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NO. 66546-4-I

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

REC'D
SEP 30 2011
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

EARL FLEMING

Appellant.

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

The Honorable Bruce Heller, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred under ER 404(b) when it admitted evidence of alleged prior sexual misconduct to demonstrate a “common scheme or plan.”

2. The trial court also erred when it admitted this evidence under RCW 10.58.090.

4. RCW 10.58.090 violates state and federal constitutional prohibitions on ex post facto legislation.

5. The Legislature’s enactment of RCW 10.58.090 violates the separation of powers doctrine of the state and federal constitutions.

6. RCW 10.58.090 violates the Washington Constitution’s fair trial guarantees.

7. The trial court denied appellant his right to present a defense when it improperly limited cross-examination of a prosecution witness.

Issues Pertaining to Assignments of Error

1. In order to satisfy the “common scheme or plan” exception to ER 404(b), the State must demonstrate a substantial similarity between the charged and prior uncharged conduct. Moreover, the probative value of the evidence must outweigh any improper prejudice. In appellant’s case, there are significant differences between the charged and uncharged prior conduct and the prejudice was significant. Did the trial court err and

deny appellant a fair trial when it admitted the State's evidence?

2. Under RCW 10.58.090, evidence of prior sex offenses is admissible in a sex offense case, notwithstanding ER 404(b). The court is to consider the facts and circumstances, including the danger of unfair prejudice, the similarity of the prior offense to the charged offense, the frequency of the prior acts, and whether the prior act resulted in a criminal conviction. Where these, and other considerations, weigh against admission of the State's evidence, did the court also err in admitting the prior misconduct under this statute?

3. A retrospective law violates the ex post facto provisions of the federal Constitution if it is substantive and disadvantages the person affected by it. In enacting RCW 10.58.090, the Legislature stated it intended the statute to work a substantive change and that it applies retroactively. Is application of RCW 10.58.090, permitting this previously forbidden inference, unconstitutional?

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

fashion to make convictions easier to obtain. Does application of RCW 10.58.090 to appellant's case violate Article I, section 23?

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

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

7. Criminal defendants have a constitutional right to present relevant evidence at trial. Was appellant denied this right where the State opened the door to evidence regarding the alleged victim's credibility, but the trial court would not allow the defense to use the evidence?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor's Office charged Earl Fleming with four criminal offenses: (count 1) Rape of a Child in the Second Degree,

(count 2) Rape of a Child in the Second Degree, (count 3) Rape of a Child in the Third Degree, and (count 4) Misdemeanor Violation of Sexual Assault Protection Order. CP 7-8; Supp. CP ____ (sub no. 177, Presentence Statement of King County Prosecuting Attorney, Second Amended Information).

The alleged victim in counts 1 through 3 was Fleming's daughter, T.F. CP 3-5. The period charged was August 30, 2006 to August 29, 2008 for counts 1 and 2, and August 30, 2008 to December 12, 2008 for count 3. CP 121-122, 124. A jury found Fleming guilty on the first three counts and not guilty on count 4. CP 134-137. The court sentenced him to a minimum term of 194 months, and Fleming timely appealed. CP 143, 155-166.

2. Ruling Under ER 404(b)/RCW 10.58.090

At trial, the State provided notice that it intended to offer evidence that prior to the time periods charged in the information, Fleming had sexual contact with Fleming's older daughter, K.F. The State argued the evidence was admissible under ER 404(b) to demonstrate a common scheme or plan and that it satisfied the requirements of RCW 10.58.090. Supp. CP ____ (sub no. 156, State's Trial Memorandum, at 18-38); 3RP 28-29, 35-41.

As an offer of proof, the State submitted transcripts of interviews with T.F. and K.F. as well as written reports from Renton police detectives. Pretrial exhibits 2, 4-6; trial exhibit 19 (previously pretrial exhibit 3).

According to these documents, T.F. alleged that beginning when she was 12 years old, her father had her rub his back and asked her to rub him lower than she was comfortable. Pretrial Exh. 5, at 5-9. Thereafter, he began coming into her bedroom on a daily basis and touching her breasts over her clothing. He also began touching her vagina. Pretrial Exh. 5, at 9-12. When she made noise, he would tell her to shut up. Pretrial Exh. 5, at 18. Eventually, when T.F. was 14 years old, she told a school nurse that her father was having intercourse with her. Pretrial Exh. 5, at 12-14. She made similar allegations about intercourse to detectives. Pretrial Exh. 2, at 1 of 5.

In contrast to T.F.'s claims, K.F. reported that on only one occasion – when she was in 9th grade – Fleming came into her bedroom while she was watching television and started giving her a massage. Pretrial Exh. 6, at 5-7. K.F. was still in her pajamas. According to K.F., her father touched her underneath her shirt and over her bra, and then pulled her pajama pants down and gave her a bottom massage over her underwear. When her father moved his hand toward her inner thigh, she told him to stop, which he did. Pretrial Exh. 6, at 7-12. K.F. also claimed that her father had given her a beer the night before the massage. Pretrial Exh. 6, at 8, 16.

The defense asked the trial court to find RCW 10.58.090 unconstitutional or that its requirements had not been satisfied. CP 32-69;

3RP¹ 3-6, 30-35. Regarding ER 404(b), the defense argued that given the dissimilarities in the girls' allegations, the evidence concerning K.F. did not qualify under the common scheme or plan exception and that any probative value was outweighed by improper prejudice. CP 32-69; 3RP 21-27.

The trial court admitted the evidence both under ER 404(b) and the statute. CP 73; 4RP 8-14; 5RP 62-64.

3. Trial Evidence

Earl² and Champagne Fleming are married. 4RP 58. They have two children together – T.F., who was born on August 30, 1994, and her younger sister C.F. 4RP 59. Earl also has three older children – K.F., Corey, and Jermaine. 4RP 62-63.

On December 12, 2008, 14-year-old T.F. complained to the nurse at Lindberg High School in Renton that her stomach hurt. 4RP 35, 40, 45. It appeared to the nurse that T.F. had a bit of a “tummy,” and she asked T.F. if it were possible she was pregnant. 4RP 40, 44. T.F. said no, but the nurse pressed her on the subject. T.F. then claimed that her father had been

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – September 28, 2010; 2RP – September 29, 2010; 3RP – September 30, 2010; 4RP – October 4, 2010; 5RP – October 5, 2010; 6RP – October 6, 2010; 7RP – October 7, 2010; 8RP – October 11, 2010; 9RP – October 11, 2010 (after break); 10RP – October 12, 2010; 11RP – October 13, 2010; 12RP – October 14, 2010; 13RP – December 17, 2010.

² Earl also goes by the name Tyrek. 4RP 61.

“coming into her bed” since she was 12 and accused him of having sexual intercourse with her. 4RP 45-46, 54.

CPS and the Renton Police were notified of the accusation. 4RP 47. Fleming was arrested when he arrived at school to pick up his daughter. 8RP 19-20. Detectives then went to the Fleming home to collect items of potential evidence, take photographs, and speak with Champagne Fleming. 8RP 21-22.

T.F. was taken to a hospital, where her pregnancy was confirmed. 4RP 135-137. The decision was made to terminate the pregnancy and an abortion was performed. 4RP 86, 107, 137. The age of the fetus was estimated at between 21 and 23 weeks. 4RP 99-100, 111.

At trial, T.F. testified to sexual abuse at three different homes – Auburn (where she lived from 3rd grade through part of 6th grade), Kent (part of 6th grade through part of 8th grade), and Renton (8th grade until she moved to Michigan with her mother in 2009). 5RP 52-55.

The first touching began in Auburn when she was about 11 years old. It was near Halloween and, after the rest of the family had gone to bed, Fleming allowed her to put on her costume. He asked her to rub his back, which was sore from his construction job. Fleming wore boxers and T.F. rubbed his back and stomach, but there was no other touching. 5RP 89-98.

T.F. testified that in the weeks that followed, her father would wake her up at night and she gave him additional back and stomach rubs. 5RP 99-102. Eventually, however, Fleming started coming into her room while she was asleep and touching her breasts over her pajamas. 5RP 102-105. Later, while T.F. was still in 6th grade, her father started having anal intercourse with her. 5RP 105-107, 132. T.F. also testified to one instance of oral intercourse in the Auburn home. She testified it happened in her brother Corey's room and she "spit it all over my brother's bed." 5RP 135-140.

As to events in the Kent Home, T.F. also testified to anal intercourse, indicating that once, when she was still in the 6th grade, she could barely walk at school that day. RP 133-135. Later, however, she testified her father never raped her anally while the family lived in Kent. RP 141. She testified she was raped seven days a week in the Kent home and recalled one instance of vaginal intercourse on a hardwood floor in her bedroom and another occasion on a couch in the living room while her mother was in the bedroom listening to music. RP 140-149, 157. Later, however, she claimed the couch incident happened in Auburn. RP 202.

As to the Renton home, T.F. testified to vaginal intercourse, including once in 9th grade – the same week she spoke to the school nurse – when Fleming put a pillow over her face and repeatedly called her "Little Ree-Ree," which was her mother's nickname. 5RP 108-115, 122. T.F. also

claimed that her father would sometimes rape her in the Renton home before he left for work in the morning or when her mother and younger sister would leave during the day. 5RP 123-131. He also sometimes came into her room at night. 5RP 155-157. As in the Kent home, she claimed she was raped seven days a week. 5RP 126.

T.F. testified that her efforts to physically resist her father and tell him to stop were futile. He just ignored her. 5RP 109-113, 124-125, 129-130, 156-157. T.F. also testified that she once told her mother that her father was touching her while the family still lived in Auburn. She, her parents, and her younger sister were at Toys-R-Us and T.F. had done something to get in trouble with her mother. She then blurted out that her father touches her. Her father denied it and T.F.'s mother hit her. 5RP 75-77.

Champagne Fleming testified that many people, including extended family and renters, lived with the family over the years. 4RP 64, 69, 71, 73; 5RP 3-5. There were as many six people living in the Auburn house, eight people in the Kent house, and seven people in the Renton house. 4RP 64, 71, 73. Most of the time, T.F. shared a bedroom with her younger sister. 4RP 65, 72-73; 5RP 4, 61, 65-66. In both the Renton and Kent homes, Champagne's bedroom door was just three to six steps from T.F.'s bedroom door. 4RP 81, 84.

Forensic scientist Brianne Huseby, from the Washington State Patrol

Crime Lab, tested fetal material from T.F.'s abortion to determine whether Fleming could be the father. 6RP 7, 19-24. Based on DNA profiles for T.F., Fleming, and the fetus, Huseby could not exclude Fleming as the father. 6RP 24-35. Huseby testified that it was 56,000 times more likely that he would observe the testing results if Fleming was the biological father of the fetus rather than an unrelated individual selected randomly from the U.S. population. 6RP 36. Huseby calculated the probability of Fleming's paternity at 99.998229 percent. 6RP 37.

Dr. Donald Riley, a DNA expert with a Ph.D. in biochemistry, took issue with analyst Huseby's figures, describing them as "misleading." 9RP 10, 19. He questioned whether standard statistical formulas apply when the alleged father is already related to the mother of the fetus and therefore naturally shares more alleles with the fetus than would a random member of the population. 9RP 18-19, 59-62, 74, 78-80, 84-86. Dr. Riley also noted the possibility another male family member – T.F.'s older half brother Corey – could be the father of the fetus but was never asked to submit a DNA sample for testing. 9RP 19. Corey may have inherited from his father (Fleming) the same alleles found in the fetus that Huseby attributed to Fleming. Without further testing, Corey could not be eliminated as the father, either. 9RP 22, 28-33, 46. And since Corey had never been tested, there was no accepted method for calculating the odds Fleming was the

father. 9RP 28, 32-33, 61-62, 78-80, 84-86.

Huseby disagreed with Dr. Riley, testifying it was generally accepted that even where the alleged father is related to the mother, this connection is taken into account in the mother's DNA profile, which is not used for the statistical paternity calculations. 9RP 93-94. Regarding Corey, Huseby calculated the chance Fleming would pass on identical alleles to his son at .000024414 percent. 9RP 101.

T.F. claimed that she had been raped often on a Tiger blanket she kept on her bed in the Renton home. 5RP 153-154; trial exh. 12. Detectives collected this, and other physical evidence, from T.F.'s bedroom. 6RP 62-68. According to T.F., some of this evidence was stained with her father's semen. 6RP 160-161. Apparently this evidence was never tested, however, because the State presented no evidence on what it revealed. 6RP 75-78.

In an attempt to bolster its case, the prosecution took advantage of the court's ruling under ER 404(b) and RCW 10.58.090. K.F., who was 20 years old by the time of trial, testified her parents divorced when she was two, and thereafter she split time with each. 6RP 85, 90-91. K.F. related the 2005 incident when she was 15 years old, in ninth grade, and living with her father in the Auburn house. 6RP 91-94. K.F. testified that her father entered her bedroom and gave her an inappropriate massage, touching her over her bra and pulling down her pants to massage her bottom over her underwear.

She told him to stop and he left the room. 6RP 95-100. Within a few days, K.F. moved to Atlanta to live with her mother. 6RP 92, 101. K.F. told other family members about the incident, but did not want to report it to police. She later moved back in to her father's home. 6RP 101-104.

Jurors were instructed they could only consider K.F.'s testimony – and T.F.'s testimony describing events in the Auburn house (which were outside the charged periods) – for a limited purpose:

Certain evidence has been admitted in this case only for a limited purpose. This evidence includes any testimony regarding the defendant touching K.F. while they lived in Auburn. It also includes the testimony of T.F. regarding the defendant touching T.F. and having T.F. touch him beginning when T.F. was in the sixth grade while they lived in Auburn.

This evidence may be considered by you only for the purpose of determining whether or not the defendant had a common scheme or plan to initiate sexual contact with his daughters and/or whether the defendant had a lustful disposition toward T.F. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 128. During closing argument, the prosecutor repeatedly focused on K.F.'s testimony. See 10RP 28, 40-42, 65-66.

The defense focused on the State's failure to test semen stains on items collected from T.F.'s bedroom and its failure to determine whether Corey was the actual father of T.F.'s child. 10RP 59-64.

Fleming now appeals.

C. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT FOUND K.F.'S TESTIMONY ADMISSIBLE UNDER ER 404(B).

A defendant must only be tried for those offenses actually charged. Consistent with this rule, evidence of other crimes must be excluded unless shown to be relevant to a material issue and to be more probative than prejudicial. State v. Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984); State v. Goebel, 40 Wn.2d 18, 21, 240 P.2d 251 (1952).

The prosecution's attempts to use evidence of other crimes must be evaluated under ER 404(b), which reads:

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

Admission of evidence under this rule is reviewed for an abuse of discretion. State v. Tharp, 27 Wn. App. 198, 205-06, 616 P.2d 693 (1980), aff'd, 96 Wn.2d 591, 637 P.2d 961 (1981). A trial court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The court abused its discretion in Fleming's case.

Although evidence of a “common scheme or plan” is a recognized exception to ER 404(b), before evidence can be admitted under this exception, it must satisfy four requirements: the prior acts must be (1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common scheme or plan, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial. State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995). The State’s burden to demonstrate admissibility is “substantial.” State v. DeVincentis, 150 Wn.2d 11, 17, 20, 74 P.3d 119 (2003).

K.F.’s testimony fails to satisfy the second and fourth requirements.

a. The Prior Acts did Not Demonstrate a Common Scheme or Plan.

To prove a common scheme or plan, the other crime evidence must demonstrate “that the person ‘committed markedly similar acts of misconduct against similar victims under similar circumstances.’” State v. Carleton, 82 Wn. App. 680, 683, 919 P.2d 128 (1996) (quoting Lough, 125 Wn.2d at 852). Stated another way, the “prior misconduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior

misconduct are the individual manifestations.” *Id.* at 684 (quoting *Lough*, 125 Wn.2d at 860).

K.F.’s testimony does not satisfy this requirement. Although there were certain similarities between K.F. and T.F. (each lived in the same household as Fleming and each claimed a massage that led to inappropriate touching), these circumstances can hardly be labeled uncommon in child rape cases. These rather ordinary circumstances should not, by themselves, establish a common scheme or plan. See *DeVincentis*, 150 Wn.2d at 21 (while uniqueness is not required, “a unique method of committing the bad acts is a potential factor in determining similarity”). Otherwise, this exception to ER 404(b) will simply swallow the rule.

These similarities must also be evaluated in light of the important differences in the alleged circumstances. T.F. alleged abuse over several years, beginning when she was 11 years old. In contrast, K.F. alleged one act when she was 15 years old. T.F. alleged vaginal, anal, and oral intercourse; K.F. did not allege any intercourse. T.F. indicated that resisting was futile; K.F. alleged that Fleming left as soon as she told him to stop. T.F. never alleged the use of any alcohol; K.F. alleged that Fleming gave her a beer the night before the incident.

In nonetheless admitting K.F.’s testimony, the trial court believed

that the circumstances in State v. Kennealy, 151 Wn. App. 861, 214 P.3d 200 (2009), review denied, 168 Wn.2d 1012 (2010), were similar to those in Fleming's case. 4RP 11-12. They are not. Kennealy was charged with sex crimes involving three children ages 5 to 7. *Id.* at 868. At trial, the court admitted evidence of four prior uncharged incidents involving children as evidence of a common scheme or plan. *Id.* at 885. The similarities in that case, however, were substantial. The defendant: (1) told several of the children not to tell anyone, (2) always committed the acts in a place or in a way that would not have been noticed, (3) committed the acts on children with whom he had easy access, (4) gained the children's trust before acting, often using popsicles or other treats, (5) always chose victims whose ages ranged from 5 to 7, (6) touched the girls involved both under and outside of their clothing, and (7) committed sexual acts more than once with most of the female victims. *Id.* at 889.

Not surprisingly, the trial judge in Kennealy found all of the charged and uncharged conduct "remarkably similar," a decision that was upheld on appeal. *Id.* The same cannot be said in Fleming's case. The similarities and significant differences between the girls' allegations – including the type and frequency of abuse and Fleming's response to resistance – do not evince sufficiently similar acts or circumstances to satisfy the common scheme or plan exception to ER 404(b).

The trial court also cited Doe v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints, 141 Wn. App. 407, 167 P.3d 1193 (2007), review denied, 164 Wn.2d 1009 (2008). 4RP 12-13. Doe, a civil case, stemmed from the church's failure to report and prevent a member, Peter Taylor, from molesting his two stepdaughters. Doe, 141 Wn. App. at 414-415. The trial court admitted evidence – under the common scheme or plan exception to ER 404(b) – that Taylor also had molested his biological daughter. Id. at 433-434. This Court affirmed that decision, noting that all three girls were under 10 when the abuse started, all abuse took place in the family home, and in every case Taylor masturbated while lying on them or sitting next to them. Id. at 435.

In Doe, and unlike Fleming's case, there were no significant differences in the allegations, only similarities. Again, differences in the alleged sex acts, the number of occurrences, and Fleming's supposed responses to his daughter's attempts to stop the abuse distinguish his situation from that in Doe. The trial court abused its discretion when it found otherwise.

b. The Evidence was More Prejudicial than Probative.

Prior bad act evidence should be admitted only where “its probative value clearly outweighs its prejudicial effect.” Lough, 125 Wn.2d at 862. The trial court erred when it found that K.F.'s testimony

met this standard. 4RP 13-14.

The prejudice potential of prior bad acts evidence is at its highest in sex abuse cases. This is so because, as the Washington Supreme Court has recognized, “Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise.” State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982) (citation omitted).

That is the prejudice here. Having heard that Fleming had previously attempted sexual contact with a daughter, jurors were far more likely to convict. The prosecutor recognized this, repeatedly reminding jurors that K.F.’s testimony corroborated T.F.’s allegations. 10RP 28 (“He had tried something similar with his first daughter”); 10RP 40-42 (arguing corroborative value of K.F.); 10RP 65-66 (“he tried this very same thing with [K.F.]”).

Of course, the prejudicial impact of K.F.’s testimony must be weighed against the probative value of her testimony. The Supreme Court’s decision in Lough is instructive on this point.

In Lough, the defendant was charged with drugging and then raping his victim while she was unconscious. The State attempted to introduce evidence from four other woman that over a ten-year period,

Lough had raped them in a similar manner. The trial court allowed the women's testimony as evidence of a common scheme or plan to drug and rape women. *Lough*, 125 Wn.2d at 849-50.

On appeal, the Supreme Court considered three factors in deciding the probative value of the testimony clearly outweighed its prejudicial effect. These factors were discussed in *State v. Krause*, 82 Wn. App. 688, 919 P.2d 123 (1996), review denied, 131 Wn.2d 1007 (1997).

First, the court found the evidence highly probative because it showed the same design or plan on a number of occasions. *Krause*, 82 Wn. App. at 696. That is not true in Fleming's case. As discussed above, even taking T.F. and K.F.'s testimony as true, there were significant differences in the acts. Moreover, in *Lough*, there were five victims testifying to substantially similar acts, making the existence of a common scheme or plan significantly more likely. Here, there were only two alleged victims.

The second factor identified by the *Lough* court was the need for the ER 404(b) testimony because the victim was drugged during the attack and not entirely capable of testifying to the defendant's actions. Only by hearing from all of the witnesses would a clear picture of events emerge. *Krause*, 82 Wn. App. at 696. Again, this is not true in Fleming's case. T.F. was able to provide detailed testimony. She was at least 12 and as old

as 14 at the time of the charged conduct and, therefore, did not experience problems often associated with younger victims, such as an inability to recall events or fear of testifying in court. Compare Kennealy, 151 Wn. App. at 890 (noting young age of alleged victims when they testified supported admission). The State also had its physical evidence. Although that DNA evidence was challenged, jurors were not left simply to depend on T.F.'s allegations in assessing Fleming's guilt.

The third factor identified in Lough was the repeated use of a limiting instruction. Krause, 82 Wn. App. at 696. While such an instruction undoubtedly minimizes prejudice to some extent, “[c]ourts have often held that the inference of predisposition is too prejudicial and too powerful to be contained by a limiting instruction.” Krause, 82 Wn. App. at 696 (citing cases). It was too prejudicial here. While the acts were not sufficiently similar to constitute a common scheme or plan, they were sufficiently similar to portray Fleming as a person of “abnormal bent” and bad character. No limiting instruction could undo the prejudice of K.F.'s testimony.

Where prior misconduct evidence is erroneously admitted, reversal is required if “within reasonable probabilities . . . the outcome of the trial would have been different if the error had not occurred.” Carleton, 82 Wn. App. at 686. Without K.F.'s allegations, the jury would have been left to

consider T.F.'s sometimes-inconsistent testimony and the prosecution's disputed paternity statistics. K.F.'s damaging testimony had a significant impact on the jury's evaluation of the charges. Her testimony made it impossible for Fleming to receive a fair trial.

2. THE TRIAL COURT ERRED WHEN IT ADMITTED EVIDENCE OF PRIOR SEXUAL MISCONDUCT UNDER RCW 10.58.090.³

As previously noted, jurors were instructed they could only consider K.F.'s testimony to determine "whether or not the defendant had a common scheme or plan to initiate sexual contact with his daughters" CP 128. Therefore, technically, jurors could not consider the evidence more generally under RCW 10.58.090 in deciding Fleming's guilt. Nonetheless, the proper admission of K.F.'s testimony under the statute could render harmless any error under ER 404(b). Therefore, a challenge to the statutory ruling is still necessary.

For each of the reasons discussed below, the trial court erred when it admitted evidence of Fleming's sexual contact with K.F. under RCW 10.58.090.

³ This Court has upheld the constitutionality of RCW 10.58.090. See *State v. Scherner*, 153 Wn. App. 621, 225 P.3d 248 (2009), review granted, 168 Wn.2d 1036 (June 1, 2010); *State v. Gresham*, 153 Wn. App. 659, 223 P.3d 1194 (2009), review granted, 168 Wn.2d 1036 (June 1, 2010). Because the Supreme Court has now granted review of these decisions, their continuing validity is in doubt.

a. Evidence Of Fleming's Prior Crime Was Not Admissible Under RCW 10.58.090.

RCW 10.58.090 provides:

In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403.

RCW 10.58.090(1). Under the statute, in evaluating whether to exclude evidence of a prior sex offense, the trial judge is to consider the following factors:

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

RCW 10.58.090(6). These factors weigh against admission of K.F.'s testimony.

First, as previously discussed, there were significant differences between the girls' allegations as to acts, frequency, age at initial contact, and Fleming's response to resistance. This weighs against admission. Second,

Fleming's contact with K.F. was alleged to have occurred shortly before the alleged contact began with T.F. Third, regarding the frequency of the acts, K.F. testified that it happened only one time. This weighs against admission. Fourth, there were no intervening circumstances. Fifth, the evidence was not necessary to the State's case. T.F. was old enough to competently convey her allegations against her father on the witness stand. The prosecution also had its DNA evidence and statistical analysis. The prior incident involving K.F. was not necessary to prove the State's case. This weighs against admission. Sixth, Fleming's alleged prior conduct involving K.F. did not result in a criminal conviction. This also weighs against admission.

Factor (g) of this statute, which mirrors the language of ER 403,⁴ should be interpreted as incorporating a rigorous balancing of probative value against the danger of unfair prejudice, as has always been done under ER 403. See generally, Blythe Chandler, Balancing Interests Under Washington's Statute Governing the Admissibility of Extraneous Sex-Offense Evidence, 84 Wash. L. Rev. 259 (2009). In the process of passing substitute senate bill 6933, which became RCW 10.58.090, Washington's

⁴ ER 403 provides that relevant evidence "may be excluded if its 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

legislature emphasized the importance of Rule 403 balancing. *Id.* at 273. Here, the minimal relevance to this case was substantially outweighed by the danger of unfair prejudice and risk of jury confusion.

The enactment of RCW 10.58.090 did not alter the inherently inflammatory nature of evidence of prior sex offenses. Evidence causes unfair prejudice when it is more likely to arouse an emotional response than a rational decision by the jury. *City of Auburn v. Hedlund*, 165 Wn. 2d 645, 654, 201 P.3d 315 (2009) (citing *State v. Cronin*, 142 Wn.2d 568, 584, 14 P.3d 752 (2000)). Substantial prejudice is inherent in evidence of prior crimes. *Lough*, 125 Wn.2d at 863. Sexual misconduct in particular must be examined very carefully in light of its great potential for prejudice. *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982). Evidence that a defendant previously committed crimes of a similar nature as the current charge is particularly likely to unfairly prejudice a defendant: there is no more insidious and dangerous testimony than that which attempts to convict a defendant by producing evidence of crimes other than the one for which he is on trial. *State v. Smith*, 103 Wash. 267, 268, 174 P. 9 (1918).

Substantial probative value is needed to outweigh the prejudice of such evidence. *DeVincentis*, 150 Wn.2d at 23. Here, the minimal relevance of K.F.'s testimony cannot begin to outweigh the danger of unfair prejudice

cumulative evidence.”

to Fleming's defense.

In admitting the evidence concerning Fleming, the trial court – as it did under ER 404(b) – found that T.F.'s and K.F.'s allegations were similar. 5RP 62-63. In doing so, the court failed to note the considerable differences in their allegations. The court also downplayed the fact there had been only one alleged incident with K.F., finding this was attributable to K.F. removing herself from the home by moving away. 5RP 63. Of course, K.F. later moved back. 6RP 102-104. Yet, there were no additional allegations of abuse toward her, thereby undermining the court's analysis.

In the end, most of the criteria under RCW 10.58.090 militated against admission of the evidence and, importantly, any probative value was far outweighed by the unfair prejudicial impact of this evidence. K.F.'s testimony should not have been admitted under RCW 10.58.090.

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

Article I, § 10 of the United States Constitution and article 1, § 23 of the Washington Constitution, the ex post facto clauses, forbid the State from enacting any law that imposes punishment for an act that was not punishable when committed, increases the quantum of punishment, or alters the rules of evidence to permit conviction based on less or different

evidence than the law required at the time of the offense. Ludvigsen v. City of Seattle, 162 Wn.2d 660, 668-69, 174 P.3d 43 (2007) (citing Calder v. Bull, 3 U.S. (3 Dall.) 386, 1 L. Ed. 648 (1798)).

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

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

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

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

Collins, 497 U.S. at 45. RCW 10.58.090 does not merely define the procedure by which a case is adjudicated but rather redefines the bounds of relevancy for sex offenses. Thus, the Legislature appropriately recognized the substantive reach of the statute.

Second, the statute applies to events that occurred before its enactment. The Legislature specifically stated the statute should apply to any case tried after its enactment without concern for when the alleged offense may have occurred. Laws 2008, ch. 90 § 3. Fleming’s alleged offenses in counts 1 and 2 occurred between August 30, 2006 and August 29, 2008, most of which is well before the effective date of the statute, June 12, 2008. See CP 121-122. Thus the statute applies retrospectively.

Finally, RCW 10.58.090 substantially disadvantages Fleming. RCW 10.58.090 allows evidence that would not have been admissible under ER 404(b) to be admitted for any purpose whatsoever.

Washington courts have long excluded this class of evidence precisely because that sort of conclusory logic was deemed incompetent, irrelevant, and greatly prejudicial. See State v. Bokien, 14 Wash. 403, 414, 44 P. 889 (1896). This incompetent, irrelevant, and greatly prejudicial

evidence was used to bolster the credibility of the complaining witnesses. Under the test enunciated in *Hennings*, application of RCW 10.58.090 to offenses committed prior to its enactment violates the ex post facto clause of the United States Constitution.

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

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

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

626 (1966).

By permitting evidence of prior sex offenses for the purpose of showing criminal propensity, RCW 10.58.090 falls into a third category somewhere in between the laws directly reducing the amount of proof and those that merely expand the permissible universe of witnesses. On the one hand, RCW 10.58.090 does expand the permissible universe of evidence. But it does more than that. It permits a previously forbidden inference of guilt based on criminal propensity.

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

This Court should hold RCW 10.58.090 violates the ex post facto clauses because this change tilts the playing field in favor of the State. See City of Seattle v. Ludvigsen, 162 Wn.2d 660, 671, 174 P.3d 43 (2007). The "different evidence" prong of the Calder standard was also at issue in Ludvigsen. Ludvigsen moved to suppress his breath test because at the time of his offense, regulations required the breath-testing machine to contain a

thermometer certified to national standards. *Id.* at 664-65. After his offense, the regulations were amended to no longer require the national certification. *Id.* The court held this change in the rules governing admission of breath tests violated the ex post facto clause because it permitted conviction on less evidence than was previously required. *Ludvigsen*, 162 Wn.2d at 674.

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

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

Article I, section 10 of the United States Constitution provides, "No State shall . . . pass any Bill of Attainder, ex post facto law, or Law impairing the Obligation of Contracts." The Washington Constitution provides: "[n]o bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed." Const. art. I, § 23.

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

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

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

While the fourth category identified in Calder seems to clearly bar retroactive changes in the type of evidence that is admissible, the Supreme Court has concluded, "[o]rdinary rules of evidence do not implicate ex post facto concerns because they do not alter the standard of proof." Carmell,

529 U.S. at 513. However, the Court had previously distinguished evidentiary laws that applied equally to the State and defendants and those that did not. Thompson v. Missouri, 171 U.S. 380, 387-88, 18 S. Ct. 922, 43 L. Ed. 204 (1898). The Thompson Court held a law permitting the admission of a defendant's letters to his wife for the purposes of comparing them to letters admitted into evidence was not an ex post facto violation because the change in law:

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

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

The Washington clause is textually different from the federal clause and mirrors the provisions of the Oregon and Indiana Constitutions. Compare, Const. art. I, § 23; Or. Const. Art. I, § 21; Ind. Const. art. I, § 24. Indeed, the Declaration of Rights, of which Article I, section 23 is a part, was largely based upon W. Lair Hill's proposed constitution and its model,

the Oregon Constitution. R. Utter and H. Spitzer, The Washington State Constitution, A Reference Guide, 9 (2002). Because it is borrowed from the Oregon Constitution, which in turn took its ex post facto language from the Indiana Constitution, it is useful to look to how the courts of those states have interpreted the relevant provisions of their constitutions. Biggs v. Dep't of Retirement, 28 Wn. App. 257, 259, 622 P. 2d 1301 (turning to interpretations of the Indiana Constitution to interpret similar, although not identical, provisions of Washington Constitution), review denied, 95 Wn.2d 1019 (1981).

Applying an analysis similar to that set forth in State v. Gunwall,⁵ the Oregon Supreme Court determined the ex post facto protections of the Oregon Constitution are broader than the protections the United States Supreme Court has recognized in the federal Constitution. State v. Fugate,

⁵ State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986). Specifically, when determining whether a provision of the Oregon Constitution provides greater protection than the federal constitution, Oregon courts consider the provision's specific wording, the case law surrounding it, and the historical circumstances that led to its creation. Billings v. Gates, 323 Or. 167, 173-74, 916 P.2d 291 (1996); Priest v. Pearce, 314 Or. 411, 415-16, 840 P.2d 65, 67- 69 (1992). By comparison, Gunwall directs a court to consider six nonexclusive factors: the textual language of the state constitution; significant differences in the texts of parallel provisions of the federal and state constitutions; state constitutional and common law history; preexisting state law; differences in structure between the federal and state constitutions; and whether the matter is of particular state interest or local concern. Gunwall, 106 Wn.2d at 61-62.

332 Or. 195, 213, 26 P.3d 802, 813 (2001). Specifically, the Oregon court has interpreted the mirror provisions of the Oregon Constitution's ex post facto clause to prohibit retroactive application of laws that alter the rules of evidence in a manner favoring only the prosecution. *Id.* *Eugate* took pains to distinguish that result from changes in evidentiary rules that apply equally to both the defense and the prosecution, finding that sort of law of general application was never viewed as resulting in the evil to which the ex post facto clause is addressed. *Id.*

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

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

Id. at 211 (quoting *Strong v. The State*, 1 Blackf. 193, 196 (1822)). Because that interpretation of Indiana's Constitution was available to the framers of the Oregon Constitution when they chose to adopt the language of Indiana's ex post facto clause, the Oregon court interpreted the Oregon provisions as

“forbid[ding] ex post facto laws of the kind that fall within the fourth category in Strong and Calder, viz., laws that alter the rules of evidence in a one-sided way that makes conviction of the defendant more likely.” Eugate, 332 Or. at 213.

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

In fact, two years after Washington became a state, the Supreme Court cited to Calder as providing “a comprehensive and correct definition of what constitutes an ex post facto law.” Lybarger v. State, 2 Wash. 552,

557, 27 P. 449 (1891). Applying an analysis that resembles that of Strong, Lybarger concluded the statute did not violate ex post facto provisions, in part, because “[i]t does not change the rules of evidence to make conviction more easy.” 2 Wash. at 560. Lybarger applied precisely the analysis that the Oregon Supreme Court applied in Eugate.

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

The framers of the Washington Constitution adopted language that differs from the language of the federal Constitution, language that had been interpreted 67 years prior to its inclusion in the Washington Constitution to bar retroactive legislation altering the rules of evidence in a

one-sided fashion. By doing so, the framers intended to apply that same protection in Washington.

d. The Enactment Of RCW 10.58.090 Violates The Separation Of Powers Doctrines.

The statute is also an unconstitutional intrusion upon the Supreme Court's rule-making authority by the Legislature. The statute changes the very nature of a trial for a defendant charged with a sex offense by allowing the State to generate otherwise inadmissible evidence of prior sex offenses. This amounts to a violation of the Court's inherent authority to govern court procedures.

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

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

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

branches); Carrick, 125 Wn.2d at 134-35 (“the very division of our government into different branches has been presumed throughout our state’s history to give rise to a vital separation of powers doctrine”).

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

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

Article 4, section 1 of the Washington Constitution vests the Washington Supreme Court with the sole authority to govern court procedures. City of Fircrest v. Jensen, 158 Wn.2d 384, 394, 143 P.3d 776 (2006), cert. denied, 549 U.S. 1254 (2007); State v. Fields, 85 Wn.2d 126, 129, 530 P.2d 284 (1975). “[T]here is excellent authority from an historical as well as legal standpoint that the making of rules governing procedure and practice in courts is not at all legislative, but purely a judicial, function.”

State ex rel. Foster-Wyman Lumber Co. v. Superior Court for King County, 148 Wash. 1, 4, 267 P. 770 (1928).

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

Given this shared power, the Court moved on to consider which branch controls if the two are in conflict. The first principle is that “[w]hen a court rule and a statute conflict, the court will attempt to harmonize them, giving effect to both.” Id. However, “[w]hen there is an irreconcilable conflict between a court rule and a statute concerning a matter related to the court’s inherent power, the court rule will prevail.” Id. Thus, when a court rule and a statute conflict, the nature of the right at issue determines which one controls. State v. W.W., 76 Wn. App. 754, 758, 887 P.2d 914 (1995). If the right is substantive, then the statute prevails; if it is procedural, then the court rule prevails. Id.

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

The legislative notes following RCW 10.58.090 claim the act is substantive. Laws 2008, ch. 90, §1. If that is the case, then as argued above,

the retroactive application of that substantive change violates the Ex Post Facto provisions of the federal and state constitutions. In the alternative, if defining the bounds of the admissibility of evidence and the permissible inferences to be drawn from that evidence is a procedural function lying at the heart of the judicial power, then the Legislature's effort to alter the rules of admissibility violates the Separation of Powers doctrine.

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

If this Court determines that application did not violate ex post facto prohibitions because it is procedural, then the Legislature did not have authority to enact it, and the statute is void. Jensen, 158 Wn.2d at 394; State v. Thorne, 129 Wn.2d 736, 762, 921 P.2d 514 (1996) ("Legislation which violates the separation of power doctrine is void."). Fleming therefore

requests this Court reverse his conviction.

e. RCW 10.58.090 Is An Unconstitutional Violation Of The Washington Constitution's Fair Trial Guarantee.

The Washington right to jury trial incorporates broader protection than its federal counterpart because it codifies the understanding of state rights at the time. City of Pasco v. Mace, 98 Wn.2d 87, 96, 653 P.2d 618 (1982).

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

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

The understanding that a fair trial must be free from propensity evidence predates the federal Constitution: "The rule against using character evidence to show behavior in conformance therewith, or propensity, is one such historically grounded rule of evidence. It has persisted since at least 1684 to the present." McKinney v. Rees, 993 F.2d

1378, 1381 (9th Cir.), cert. denied, 510 U.S. 1020 (1993). By transgressing this fundamental aspect of a constitutionally guaranteed fair trial, RCW 10.58.090 violates Fleming's state constitutional fair trial protections

3. THE TRIAL COURT DENIED FLEMING HIS RIGHT TO PRESENT A DEFENSE WHEN IT PRECLUDED EVIDENCE FOR WHICH THE PROSECUTION HAD OPENED THE DOOR.

The Sixth and Fourteenth Amendments to the United States Constitution, and article 1, § 22 of the Washington Constitution, guarantee the right to trial by jury and to defend against the State's allegations. These constitutional guarantees provide persons accused of crimes the right to present a complete defense. State v. Cheatam, 150 Wn.2d 626, 648, 81 P.3d 830 (2003) (citing Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)).

"The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." State v. Thomas, 150 Wn.2d 821, 857, 83 P.3d 970 (2004). The right to present a defense is a fundamental element of due process. Chambers v. Mississippi, 410 U.S. 284, 294, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973);

Washington v. Texas, 388 U.S. 14, 19, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967); State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976). Absent a valid justification, excluding relevant defense evidence denies the right to present a defense because it "deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." Crane v. Kentucky, 476 U.S. at 689-690.

The Washington Supreme Court's decisions in State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983), and State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002), define the expanse of an accused's right to present evidence in his defense. The accused is allowed to present even minimally relevant evidence unless the State can demonstrate a compelling interest for exclusion. Darden, 145 Wn.2d at 612.

Once defense evidence is shown to be even minimally relevant, the burden shifts to the State to show a compelling interest in excluding it, meaning the evidence would disrupt the fairness of the fact-finding process. If the State cannot do so, the evidence must be admitted. Darden, 145 Wn.2d at 622; Hudlow, 99 Wn.2d at 15-16; see also State v. Reed, 101 Wn. App. 704, 715, 6 P.3d 43 (2000) ("Evidence relevant to the defense of an accused will seldom be excluded, even in the face of a compelling state interest."). For evidence with high probative value, "it appears no state interest can be compelling enough to preclude its

introduction consistent with the Sixth Amendment and Const. art. 1, § 22.”
State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting
Hudlow, 99 Wn.2d at 16).

Notably, under the “open door” doctrine, otherwise inadmissible evidence may become relevant and admissible when the opposing party raises an issue. State v. Berg, 147 Wn. App. 923, 939, 198 P.3d 529 (2008); see also State v. Brush, 32 Wn. App. 445, 451, 648 P.2d 897 (1982) (open door doctrine trumps evidentiary rules), review denied, 98 Wn.2d 1017 (1983). The doctrine preserves the fairness of proceedings by preventing a party from raising a subject to gain an advantage and then barring the other party from further inquiry. State v. Avendano-Lopez, 79 Wn. App. 706, 714, 904 P.2d 324 (1995) (citing State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)), review denied, 129 Wn.2d 1007 (1996). A trial court’s decision under the doctrine is reviewed for abuse of discretion. State v. Ortega, 134 Wn. App. 617, 626, 142 P.3d 175 (2006), review denied, 160 Wn.2d 1016 (2007).

During Champagne Fleming’s testimony, the prosecutor elicited the fact that even after T.F.’s allegations and after charges had been filed, Champagne had contact with her husband. She visited him in jail prior to the period he was able to make bail. 4RP 137-138. She spoke to him on the telephone. 4RP 138-139. Because there was a protection order

prohibiting Fleming from coming to the residence, Champagne met him at various public locations and at a friend's home in Puyallup. 4RP 140-143.

Even when Fleming was taken back into custody, Champagne continued to speak with him on the telephone more than once a day. She also put money in his jail account. 4RP 144-146.

The prosecutor then contrasted this period of time with what happened after Champagne learned of the DNA test results:

Q: Was there a point in time where you decided you weren't going to continue to have contact with the Defendant? That you weren't going to speak to him on the phone or go visit him in person?

A: Yes.

Q: Do you remember about when that was?

A: Yes.

Q: When was that?

A: When the DNA results came back.

DEFENSE COUNSEL: What was that? I'm sorry.

COURT: When the DNA test results came back.

4RP 148. A bit later, the prosecutor asked, "Was it about the time that you found out about the results that you decided to move out of the area?"

Champagne answered, "yes." 4RP 149.

During defense counsel's cross-examination of Champagne

Fleming, and outside the jury's presence, counsel requested permission to ask Champagne why the DNA results caused her to break contact with her husband and move to Michigan. Counsel made an offer of proof that Champagne did not believe her daughter's allegations prior to the test results. 5RP 25-26.

The prosecutor objected because a witness is not allowed to express an opinion on another witness's credibility. 5RP 26. The court called it "a close question," but deferred a ruling until it had seen some authority on the issue. 5RP 26-27. Later, however, the court ruled defense counsel could not address the subject with Champagne, reasoning it would be an improper opinion on T.F.'s credibility. 5RP 120-121. This was error.

Generally, one witness may not express an opinion on the credibility of another. The jury "is the sole judge of the weight of the testimony and of the credibility of the witnesses." State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995) (quoting State v. Crofts, 22 Wash. 245, 250-251, 60 P. 403 (1900)). "What one witness thinks of the credibility of another witness' testimony is simply irrelevant." State v. Wright, 76 Wn. App. 811, 821-822, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995). And it is misconduct to ask one witness whether another is telling the truth. State v. Jerrels, 83 Wn. App. 503, 507-508,

925 P.2d 209 (1996); see also ER 609 (limiting evidence of witness credibility).

Here, however, the prosecution opened to door to such evidence. The prosecutor purposefully elicited testimony from Champagne that she continued to have a relationship with her husband up until the point at which DNA results were obtained. The unmistakable message was that Champagne believed those results established that T.F. was credible and had told the truth about being raped. It was not fair to stop the inquiry at that point. The defense challenged the DNA statistical evidence and should have been permitted to establish that without that evidence, Champagne – perhaps in the best position to assess T.F.’s credibility – did not believe her daughter’s claims.

Because the State cannot demonstrate this error was harmless beyond a reasonable doubt, Fleming is entitled to a new trial.

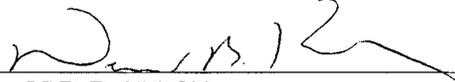
D. CONCLUSION

For all of the foregoing reasons, Mr. Fleming respectfully asks this Court to reverse his convictions and remand for a new and fair trial.

DATED this 28th day of September, 2011.

Respectfully submitted,

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