

63062-8

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NO. 63062-8-1

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT L. KAIL,

Appellant.

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BRIEF OF RESPONDENT

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I. ISSUES

1. The victim made a journal entry that she had a plan to get her parents' attention. The victim testified that she did not have a plan, but wanted her parents to think she did. The defendant presented no evidence that the journal entry related to the charged child molestation. Did the court abuse its discretion by not admitting the evidence about the entry?

2. The State moved to admit evidence that the defendant had molested his step-daughter some 15 years before the charged molestation of his step-granddaughter. The court performed the balancing tests mandated by ER 404(b) and RCW 10.58.090 and found the evidence was admissible under both the court rule and the statute. Did the court abuse its discretion in admitting the evidence?

3. Has the defendant shown beyond a reasonable doubt that RCW 10.58.090 is an unconstitutional legislative intrusion on the Supreme Court's authority?

4. Has the defendant shown beyond a reasonable doubt that the due process clause of the Washington Constitution bars introducing evidence "propensity" evidence where the probative

value is not substantially outweighed by the danger of unfair prejudice?

II. STATEMENT OF THE CASE

A. FACTS OF THE CRIMES.

The defendant is S.D.'s (dob. 8/27/92) step-mother's father. S.D. is the victim of all four counts of third degree child molestation.

In June of 2007, the defendant moved to Washington from Alaska. During the 2007-08 school year, on four different occasions, defendant had his step-granddaughter masturbate him until he ejaculated. Three of the molestations took place in or near S.D.'s home. The fourth took place in a barn near defendant's home. In each instance, defendant was wearing sweat pants which he pulled down enough for his penis to be exposed. Defendant put lubricant on S.D.'s hand. 12/16 RP 75-78, 79-81, 81-82, 84, 87.

Before the first incident, defendant told his step-granddaughter that the rumors she had heard about him molesting his step-daughter were true. 12/16 RP 73, 122. He also told her he wanted to "rub [her] clit." 12/16 RP 73. On two occasions, defendant also rubbed his step-granddaughter's butt – once he put his hand down her pants and the second time he put his hand up under her nightgown. 12/16 RP 74. After each charged

molestation, defendant gave his step-granddaughter prescription drugs, nose rings, or candy. 12/16 RP 87. Defendant told his step-granddaughter not to tell anyone, or she “would lose a grandpa.” 12/16 RP 85.

B. THE OFFER OF THE JOURNAL ENTRY.

During cross-examination, after eliciting testimony that S.D. was doing things like sneaking out of the house, performing poorly in school, and stealing from her mother, defendant tried to ask S.D. about an entry in her journal that read, “I feel neglected so I have a plan so I can get my parents’ attention, and I might get in trouble for being stupid, so if that’s what I got to do, then I will.” 12/16 RP 125. The State asked to discuss the journal entry’s admissibility out of the presence of the jury.

The Court asked defendant “What’s the plan?” Defendant replied “I don’t know what the plan is, but I think it could have been the plan to tell her mother that her grandfather was abusing her, which she does about a week after this is written.” 12/16 RP 126.

The court then asked S.D. what her plan was. S.D. responded:

I don’t remember what my plan was, but my intention was that I wrote this, and then I left it out so my parents would read it, and then – in hopes that they

would pay attention to me so I wouldn't have to do something stupid.

12/16 RP 132.

S.D. then agreed with the statement, "So what you're telling me is, you don't remember having a specific plan, but you wanted them to think you did?" 12/16 RP 132.

The court ruled:

The issue arose when there was reference to a passage in [S.D.'s] journal that was what I just read in reference to her having some sort of plan. The objection was made that that's not relevant. I had a question about whether it was relevant.

Now that I've heard the answer from the witness that basically she had no plan but this was simply a ploy to get her parents to do something and maybe lighten up on her, I see no relevance, and I'm going to sustain the objection.

12/16 RP 133.

Despite the court not admitting this evidence, defendant referred to it in his closing argument. Defendant said:

When we talked about the journal that she had, she said, Oh, that's just a journal that I leave around so my parents will read it and feel bad for me. And the line that she read from the journal was – that I have a plan so I can get my parents' attention. I might get in trouble for being stupid, but if that's what I've got to do, then I will.

12/18 299-300.

The court overruled the State's objection to this argument.

12/18 RP 300.

C. THE ADMISSIBILITY OF DEFENDANT'S MOLESTATION OF HIS STEP-DAUGHTER 15 YEARS BEFORE THE CHARGED CRIMES.

Before trial, the State moved to admit testimony by defendant's step-daughter that he had molested her some 15 years earlier. The State made an offer of proof in its Trial Memorandum that the step-daughter's testimony was admissible under ER 404(b) because it was relevant to prove a common plan or scheme. 2 CP 58. The similarities pointed out by the State were:

In this case, the degree of similarity between the defendant's prior conduct and the charged offense is substantial: T.J. was the defendant's step-daughter. S.D. was the defendant's step-granddaughter. The abuse of T.J. occurred from the ages of 6 or 7 to 13 years old, with "hand jobs" beginning when she was 10. The abuse of S.D. began when she was 15 years old, shortly after the defendant entered into her life. Both girls were in their homes where the defendant was also staying. S.D. reported that the defendant said he wanted to rub her pussy. T.J. reported that the defendant repeatedly rubbed her vagina. Both girls reported that the defendant approached them when their parents were not home. Both girls reported that the defendant grabbed their hands and showed them what to do. Both girls reported that the defendant usually wore sweat pants and would pull the front down just enough so that his penis would stick out. Both girls reported that the defendant ejaculated. Both girls reported that the defendant offered them money in return for sexual favors. S.D.

reported that the defendant told her to look under her pillow for candy after she gave him a hand job. T.J. reported that the defendant suggested she buy candy with the money he gave her for a blow job. Both girls reported that the defendant was drinking during the incidents. Both girls reported that the defendant told them not to tell anyone and threatened them in some way if they did. S.D. reported that the defendant stated that he would kill himself or go away. T.J. reported that the defendant stated that he would kill her and that he would run away. Both girls reported the defendant's attempt to escalate the sexual activity by implying that he would force them if necessary. He told S.D. that if he wanted S.D. to give him a blow job she would; and he told T.J. that they would have sex the following week if she liked it or not.

2 CP 59.¹

The State also argued that the testimony was admissible under RCW 10.58.090(4). The State examined the factors the statute requires the court to consider.² 2 CP 67-72. The State

¹ The State also provided the court with a CD of a June 10, 2008, police interview of the step-daughter. The CD was not made an exhibit and is not in the court file.

² When evaluating whether evidence of the defendant's commission of another sexual offense or offenses should be excluded pursuant to Evidence Rule 403, the trial judge shall consider the following factors:

- (a) The similarity of the prior acts to the acts charged;
- (b) The closeness in time of the prior acts to the acts charged;
- (c) The frequency of the prior acts;

concluded that after examining those factors, the evidence was admissible. 2 CP 73.

Defendant submitted a memorandum opposing the step-daughter's testimony. 12/15 RP 3. The memorandum is not in the court file. Orally, defendant argued that the similarities were not sufficient to show a common plan, and pointed out the differences he saw to the court. 12/15 RP 9-10. Defendant then argued that the evidence did not prove by a preponderance that the molestation of his step-daughter even happened, since the State declined to prosecute the allegations. 12/15 RP 11.

Defendant concluded by arguing that RCW 10.58.090 is unconstitutional because (1) "it violates the separation of powers

(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).

arguments,” (2) “Applying this [statute] creates an unconstitutional ex post facto law[,]” (3) “violates equal protection[,]” and (4) “it violates the subject and title rule.” 12/15 RP 13.

The court reserved ruling on the ex post facto and “single subject” issues. It then ruled that “the prior bad acts have been proven by the requisite preponderance standard.” 12/15 RP 15.

The court found the following similarities between the charged and uncharged acts: (1) the victims were about the same age, (2) the victims were the same sex, (3) both victims had familial relationships with defendant, (4) all incidents occurred when the parents were not home, (5) in each instance defendant showed the victim what he wanted done, (6) defendant advised both victims not to tell, and (7) defendant told both victims he would escalate the sexual contact if he wanted, regardless of the victims’ consent, (8) defendant offered both victims payment for the sexual contact. 12/15 RP 15-17. The court ruled, “there are sufficient similarities that I’m persuaded constitute the substantial similarities between the two offenses and the two young women that allow admission of the prior bad acts under Evidence Rule 404(b).” 12/15 RP 17.

The court then analyzed the evidence using the factors set out in RCW 10.58.090. The court found the events were similar,

they were not close in time, the incidents “occurred over a noticeable period of time, fairly regularly and repeatedly[,]” it had no guidance on what “intervening circumstances” meant, the evidence was necessary, the prior acts were not criminal convictions, “the probative value substantially outweighs the danger of any unfair prejudice[,]” and that referring to the prior acts “as a way of inducing or encouraging acceptance of” the alleged crimes was a fact or circumstance favoring admission of the acts. The court found the prior acts were admissible under RCW 10.58.090. 12/15 RP 17-21.

The court also concluded that RCW 10.58.090 did not violate the separation of powers or violate the rule-making authority of the Supreme Court. 12/15 RP 17. The court indicated it would give a limiting instruction if asked. 12/15 RP 21. The court later instructed the jury:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of Terrie Jo Gorena’s testimony and may be considered by you only for the purpose of a common scheme or plan. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

1 CP 41.

Defendant did not object to that instruction or request any other instruction. 12/18 RP 282.

III. ARGUMENT

A. INTRODUCTION.

Defendant asserts that the court abused its discretion by not allowing him to cross-examine the victim about a cryptic journal entry she made about two weeks before she disclosed that defendant had molested her. Defendant failed to present any evidence that the entry referred to her molestation by her step-grandfather. The court properly found the evidence was not relevant.

Defendant challenges the admission of evidence of his prior molestation of his step-daughter pursuant to ER 404(b) and RCW 10.58.090 on the basis that its admission violated both the rule and the statute. The court followed the criteria set out by the Supreme Court and found the evidence was admissible under ER 404(b) since it proved a common scheme or plan. There was no abuse of discretion.

The court then considered the factors set out in RCW 10.58.090 and determined the evidence was also admissible under the statute. There was no abuse of discretion.

Defendant asserts that RCW 10.58.090 is unconstitutional both because it irreconcilably conflicts with ER 404(b), and because

it may allow a defendant to be convicted on propensity evidence. The defendant fails to sustain his burden to prove RCW 10.58.090 is unconstitutional on either basis. It does not conflict with the “true test” of ER 404(b), and there is no constitutional prohibition on the introduction of propensity evidence where the probative value is not substantially outweighed by the danger of unfair prejudice.

B. STANDARD OF REVIEW.

1. Admission Of Evidence.

When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

ER 104(b).

In determining whether the Government has introduced sufficient evidence to meet Rule 104(b),³ the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence.

Huddleston v. United States, 485 U.S. 681, 690, 108 S.Ct. 1496, 99

L.Ed.2d 711 (1988).

³ The language of FRE 104(b) is identical to that of ER 104(b).

To admit evidence of other wrongs, the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charges, and (4) weigh the probative value against the prejudicial effect.

State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

“The trial court’s balancing [of probative value against the potential for unfair prejudice] is reviewed for an abuse of discretion.

State v. Lough, 125 Wn.2d 847, 863, 889 P.2d 487 (1995).

“Discretion is abused if it is exercised on untenable grounds or for untenable reasons. Alternatively, the Court considers whether any reasonable judge would rule as the trial judge did.”

Thang, 145 Wn.2d at 642.

2. Challenging The Constitutionality Of A Statute.

The party challenging the constitutionality of the statute bears the burden to prove the statute is unconstitutional beyond a reasonable doubt. State v. Ramos, 149 Wn. App. 266, 270, 202 P.3d 383 (2009).

The reason for this high standard is based on our respect for the legislative branch of government as a co-equal branch of government, which, like the court, is sworn to uphold the constitution. We assume the legislature considered the constitutionality of its enactment and afford some deference to that judgment. Additionally, the Legislature speaks for the people and we are hesitant to strike a duly enacted

statute unless fully convinced, after a searching legal analysis, that the statute violates the constitution.

Island County v. State, 135 Wn.2d 141, 147, 955 P.2d 377 (1998).

C. THE EVIDENCE CONCERNING THE JOURNAL ENTRY WAS NOT RELEVANT.

About two weeks before she first reported defendant had molested her, the victim wrote in her journal “I feel neglected so I have a plan so I can get my parents’ attention, and I might get in trouble for being stupid, so if that’s what I got to do, then I will.” 12/16 RP 125. As he did at trial, defendant asserts that entry was relevant,⁴ regardless of whether the victim actually had a plan or what her plan was. 12/15 RP 126, 128, 133. Brief of Appellant 17-18. Defendant appears to not appreciate that unless the victim actually had a plan, and the plan related to defendant molesting her, the journal entry would not have “any tendency to make the existence of any fact . . . more probable or less probable.” ER 401.

As the court below recognized, the relevance of the journal entry depended on the “fulfillment of a condition of fact.”

⁴ Relevant evidence” means evidence having 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.

Accordingly, ER 104(b)⁵ controls the admissibility of the journal entry.

Resolution of this issue is subject to the legal reasoning in State v. Dixon, 159 Wn.2d 65, 147 P.3d 991 (2006). There, during a conversation about her molestation, N.D., the victim, asked her 16-year old aunt, Ms. Hansen, "what she should do if she had lied about something." Dixon, 159 Wn.2d at 73. The Supreme Court agreed with the trial court:

[T]he relevancy of the defense's proffered impeachment evidence (Hansen's testimony concerning N.D.'s alleged question about lying) was dependent upon the establishment of fact B (that N.D. was referring to lies she had told about the molestation allegations).

Dixon, 159 Wn.2d at 78.

The Supreme Court reviewed the trial court's finding that the defendant failed to establish that the lies referred to molestation under the standard set out in State v. Karpenski, 94 Wn. App. 80, 102, 971 P.2d 553 (1999). The Supreme Court held:

We conclude, as did the trial court, that the defense provided no "evidence . . . sufficient to support . . . the needed fact." Hansen's testimony proved nothing

⁵ When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of fulfillment of the condition. ER 104(b).

more than that N.D. had possibly lied about something. Hansen's speculation remained the only support for the "needed fact" that N.D.'s comments to Hansen pertained to the molestation allegations. . . . Because the defense failed to establish the relevancy of N.D.'s cryptic remark to Hansen, the trial court properly precluded the defense from using Hansen's testimony[.]

Dixon, 159 Wn.2d at 78-79.

Here, the trial court recognized that the journal entry was relevant only if there actually was a plan was "to disclose sexual abuse by her grandfather[.]" 12/16 RP 127. Defendant admitted that he did not know what the plan was. 12/16 RP 126. The victim testified that she did not actually have a plan, but she wanted her parents to think she did. 12/16 RP 132. Defendant offered no proof that any plan existed or related to his sexual abuse of his step-granddaughter.

Defendant asserts that "the diary entry was undeniably relevant, as it supported the defense theory of the case." Brief of Appellant 18. Defendant is wrong, since there was no proof the entry made his abuse of the victim more or less likely. The contention that the entry "supported the defense theory of the case" is nothing but rank speculation.

The court did not abuse its discretion in finding that defendant had not established the factual predicate for finding the journal entry was relevant. This Court should affirm that ruling.

D. EVIDENCE THAT DEFENDANT MOLESTED HIS STEP-DAUGHTER 15 YEARS BEFORE HE MOLESTED HIS STEP-GRANDDAUGHTER WAS ADMISSIBLE UNDER ER 404(B).

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, or absence of mistake or accident.

ER 404(b).

Here, the court found the acts occurred by a preponderance of the evidence, identified proof of a common plan as the purpose for which the evidence was sought to be introduced, determined that the evidence was relevant to prove an element of the crime, and weighed the probative value against the prejudicial effect. 12/15 RP 14-17.⁶ This is the procedure the Supreme Court has proscribed to determine the admissibility of other acts of misconduct. Thang, 145 Wn.2d at 642. "When this analysis is scrupulously applied by the trial court, it effectively prohibits mere

⁶ Defendant does not assign error to any of these findings, thus they are verities before this Court. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

propensity evidence.” State v. DeVincentis, 150 Wn.2d 11, 23, 74 P.3d 119 (2003).

A comparison of the facts here with those in DeVincentis shows that the court properly admitted the evidence of defendant’s prior misconduct. There, to prove sex crimes with children in 1998, the State sought to introduce evidence of sex crimes with children that occurred in 1983. DeVincentis, 150 Wn.2d at 13, 14. The court found that the prior act evidence showed the defendant “had devised a scheme” to lure young girls into his home “so that he could pursue his compulsion to have sexual contact with these . . . prepubescent or pubescent girls.” DeVincentis, 150 Wn.2d at 22.

The similarities the court noted in DeVincentis were the wearing “an unusual piece of clothing[,]” asking for a massage, taking the girls to a secluded spot, and having the girls “masturbate him until climax.” DeVincentis, 150 Wn.2d at 22.

Here, the court found the victims of both sets of acts were about the same age, the same gender, had familial relationships with defendant, the acts occurred when the girls’ parents were not home. Defendant showed both victims “what he wanted them to do.” Defendant made similar threats to both victims. He indicated to both victims he could escalate the sexual contact if he wished

“as if there were no decision-making ability” on the victims’ part. The last similarity was that defendant offered both victims payment of cash in the earlier instances and pills, candy, nose rings, and driving privileges in the charged instances. 12/15 RP 16.

The Supreme Court in DeVincentis found the trial court did not abuse its discretion when it admitted the evidence of other acts of misconduct “because it meticulously applied the law and had tenable grounds and reasons for its decision.” DeVincentis, 150 Wn.2d at 23-24. This Court should make the same finding about the court here.

Defendant argues that the crimes described by his step-daughter were not sufficiently similar to the charged crimes to demonstrate a common scheme or plan. Brief of Appellant 22. Defendant then articulates four dissimilarities: (1) there were 15 years between the events, (2) “the girls were of different ages at the time of the alleged contacts[,]” (3) the step-daughter “alleged manual sexual contact by [defendant] while S.D. did not[,]” and the step-daughter “claimed [defendant] stated he intended to have sexual intercourse with her, while S.D. did not.” Brief of Appellant 22. Defendant does not address the similarities found by the court.

The lapse of time is a consideration, but it is not dispositive. 15 years between the charged acts and the other acts, the same length of time here, did not preclude admission of evidence showing a common scheme or plan in DeVincentis, 150 Wn.2d at 13, 15, accord United States v. Hadley, 948 F.2d 848, 850-51 (9th Cir. 1990) (lapse of 15 years does not preclude admission). One Federal Circuit Court of Appeals has found that a lapse of 30 years does not preclude admission of prior acts. United States v. Meacham, 115 F.3d 1488, 1491 (10th Cir. 1997). The lapse of time here did not preclude admission of the prior molestation.

The court acknowledged that there were dissimilarities, but found “there are sufficient similarities that I’m persuaded constitute the substantial similarities between the two offenses and the two young women that allow the admission of the prior bad acts under Evidence Rule 404(b).” 12/15 RP 17.

Here, the court “meticulously applied the law and had tenable grounds and reasons for its decision.” Like the trial court in DeVincentis, the court below did not abuse its discretion.

E. THE PRIOR ACTS WERE ADMISSIBLE UNDER RCW 10.58.090.

After concluding its analysis under ER 404(b), the court performed the analysis required by RCW 10.58.090. 12/15 RP 17-21. It found that there were substantial similarities, the frequency of the prior acts had been established, there were no intervening circumstances, and the evidence was necessary. The court weighed on the record the probative value against the danger of unfair prejudice, confusion of the issues or misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. 12/15 RP 20-21.

The court found that the time between the charged and uncharged acts was “not fatal to application of the statute . . . in terms of what I understand to be the importance of the closeness in time.” 12/15 RP 18.

The court also found that the prior acts were not convictions, but convictions were not required by the statute before the other acts could be admitted. 12/15 RP 20.

The court ruled the evidence was admissible under RCW 10.58.090. 12/15 RP 21.

Defendant argues that the evidence was not admissible under RCW 10.58.090. He cites the differences between the allegations, the 15 years between the events, the ability of the victim to testify, and the fact that the earlier acts did not result in convictions as reasons RCW 10.58.090 would not allow introduction of the evidence. Brief of Appellant 26.

The similarity of the acts and lapse of time are addressed above. The ability of the victim to testify does not determine whether the evidence the defendant committed other sex offenses is necessary. When the only evidence is the testimony of the victim, and there is no “scientific, forensic, medical, or psychological witness[,]” the prior bad acts evidence may be necessary. “Prior acts evidence need not be absolutely necessary to the prosecutor’s case in order to be introduced; it must simply be helpful or practically necessary.” United States v. LeMay, 260 F.3d 1018, 1029 (9th Cir. 2001) (emphasis in the original).

Here, the only evidence of defendant’s crimes was the testimony of the victim. Defendant attacked the victim’s credibility and argued that she invented the crimes so that she could get out of her living situation. 12/18 RP 302-03. The evidence of

defendant's molestation of his step-daughter was "helpful or practically necessary." LeMay, 260 F.3d at 1029.

The ability of the victim to testify is not one of the considerations set out in RCW 10.58.090. It is not a reason for the court to deny admission of this evidence.

Defendant next argues that the evidence should be excluded because "the prior acts did not result in a criminal conviction." Brief of Appellant 26. This argument ignores the language of the statute. "For purposes of this section, uncharged conduct is included in the definition of 'sex offense.'" RCW 10.58.090(5). In analyzing FRE 413,⁷ the federal counterpart of RCW 10.58.090, the federal circuit

⁷ (a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

courts of appeal have held that a conviction is not required before evidence of prior sexual assault is admissible. Rather, the “similar acts must be established by ‘sufficient evidence to support a finding by the jury that the defendant committed the similar act[.]’” United States v. Enjady, 134 F.3d 1427 (10th Cir. 1998), quoting D. Karp, Evidence of Propensity and Probability in Sex Offense Cases and

(d) For purposes of this rule and Rule 415, “offense of sexual assault” means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved--

(1) any conduct proscribed by chapter 109A of title 18, United States Code;

(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

(3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

FRE 413

Other Cases, 70 Chi-Kent L. Rev. 15, 19 (1994). The fact that defendant was not convicted of his molestation of his step-daughter does not preclude the admission of that evidence.

Defendant last argues that because of his analysis of other factors set out in RCW 10.58.090, “the probative value of Ms. Gorena’s testimony was not sufficient to outweigh the dangers of unfair prejudice inherent to her testimony.” Brief of Appellant 26-27. The court carefully weighed the probative value against the potential for unfair prejudice. 12/15 RP 20-21. Defendant did not assign error to this weighing. The court “meticulously applied the law and had tenable grounds and reasons for its decision.” DeVincentis, 150 Wn.2d at 24. This Court should find there was no abuse of discretion and affirm that decision.

F. THE LEGISLATURE DID NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE WHEN IT ENACTED RCW 10.50.090.

The separation of powers doctrine is not formally enunciated in either the federal or state constitutions. The doctrine has traditionally been presumed to exist from the division of government into three distinct branches; executive, legislative, and judicial. Carrick v. Locke, 125 Wn.2d 129, 135, 882 P.2d 173 (1994). The purpose of the doctrine is to prevent one branch of government

from encroaching on the “fundamental functions” of another. State v. Moreno, 147 Wn.2d 500, 505, 58 P.3d 265 (2002).

The doctrine does not absolutely bar different branches performing similar functions. “The validity of this doctrine does not depend on the branches of government being hermetically sealed off from one another.” Carrick 125 Wn.2d at 135.

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.”

Zylstra v. Piva, 85 Wn.2d 743, 750, 539 P.2d 823 (1975).

The defendant challenges the constitutionality of RCW 10.58.090 on the basis that it violates the separation of powers doctrine. He argues that because the statute includes the phrase “notwithstanding Evidence Rule 404(b),” it irreconcilably conflicts with ER 404(b). Defendant is wrong.

RCW 10.58.090 provides in part:

(1) In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant’s commission of another sex offense or sex offenses is admissible, if the evidence is not inadmissible pursuant to Evidence rule 403. . .

(3) This section shall not be construed to limit the admission or consideration of evidence under any other evidence rule.

RCW 10.58.090.

In contrast ER 404(b) states:

(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, or absence of mistake or accident.

ER 404(b).

The Supreme Court has recognized that its authority to adopt rules of evidence was delegated to the judiciary by the Legislature. “Therefore, rules of evidence may be promulgated by both the legislative and judicial branches.” City of Fircrest v. Jensen, 158 Wn.2d 384, 394, 143 P.3d 776 (2006).

Courts have rejected the argument that a legislatively adopted rule of evidence necessarily violates the separation of powers doctrine. The Supreme Court held the child hearsay statute, RCW 9A.44.120, did not violate the doctrine for two reasons. First, under ER 802 hearsay is not admissible, but provided an exception for hearsay that was admissible pursuant to statute. Second, the statute did not require child hearsay to be admitted. Rather it was admissible if it contained particularized

guarantees of trustworthiness. State v. Ryan, 103 Wn.2d 165, 178-79, 691 P.2d 197 (1984).

In Fircrest the defendant challenged SHB 3055 relating to admissibility BAC tests in DUI prosecutions on the basis that it conflicted with the court's authority to reject evidence under ER 401, 402, 403, and 404(b). Fircrest, 158 Wn.2d at 395. The Supreme Court rejected that argument because the statute only made such test admissible if the State met its prima facie burden. The statute therefore permitted, but did not require, a court to admit evidence of the test once that burden had been met. The trial court was free to exercise its discretion to exclude the evidence under any rule of evidence. Because it was permissive, the statute did not invade the prerogative of the court or threaten judicial independence. It did not violate the separation of powers doctrine. Id at 399.

RCW 10.58.090 permits, but does not require, a trial court to admit evidence of prior sexual misconduct after it considers certain factors. Because it is permissive, not mandatory, under Ryan and Fircrest, it does not violate the separation of powers doctrine.

Other jurisdictions have found no separation of powers violation in statutes which are similar to RCW 10.58.090 and ER

404(b). Michigan determined the separation of powers doctrine was not violated because its version of the statute, MCL 768.27a, was a substantive rule of evidence that did not principally regulate the operation or administration of the courts. State v. Pattison, 741 N.W.2d 558, 562 (Mich. 2007). See also State v. McCoy, 682 N.W.2d 153, 161 (Minn. 2004) (adopting Minn.Stat § 634.20 which creates an exception to the ER 404(b) ban on propensity evidence for domestic violence offenses finding the legislative policy behind the statute best serves the interest of justice). These authorities persuasively support the conclusion that RCW 10.58.090 does not violate the separation of powers doctrine.

Defendant claims that RCW 10.58.090 irreconcilably conflicts with ER 404(b) in cases where the evidence would not be admissible under ER 404(b). The Court need not reach this issue here because the evidence was admissible under ER 404(b).

Even if the evidence were not admissible under ER 404(b), as discussed above, there is no irreconcilable conflict. "[T]he true test of [ER 404(b)] being whether the evidence as to other acts is relevant and necessary to prove an essential element of the crime charged." State v. Turner, 29 Wn. App. 282, 289, 627 P.2d 1324 (1981). RCW 10.58.090(6)(e) requires the court to consider "the

necessity of the evidence beyond the testimonies already offered at trial.” RCW 10.58.090(3) provides, “This shall not be construed to limit the admission or consideration of evidence under any other evidence rule.” ER 402 prohibits the admission of irrelevant evidence.

When the “true test” of ER 404(b) is read with RCW 10.58.090, the inescapable conclusion is that the statute expands the court rule, but does not irreconcilably conflict with it.

This Court should conclude that RCW 10.58.090 is not in irreconcilable conflict with ER 404(b), thus there is no violation of the separation of powers.

G. RCW 10.58.090 DOES NOT VIOLATE DUE PROCESS.

Defendant argues that RCW 10.58.090 violates the state constitutional guarantee of a fair trial. Brief of Appellant 31. Defendant cites State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008), for the proposition that the Washington jury trial right is broader than the federal constitutional jury trial right. He does not articulate how a statute governing the admissibility of evidence affects the right to a jury trial.

Defendant then relies on McKinney v. Rees, 993 F.2d 1378 (9th Cir. 1993), to argue that allowing “propensity” evidence violates

the state constitutional right to a fair trial because prohibitions against using it have been part of the common law since at least 1684. Brief of Appellant 32. He does not undertake an analysis of the state due process guarantees under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), so this Court must consider that the state constitutional right is co-extensive with the federal constitutional right. State v. Lee, 135 Wn.2d 369, 387, 957 P.2d 741 (1998). This argument, when applied to the Fifth and Fourteenth Amendments, has been rejected.

“That a practice is ancient does not mean it is embodied in the Constitution. Many procedural practices – including evidentiary rules – that have long existed have been changed without being held unconstitutional.” Enjady, 134 F.3d at 1432.

“[T]he Due Process Clause requires a fair trial in a fair tribunal.” Bracy v. Gonzales, 520 U.S. 899, 904, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997).

The federal constitutional due process guarantees are not violated by allowing propensity evidence in sex cases under FRE 413. In Enjady, the 10th Circuit Court of Appeals undertook an extensive analysis of whether FRE 413 (see n. 7) violated due process. It determined that “Considering the safeguards of Rule

403, we conclude that Rule 413 is not unconstitutional on its face as a violation of the Due Process Clause.” Enjady, 134 F.3d at 1433.

This Court should likewise rule that considering the safeguards in RCW 10.58.090, it does not violate due process guarantees.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on November 5, 2009.

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