.

3. S.C.'S HISTORY OF SUBSTANCE ABUSE WAS IRRELEVANT AND, GIVEN S.C.'S SHAME AFTER BORDERS RAPED HER, LIKELY NOT WHY S.C. FELT SUICIDAL.

Borders makes two related claims regarding the trial court's ruling to preclude Harborview social worker William Bodick from testifying about S.C.'s "polysubstance" abuse, "Substance-Induced Mood Disorder," and cocaine dependence. Borders first contends that the ruling violated his constitutional right to present a defense. Br. of Appellant at 38-43. Borders argues that the evidence was needed to explain S.C.'s emotional state.²⁸ Borders further contends that the prosecutor committed

²⁸ Borders contends that the evidence was also needed to rebut the State's claim that S.C.'s suicidal thoughts enhanced her credibility. Br. of Appellant at 38. The State discusses this claim, along with Border's other claims of prosecutorial misconduct, in section C.3.c of Br. of Respondent, infra.

misconduct when she argued that S.C.'s shame was interrelated with her suicidal thoughts. Br. of Appellant at 43-46.

Borders has failed to show a constitutional violation. Indeed, the first claimed error is not of constitutional proportion; it is based on an evidentiary ruling. After Bodick testified in an offer of proof, the trial court ruled that S.C.'s historical drug abuse, with the exception of the two-day crack binge that led up to and included the day of the rape, was irrelevant to whether Borders raped S.C. The limitation was within the trial court's discretion. Then, without objection, the prosecutor argued that it was reasonable to infer from the evidence that the rape led to S.C.'s suicidal thoughts. The argument was not improper, much less flagrant and ill-intentioned.

a. Facts.

In the immediate aftermath of the rape, S.C. told two social workers at Harborview that she felt suicidal.²⁹ 13RP 99 (Bodick); 14RP 80 (Heginbottom). Bodick wrote in his report, "Patient reports that she's feeling depressed and suicidal with a plan to cut her wrists. Patient says, 'I'll just cut my wrists and get it over with.'" 13RP 99. S.C. told Heginbottom that she was homeless and without any support system, such

²⁹ S.C. did not simply have a "run-in" with Borders. See Br. of Appellant at 40. Borders raped S.C.

as family, church, or members of the community—other than from her Downtown Emergency Service Center case manager. S.C. said, “I feel like killing myself.” 14RP 74, 80. S.C. also told a social worker at Sound Mental Health (who provided care for S.C. that same day after she was discharged by the psychiatric emergency services department at Harborview), that she was depressed. 14RP 113.

S.C. also reported feeling shame after Borders raped her. S.C. said that having to tell the 911 operator what had just happened “felt bad . . . , shameful[,] disgracing.” 13RP 155. S.C. stated that it felt “shameful” to have to tell the Harborview treatment providers that Borders had raped her. 13RP 158. Heginbottom wrote in her report, “Patient tearful throughout the interview stating, ‘I cannot believe this’ . . . , multiple times and reporting feeling . . . , ‘shame due to the assault.’” 14RP 79.

At the first trial, Bodick testified that S.C. suffered from polysubstance abuse, Substance-Induced Mood Disorder, cocaine dependence and depression. 7RP 65, 71-73. However, during closing argument, Borders relied on testimony from the sexual assault nurse examiner, Patricia Ousley, to support his argument that a person coming down from a two-day crack binge might feel suicidal when she cannot get her drugs. 8RP 122. Borders argued that the State had not called a witness with expertise in the effects of cocaine withdrawal, but “Patricia

Ousley tells you what you need to know.” 8RP 122-23, 128-29. Borders also told the jurors that they certainly could consider S.C.’s cocaine use in assessing her credibility. 8RP 120, 128-29.

Before Bodick testified at the retrial, the State asked the court to preclude testimony about Bodick’s diagnoses, other than depression, because it assailed S.C.’s character and credibility on unrelated matters. 13RP 77-83. Borders argued that the evidence was relevant because “[Bodicks] evaluating [S.C.’s] suicide. He has to understand her history in order to do that.” 13RP 79. The court said that if S.C.’s Stress-Induced Mood Disorder explained her behavior in the emergency room (mood swings), then it probably had some relevance. 13RP 85, 89. However, the court wanted to hear from Bodick before ruling. 13RP 85.

In a proffer, Bodick said S.C.’s Substance-Induced Mood Disorder did not explain her mood swings and that it was unnecessary for him to know whether S.C. was a polysubstance drug abuser to assess her suicide risk. 13RP 89-90.

The court said that either counsel could ask witnesses whether S.C. appeared to be depressed. 13RP 93. However, the court stated that S.C.’s “entire history” was not relevant to S.C.’s ability to perceive events. 13RP 93. Moreover, the court said that it did not believe any witness would be able to definitively say why S.C. felt suicidal. 13RP 93.

The court also ruled that Bodick's substance abuse diagnoses were irrelevant. 13RP 89, 92-93. The issue, the court said, was not whether S.C. should be voluntarily committed as a risk to self or others, but whether the State could prove that Borders had raped S.C. 13RP 92. The court stated that, "The fact that [S.C.] has a history of drug use is not related to her credibility"; S.C.'s historical drug use is irrelevant to her ability to perceive, remember or relate the charged incident. 13RP 78, 92-93; see also CP 204-05. The court accordingly excluded the evidence. However, the court reiterated that S.C.'s drug use within the days around the time of the rape was "highly relevant" to S.C.'s credibility. 13RP 92.

At the retrial, Bodick testified that S.C. felt depressed and suicidal with a plan to cut her wrists. 13RP 99, 102. Bodick rated S.C.'s depression as severe. 13RP 107. Bodick did not have the expertise to say how long S.C.'s depression had lasted; i.e., when it had begun. 13RP 108. S.C. told Bodick (and other treatment providers) that she had used cocaine the last two days.³⁰ 13RP 99; see also 13RP 70; 14RP 113, 131. Bodick stated that S.C.'s memory was impaired; she had difficulty remembering things. 13RP 102, 105. And the Sound Mental Health social worker (Erin

³⁰ At trial, S.C. denied having used crack cocaine and could not remember having told her treatment providers that she had smoked crack. 13RP 133, 161, 180.

Massey) said that S.C. had given conflicting accounts of what had happened to the Harborview treatment providers. 14RP 113.

Without objection the prosecutor argued that jurors “*may find*” or “*could find*” S.C.’s sense of shame and despair had a “ring of truth.”

15RP 86. And, that those emotions “naturally flow[] from the act of violence that was committed against her in that bathroom.” 15RP 86.

Borders, in turn, asked the jurors to draw different inferences:

Well, what about I feel like killing myself? What about that comment? How do we deal with that? We deal with that because Mr. Bodick, one of the social workers, said this woman also had depression. Suicide is a stepchild or sister of depression.

You can relate it to any number of things in this case. You can relate it to not getting crack after coming down after two days. You can relate it to what the prosecutor would like you to relate it. You can relate it to something else in this case.

15RP 116-17.

In rebuttal, the prosecutor argued:

And . . . when you think about direct and circumstantial evidence *and you think about reasonable inferences*, that one plus one equals two, that flow from the evidence, it specifically keeps you from doing something like this: speculating, conjecture. Those two notions, speculation and conjecture have no part of this, no part of this process. Speculation and conjecture.

When counsel tells you and suggests to you that there are all of these possibilities as to why [S.C.] might have told someone she feels like killing herself, oh, she was depressed, oh, she was coming down from a two-day

cocaine bender, there's not a lick of evidence to support that.

She told the social worker Kenna Heginbottom in the context of a sexual assault examination, I feel so much shame; I feel like killing myself. Because of what happened to her. She drew that nexus.

15RP 130.

b. The Trial Court Exercised Its Discretion Properly When It Excluded Irrelevant Evidence.

i. S.C.'s prior drug abuse was irrelevant.

A defendant has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible.³¹ State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022 (1993), cert. denied, 508 U.S. 953 (1993). A limitation on the right to introduce evidence is not unconstitutional unless it affects fundamental principles of justice. Montana v. Engelhoff, 518 U.S. 37, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996) (stating that the “accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence” (quoting Taylor v. Illinois, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988))).

³¹ Borders acknowledges that the constitutional right to present evidence is subject to relevant evidence. Br. of Appellant at 39.

Under ER 401, evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. “Evidence which is not relevant is not admissible.” ER 402. This Court reviews a trial court’s relevancy determinations for manifest abuse of discretion. State v. Gregory, 158 Wn.2d 759, 835, 147 P.3d 1201 (2006). “It is not an abuse of discretion to exclude irrelevant evidence.” State v. Edvalds, 157 Wn. App. 517, 536, 237 P.3d 368 (2010).

The trial court exercised its discretion properly when it excluded Bodick’s diagnoses of S.C. as a polysubstance or serious cocaine abuser. The evidence, as the court ruled, was not relevant to whether the State proved beyond a reasonable doubt that Borders raped S.C. S.C.’s drug use around the time of the charged incident, however, was relevant and admissible because the jury had to assess S.C.’s credibility in light of her drug use.³²

Borders argued at trial, as he does on appeal, that S.C.’s history of depression and substance abuse were admissible because Bodick had to

³² The trial court instructed the jury that as the sole judges of credibility, jurors could consider whether a witness had the ability to observe accurately, the witness’s memory while testifying and the reasonableness of the witness’s statements in the context of all of the other evidence. CP 216.

consider S.C.'s drug use to assess her suicide risk—but Bodick said that information about S.C.'s drug use was helpful, but unnecessary to his risk assessment. 13RP 89; Br. of Appellant at 42. As stated above, the trial court did not exclude evidence of S.C.'s depression. Indeed, Bodick and Massey (Sound Mental Health social worker) testified that S.C. said she felt depressed. 13RP 99; 14RP 113.

Borders also contends that admission of Bodick's diagnoses, "would have better explained S.C.'s emotional state at the ER." Br. of Appellant at 42. Yet, Bodick said that S.C.'s Stress-Induced Mood Disorder was not the cause of S.C.'s mood swings. 13RP 89.

Why S.C. felt suicidal was quite simply not material to the jury's determination of whether the State had proved that Borders raped S.C. This Court should affirm the trial court's exclusion of irrelevant evidence. See Edvalds, 157 Wn. App. at 536.

ii. Error, if any, was harmless.

Borders has failed to show any constitutional violation. However, even if this Court finds that the trial court abused its discretion, any error was harmless.

An evidentiary error is grounds for reversal only if the error is prejudicial. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An error "is not prejudicial unless, within reasonable

probabilities, the outcome of the trial would have been materially affected had the error not occurred.” Id.

The trial court’s exclusion of S.C.’s diagnoses as a polysubstance or cocaine abuser did not materially affect the outcome of the trial. Significantly, the jury heard that S.C. felt shame and self-loathing, had suicidal thoughts, had suffered from depression for an indeterminable time, was homeless and without a support system and had used crack cocaine for two days. 13RP 62, 70, 99, 117, 158-59; 14RP 74, 79-80, 84, 113, 131.

The precluded evidence did not affect Borders’ theory on this charge: the incident was about two crack cocaine users who see things through the prisms of their own lives and experiences, and that the evidence—or lack of evidence—was more consistent with this theory than the State’s theory of forcible rape. 15RP 103-20. Moreover, Borders highlighted S.C.’s statements and argued that the treasure trove of inconsistencies militated against the jury finding her credible. 15RP 103-20.

Finally, the State’s evidence against Borders on this charge was strong. As discussed above, Borders’ rapes of S.C., J.P. and S.G. were strikingly similar. Witnesses described S.C.’s demeanor immediately after the rape as “very distraught,” “upset,” “visibly afraid,” in a “fetal

position,” “sobbing,” “panicked,” ashamed, “depressed” and suicidal. 11RP 45-46, 59, 67; 12RP 19; 13RP 99; 14RP 79-80. S.C. immediately disclosed the rape. 13RP 154-55.

Borders’ claim, that the alleged error affected not just the verdict on Borders’ rape of S.C. but that it also affected the verdict on the count involving J.P., is illogical. Even if S.C.’s suicidal thoughts had a “ring of truth” and enhanced her credibility, Borders has not addressed the strikingly similar rapes described by S.C., J.P. and S.G.—especially given that neither S.C. nor J.P. knew each other or S.G. 12RP 120; 13RP 165. This claim merits no further review.³³

c. The Prosecutor Did Not Commit Misconduct During Closing Argument.

Borders contends that the prosecutor committed misconduct when she argued that S.C.’s suicidal thoughts were tied to the rape. Br. of Appellant at 43-46. Despite the lack of objection, Borders claims that the “misstatement of key evidence” warrants reversal.³⁴ The Court should

³³ Borders puts great stock in the first jury’s inability to reach a verdict and thus the importance of the excluded evidence vis-à-vis S.C.’s credibility. Ironically, the first jury was 10 – 2 in favor of conviction on the count involving S.C. and split 6 – 6 on the count involving J.P. CP 83-84, 127.

³⁴ Borders’ argument misses the mark because he confuses evidence with arguments based on reasonable inferences from the evidence. See Br. of Appellant at 41 (State presented evidence that S.C. told treatment providers that post-rape she felt like killing herself and “used this evidence to argue” that S.C.’s shame and suicidal thoughts gave her testimony a “ring of truth.”).

reject this claim. The prosecutor did not misstate the evidence. The prosecutor argued a very reasonable inference from the evidence: in the immediate aftermath of the rape, S.C.'s shame was so palpable that she felt like killing herself.

When considering allegations of prosecutorial misconduct, this Court first must determine whether the comments were improper. If they were, the Court must then consider whether there was a substantial likelihood the comments affected the jury verdict. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). The defense bears the burden of establishing both of these elements. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). Absent an objection to the comments during the trial, a request for a curative instruction, or a motion for a mistrial, the issue of prosecutorial misconduct cannot be raised for the first time on appeal unless the misconduct was so flagrant and ill-intentioned that the prejudice could not be obviated by a curative instruction. State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990).

A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. Hoffman, 116 Wn.2d at 93. During closing argument, any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed

in the argument, and the jury instructions. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

The prosecutor argued that S.C.’s feeling of despair “naturally flow[ed] from the act of violence that was committed against her in that bathroom,” despite S.C.’s life circumstances—her homelessness, her addiction, her belief that she had no support system. 15RP 85-86. The prosecutor argued that the jury “*may*” or “*could*” find S.C.’s “sense of shame and that feeling of despair” had a “ring of truth.”³⁵ 15RP 85-86.

Borders, in turn, asked the jurors to draw different inferences—that S.C.’s suicidal thoughts were the result of depression (suicide’s “step-child” or “sister”), not getting crack after coming down from two day’s use, or “any number of things in this case.” 15RP 116.

In rebuttal, the prosecutor did not say that S.C. had said the genesis of her suicidal thoughts was the rape. See Br. of Appellant at 45. Rather, the prosecutor discussed “reasonable inferences” versus speculation and conjecture. 15RP 130. The prosecutor then said, that in the context of a sexual assault examination, S.C. had said she felt shame and felt like killing herself, “[b]ecause of what happened to her. *She drew that*

³⁵ Borders does not claim, nor could he, that the prosecutor vouched for S.C.

nexus.”³⁶ 15RP 130. In other words, S.C. inferentially (not explicitly) connected her shame with her suicidal thoughts.

The State found no support in the record for Borders’ assertion that the prosecutor assured the trial court that it did not intend to use S.C.’s statements about wanting to kill herself to prove its case.³⁷ Br. of Appellant at 46. In fact, before Bodick testified at the first trial, the parties represented to the court that they had agreed on the scope of inquiry. 7RP 7-8.

Finally, the prosecutor did not misstate the evidence in rebuttal. When the prosecutor stated that “there’s not a lick of evidence” to support Borders’ claim that S.C.’s suicidal thoughts were the result of depression or her coming down from a “two-day cocaine bender,” she was simply acknowledging that no one had explicitly stated why S.C. felt suicidal. It was for this very reason that the prosecutor asked the jury to infer that

³⁶ Borders says that Heginbottom was not present at the sexual assault examination. Br. of Appellant at 45. To the extent that Borders means the physical examination done by the sexual assault nurse examiner, he is correct. However, Heginbottom explained the procedure when a sexual assault victim arrives at Harborview: she is first seen by a triage nurse, then by an ER doctor (if she needs medical attention), then the social worker (Heginbottom), who helps the victim decide if she wants to have a sexual assault kit done (by the SANE). 14RP 66-69. Heginbottom’s report is part of S.C.’s medical records related to her sexual assault. 14RP 67-68.

³⁷ Rather, following Bodick’s proffer, the trial court said, that if the court recalled from the first trial, the court did not believe the State was trying to argue that the reason S.C. felt suicidal was necessarily the rape, but introduced the testimony only to explain why there was a mental health referral. 13RP 92.

S.C.'s shame and despair following the rape led to her suicidal thoughts.³⁸

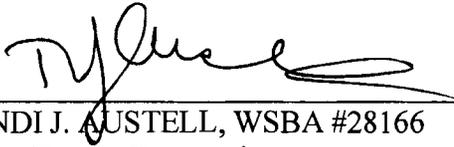
D. CONCLUSION

For the reasons stated above, the State respectfully asks this Court to affirm Borders' two convictions for second degree rape.

DATED this 18 day of July, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

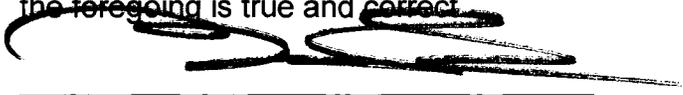
By: 
RANDI J. AUSTELL, WSBA #28166
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

³⁸ Indeed, given S.C.'s life circumstances at that time, the rape may simply have been the proverbial straw that broke the camel's back. No one, including Bodick, could have said precisely why S.C. felt suicidal. Furthermore, the jurors certainly did not need anyone to tell them that depression or homelessness or two-day cocaine benders could lead to suicidal thoughts.

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 Jennifer Winkler, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Notice of Appearance, in STATE V. FRANK BORDERS, Cause No. 66214-7-1, 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.



Name Bora Ly
Done in Seattle, Washington

07-18-11
Date