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STATE OF WASHINGTON
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Court of Appeals No. 41578-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON

Plaintiff/Respondent,

v.

BRETT ANTHONY SCHMUS,

Defendant/Appellant.

BRIEF OF APPELLANT

Appeal from the Superior Court of Pierce County,
Cause No. 10-1-00667-4
The Honorable Edmund Murphy, Presiding Judge

Sheri Arnold, WSBA No. 18760
Attorney for Appellant
P.O. Box 7718
Tacoma, Washington 98417
(253) 759-5940

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in finding that RCW 10.58.090 did not violate the separation of powers doctrine.
2. The trial court erred in finding that RCW 10.58.090 did not violate due process.
3. The trial court erred in finding that evidence of Mr. Schmus' alleged prior sexual misconduct was admissible under RCW 10.58.090.
4. The trial court erred in finding that evidence of Mr. Schmus' alleged prior sexual misconduct was admissible under ER 404(b) as evidence of a common scheme or plan.
5. The introduction of evidence regarding V.C. deprived Mr. Schmus of a fair trial.
6. The trial court's findings of fact invaded the province of the jury.
7. Error is assigned to Finding of Fact regarding RCW 10.58.010 and ER 404(b) evidence number II which reads:

That the victim of the current charges is C.M. C.M. was 15 years old at the time of the incident.
8. Error is assigned to Finding of Fact regarding RCW 10.58.010 and ER 404(b) evidence number IV which reads:

That on January 11, 2010, C.M. stayed home from school because she was sick[.] Sometime during the day she became better and called the defendant to come over and watch television.
9. Error is assigned to Finding of Fact regarding RCW 10.58.010 and ER 404(b) evidence number V which reads:
That while the two of them were watching television, the defendant began touching C.M.[.] During this touching, the defendant unzipped C.M.'s pants and digitally penetrated

her vagina.

10. Error is assigned to Finding of Fact regarding RCW 10.58.010 and ER 404(b) evidence number VI which reads:

As the defendant was digitally penetrating C.M., he received a phone call. C.M. left the room at that time and zipped her pants up.

11. Error is assigned to Finding of Fact regarding RCW 10.58.010 and ER 404(b) evidence number VII which reads:

After the defendant completed his phone call, he found C.M. and they ended up in her bedroom. In her bedroom, the defendant again began touching C.M. He again unzipped her pants and digitally penetrated her vagina[.]

12. Error is assigned to Finding of Fact regarding RCW 10.58.010 and ER 404(b) evidence number VIII which reads:

That after digitally penetrating her, the defendant took C.M.'s clothes off. At some point, the defendant left her bedroom and went out to his car to retrieve a condom[.] The defendant returned to the bedroom and took his own clothes off.

13. Error is assigned to Finding of Fact regarding RCW 10.58.010 and ER 404(b) evidence number IX which reads:

The defendant then had sexual intercourse with C.M. by inserting his penis into her vagina. The defendant used a condom during the sexual intercourse.

14. Error is assigned to Finding of Fact regarding RCW 10.58.010 and ER 404(b) evidence number X which reads:

After the defendant finished with the sexual intercourse, he removed the condom, tied it in a

knot and took it with him.

15. Error is assigned to Finding of Fact regarding RCW 10.58.010 and ER 404(b) evidence number XI which reads:

A neighbor saw a man and a car at C.M.'s house on January 11 and alerted C.M.'s mother.

16. Error is assigned to Finding of Fact regarding RCW 10.58.010 and ER 404(b) evidence number XII which reads:

Some period of time after the event, C.M. disclosed the January 11, 2010 incident to her school counselor.

II. ISSUES PRESENTED

1. Did the trial court err in finding RCW 10.58.090 constitutional where it violates the separation of powers doctrine? (Assignment of Error No. 1)
2. Did the trial court err in finding that RWC 10.58.090 did not violate due process where admission of the evidence violated Mr. Schmus' right to a fair trial? (Assignments of Error Nos. 2 and 3)
3. Did the trial court err in finding RCW 10.58.090 constitutional where it violates due process by conditioning the relevance of the evidence on the importance of the evidence to the State's case? (Assignment of error No. 2)
4. Assuming that RCW 10.58.090 passes constitutional muster, did the trial court abuse its discretion in finding that the evidence of Mr. Schmus' alleged prior sexual misconduct was admissible under RCW 10.58.090? (Assignment of Error No. 3)
5. Did the trial court err in finding that the evidence of Mr. Schmus' alleged prior sexual misconduct was admissible under ER 404(b) as evidence of a common scheme or plan

where the facts did not support a finding that Mr. Schmus used a distinctive or unique method of allegedly committing the rapes? (Assignment of Error No. 4)

6. Did the trial court invade the province of the jury to determine Mr. Schmus' guilt where the trial court's findings on the admissibility of evidence include findings that Mr. Schmus was guilty of all crimes charged? (Assignments of Error Nos. 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16)

III. STATEMENT OF THE CASE

A. Factual Background

C.M.¹ met Brett Schmus at a square dance club in 2009. CP 72. On January 11, 2010, C.M., who was 15 years old at the time, stayed home from school because she didn't feel well. RP 104, 108. She began to feel better around mid-morning, so she called Mr. Schmus and asked if he would come over and hang out. RP 105-106. Mr. Schmus went to C.M.'s house and they began watching T.V. RP 108. Mr. Schmus was 21 years old on January 11, 2010. RP 258.

As they watched T.V., Mr. Schmus began touching C.M.'s leg, moving up her leg to her inner thigh and eventually her crotch. RP 111-113. Eventually, Mr. Schmus began touching C.M.'s vagina under her clothes and inserted his finger into her vagina. RP 113-114. At that point Mr. Schmus got a phone call and removed his hand from C.M.'s pants and told her to be quiet. RP 114-115.

¹ C.M. is a minor. She will be referred to by her initials to protect her privacy.

C.M. went upstairs and Mr. Schmus followed her and asked her for a tour. RP 115-116. When C.M. showed Mr. Schmus her bedroom, Mr. Schmus pushed her into the bedroom and began rubbing his hands up and down of the sides of her stomach. RP 116-118. Mr. Schmus again put his hand inside C.M.'s pants and touched her vagina. RP 119. Mr. Schmus told C.M. to get on the bed and then undressed C.M. RP 120-121. Mr. Schmus sat down on the bed next to C.M. and put his finger inside her vagina again. RP 127.

Eventually, Mr. Schmus stopped touching C.M. and went outside. RP 123. Mr. Schmus returned to C.M.'s bedroom, undressed, and put on a condom. RP 124. Mr. Schmus sat on the bed, pushed C.M. down so she was laying, laid on top of C.M., put his penis in her vagina, and moved up and down until he ejaculated. RP 125-127. Mr. Schmus removed the condom, put it in a pocket, got dressed, and left. RP 128.

Three weeks later C.M. told her school counselor about the incident. RP 132-133. C.M. spoke to police about the incident the day after she spoke to her counselor. RP 135.

B. Procedural Background

On February 10, 2010, Mr. Schmus was charged with one count of rape of a child in the third degree. CP 1.

On September 3, 2010, the State filed a notice and memorandum

of authorities informing Mr. Schmus that the State intended to introduce evidence that he had committed a prior act of sexual misconduct under both RCW 10.58.090 and under ER 404(b). CP 8-25.

On October 12, 2010, Mr. Schmus filed a motion in limine regarding RCW 10.58.090 and ER 404(b). CP 27-60. Mr. Schmus objected to admission of any evidence under RCW 10.58.090 and ER 404(b) and argued that: (1) RCW 10.58.090 violated the constitutional separation of powers doctrine; (2) application of RCW 10.58.090 in this case violated the ex post facto clause of the Federal constitution; (3) application of RCW 10.58.090 to this case violated the ex post facto clause of the Washington constitution; (4) RCW 10.58.090 violates due process because it conditions evidentiary admissibility on its importance to the State's case; (5) and that even if the trial court found RCW 10.58.090 to be constitutional, the evidence of Mr. Schmus' prior conviction was still inadmissible under the balancing factors of the statute. CP 27-60.

On October 20, 2010, the trial court excluded use of the word "perpetrator," ruled that the word victim could be used in moderation, and found that no 3.5 hearing was necessary. RP 14-16. Argument regarding RCW 10.58.090 and ER 404(b) was also heard on October 20, 2010. RP 22-57.

On October 21, 2010, the trial court held that the State had proven by a preponderance of the evidence that the prior act of sexual misconduct had occurred and found that RCW 10.58.090 was constitutional. RP 63-71. The trial court found that the evidence of the prior act of sexual misconduct was admissible under RCW 10.58.090 and also found that the evidence was admissible under ER 404(b) as evidence of a common scheme or plan. RP 63-71. The trial court held that the underlying facts of Mr. Schmus' prior sexual misconduct were admissible but that the ultimate resolution of the case was not. RP 71.

Counsel for Mr. Schmus objected to the court's finding RCW 10.58.090 constitutional and admitting the evidence of Mr. Schmus' prior misconduct. RP 71-72. Counsel for Mr. Schmus indicated that she would be seeking a limiting instruction regarding the evidence. RP 71-72.

On October 25, 2010, Mr. Schmus filed a trial memorandum and motions in limine seeking: (1) to exclude the use of the term "victim" or "perpetrator"; (2) to exclude ER 609 evidence; (3) to exclude ER 404(b) evidence; (4) to exclude RCW 10.58.090 evidence; (5) to exclude uncharged conduct evidence; (6) to have a CrR 3.5 hearing; (7) to exclude any hearsay testimony; and (8) to exclude any "expert" testimony. CP 64-

69.²

Also on October 25, 2010, the State amended the charges against Mr. Schmus to three counts of rape of a child in the third degree. CP 70-71.

Jury trial began on October 25, 2010. RP 97.

Prior to the jury hearing evidence relating to Mr. Schmus' alleged prior sexual misconduct, counsel for Mr. Schmus renewed her objection to the admission of the evidence and submitted a proposed limiting instruction to be read to the jury prior to the admission of the evidence. RP 225-228. The trial court acknowledged that Mr. Schmus was not waiving any objection to the admission of the evidence and read the proposed limiting instruction to the jury before the evidence was admitted. RP 228-229; CP 95-96.

At trial, V.C. testified about Mr. Schmus' prior alleged act of sexual misconduct.³ RP 230-251. V.C. testified that in the summer of 2007 she was 15 years old and that she attended high school with Mr. Schmus. RP 230-231. V.C. testified that she had Mr. Schmus drive her home one time during the middle of the school year. RP 234. V.C. testified that at some point Mr. Schmus tapped on her bedroom window at

² Presumably, a copy of this trial memorandum and motions in limine was circulated to the State and the trial court and the motions contained in this trial memorandum were what the trial court was ruling on on October 20.

³ V.C. is also a minor. Her initials will be used to protect her privacy.

night and she told him to go away but Mr. Schmus opened the window and climbed into her room. RP 234-235. V.C. testified that she told Mr. Schmus to leave and tried to push him out of her room and he responded by laughing at her and saying, "I'll see you." RP 235-236.

V.C. testified that two weeks after the first time Mr. Schmus entered her bedroom he again opened her bedroom window and climbed inside. RP 238. V.C. testified that Mr. Schmus ordered her to take her clothes off and told her that her father would suffer the consequences if she did not. RP 238-239. V.C. testified that she began taking her clothes off but that once she started Mr. Schmus finished taking them off her. RP 239-240. V.C. testified that Mr. Schmus then began touching her all over her body with his hands and eventually penetrated her vagina with two of his fingers. RP 240. V.C. testified that Mr. Schmus stopped touching her when her mother returned home. RP 241.

V.C. testified that Mr. Schmus returned to her bedroom during the weekend following Mr. Schmus' second visit. RP 241. V.C. testified that Mr. Schmus sent her an instant message telling her that he would be by her house around ten o'clock and that she had better let him come in. RP 241-242. V.C. testified that Mr. Schmus undressed her as well as himself, touched her with his hands, and penetrated her vagina with his fingers and his penis. RP 242-243. V.C. testified that Mr. Schmus ejaculated when

his penis was inside of her. RP 242-243. V.C. testified that Mr. Schmus returned to her bedroom and had sexual intercourse with her every other weekend for the next six months. RP 243-244. V.C. testified that she and Mr. Schmus engaged in mutual oral sex and that he had her give him “hand jobs.” RP 244-245. V.C. testified that Mr. Schmus was finally stopped when V.C.’s mother walked in on V.C. and Mr. Schmus having sex. RP 247.

A limiting instruction regarding V.C.’s testimony that was substantially similar to the limiting instruction read to the jury before V.C.’s testimony was included in the trial court’s instructions to the jury. CP 106.

The jury returned verdicts of guilty on all three counts of third degree rape of a child. CP 117-119.

On December 10, 2010, Mr. Schmus stipulated that he had an offender score of 6. CP 135-137.

Mr. Schmus received a sentence of 60 months on each count to be served concurrently. CP 138-152.

Notice of Appeal was timely filed on December 15, 2010. CP 153-168.

IV. ARGUMENT

1. **RCW 10.58.090 violates the constitutional separation of powers doctrine because it directly conflicts with ER 404(b), a valid procedural rule promulgated by the Washington Supreme Court.**

RCW 10.58.090 permits the court to admit, 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... notwithstanding Evidence Rule 404(b).” RCW 10.58.090(1). The statute directs courts to consider evidence of other sexual offenses in sexual misconduct prosecutions for any purpose. RCW 10.58.090. By its express terms, the statute conflicts with ER 404(b), which categorically bans the admission of prior misconduct evidence for the purpose of “prov[ing] the character of a person in order to show action in conformity therewith.” ER 404(b). The statute further conflicts with ER 404(b) to the extent it does not require courts to identify the purpose of the evidence or to limit its consideration by the jury for only that purpose.

As discussed below, in Washington, the Supreme Court has ultimate authority, inherent in the state constitution and delegated by statute, to promulgate rules governing procedures in state courts. Although that authority is often shared with the Legislature, it is well settled that where a

procedural statute conflicts with a procedural rule promulgated by the court, the rule must prevail.

The Evidence Rules, which “govern the proceedings in the courts of the state of Washington,” ER 101, are unquestionably a valid exercise of the Supreme Court’s ultimate authority and the constitutional separation of powers doctrine. Although the Legislature may enact statutes governing the admission of evidence, courts do not hesitate to invalidate evidence statutes that conflict with the Supreme Court’s evidence rules.

In this case, because RCW 10.58.090 directly conflicts with a procedural rule, ER 404(b), it usurps the Supreme Court’s constitutional authority to govern the procedures of Washington courts and must be stricken.

- a. Under the separation of powers doctrine, the Washington Supreme Court has ultimate authority to govern state court procedures, and where a statute directly conflicts with a court rule, the rule must prevail.

The doctrine of separation of powers stems from the constitutional distribution of the government’s authority into three branches. The doctrine is essential to “the maintenance of a republican form of government,” and in “guaranteeing the liberties of the people, and preventing the exercise of autocratic power.” *Washington State Bar Ass’n*

v. *State*, 125 Wn.2d 901, 906-07, 890 P.2d 1047 (1995) (citation omitted),
State v. Moreno, 147 Wn.2d 500, 505, 58 P.3d 265 (2002).

The purpose of the separation of powers doctrine “is to prevent one branch of government from aggrandizing itself or encroaching upon the ‘fundamental functions’ of another.” *Moreno*, 147 Wn.2d at 505, 58 P.3d 265 (quoting *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)). Although some overlap among the three branches of government is allowed, the separation of powers demands the independence of each branch. *Moreno*, 147 Wn.2d at 505, 58 P.3d 265. Thus, the question 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.” *Moreno*, 147 Wn.2d at 505, 58 P.3d 265 (quoting *Carrick*, 125 Wn.2d at 135, 882 P.2d 173).

Each branch of government wields only the power it is given. *Moreno*, 147 Wn.2d at 505, 58 P.3d 265. The state constitution vests the “judicial power of the state” in the Supreme Court and the various inferior courts designated. Wa. Const. art. 4, § 1. The function of the judicial branch is to govern court procedures. The Washington Supreme Court has inherent power to govern court procedures, stemming from article 4 of the state constitution. *City of Fircrest v. Jensen*, 158 Wn.2d 384, 394, 143 P.3d 776 (2006), cert. denied 549 U.S. 1254, 127 S.Ct. 1382, 167 L.Ed.2d

162 (2007); *State v. Fields*, 85 Wn.2d 126, 129, 530 P.2d 284 (1975); Const. art. 4, § 1. The court also has power delegated by the Legislature to adopt rules of procedure. *City of Fircrest*, 158 Wn.2d at 394, 143 P.3d 776; *Fields*, 85 Wn.2d at 129, 530 P.2d 284; RCW 2.04.190. RCW 2.04.190 provides the Supreme Court the power “to regulate and prescribe by rule the forms for and the kind and character of the entire pleading, practice and procedure to be used in all suits, actions, appeals and proceedings of whatever nature by the supreme court, superior courts, and district courts of the state.”

Although the authority to govern matters of court procedure is often shared between the judicial and legislative branches, in Washington, unlike many other jurisdictions, the Supreme Court’s authority to prescribe procedural rules takes precedence over the Legislature’s. The intent of RCW 2.04.190, enacted in 1925, was to grant the courts sole authority to prescribe court procedure and practice. *State ex rel. Foster-Wyman Lumber Co. v. Superior Court for King County*, 148 Wn.1, 4, 9, 267 P. 770 (1928); The Rule-Making Power of the Courts, 1 Wn.L. Rev. 163, 175, 228 (1925). RCW 2.04.200, enacted at the same time as RCW 2.04.190, makes clear that the court’s rules of procedure trump the laws of the Legislature: “When and as the rules of courts herein authorized shall be promulgated all laws in conflict therewith shall be and become of no

further force or effect.” RCW 2.04.200; *State v. Williams*, 156 Wn.6, 7, 286 P. 65 (1930) (RCW 2.04.090 and RCW 2.04.200 abrogated preexisting statutes in conflict with the court’s new rules).

Washington courts routinely and consistently recognize that the Supreme Court’s procedural rules take precedence over conflicting legislative enactments. As the court explained in *State v. Smith*, 84 Wn.2d 498, 502, 527 P.2d 674 (1974), “[s]ince the promulgation of rules of procedure is an inherent attribute of the Supreme Court and an integral part of the judicial process, such rules cannot be abridged or modified by the legislature.” *See also, e.g., City of Fircrest*, 158 Wn.2d at 394, 143 P.3d 776 (“Whenever 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.”); *State v. Templeton*, 148 Wn.2d 193, 217, 59 P.3d 632 (2002) (“Under *Smith* and *Fields* the validity of a court rule need not stand solely on either constitutional or statutory grounds. A nexus between the rule and the court’s rule-making authority over procedural matters validates the court rule, despite possible discrepancies between the rule and legislation or the constitution.”); *State v. Ryan*, 103 Wn.2d 165, 178, 691 P.2d 197 (1984) (“statutory enactments of evidentiary rules are subject to judicial review, this court being the final arbiter of evidentiary rules.”); *Fields*, 85 Wn.2d at 129-30, 530 P.2d 284

(CrR 2.3(b), governing issuance of search warrants, trumps its counterpart in RCW 10.79.015).

The court's constitutional authority to govern matters of court procedure contrasts with the Legislature's authority to govern matters of substance. *Fields*, 85 Wn.2d at 129, 530 P.2d 284; *Smith*, 84 Wn.2d at 501, 527 P.2d 674. "Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated." *City of Fircrest*, 158 Wn.2d at 394, 143 P.3d 776 (quoting *Smith*, 84 Wn.2d at 501, 530 P.2d 284). Promulgation of state court rules creates procedural rights; creation of substantive rights is in the province of the Legislature absent any constitutional prohibition. *Templeton*, 148 Wn.2d at 212, 59 P.3d 632.

- b. The Washington Supreme Court's sole authority to govern court procedures includes the authority to invalidate legislatively enacted rules of evidence.

The Washington Supreme Court has unequivocally held that the Evidence Rules fall within the court's constitutional and statutory authority to govern matters of procedure. *City of Fircrest*, 158 Wn.2d at 394, 143 P.3d 776. The language of ER 101 makes clear that the Evidence Rules govern the admissibility of evidence in Washington trials,

and that in the event of an irreconcilable conflict between a rule and a statute, the rule will govern. ER 101 (“These rules govern proceedings in the courts of the state of Washington to the extent and with the exceptions stated in rule 1101.”).⁴

Rules of evidence are rules of procedure, because they ““pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated.”” *City of Fircrest*, 158 Wn.2d at 394, 143 P.3d 776 (quoting *Smith*, 84 Wn.2d at 501, 530 P.2d 284).

Washington courts consistently recognize that, pursuant to the court’s sole authority over matters of procedure, the Evidence Rules take precedence over statutes that are directly in conflict. For example, in *City of Fircrest*, the court examined whether a statute that allowed the admission of BAC test results despite a suspect’s challenges to them, conflicted with the rules of evidence. The court concluded that, because admission of the evidence was permissive and not mandatory, the statute could be harmonized with the rules of evidence and did not violate the separation of powers doctrine. *City of Fircrest*, 158 Wn.2d at 399, 143 P.3d 776.

⁴ According to the exceptions stated in ER 1101, the Evidence Rules do not apply to the determination of questions of fact preliminary to the determination of admissibility of evidence, or to various sorts of non-jury trial proceedings not relevant here. ER 1101(c).

Similarly, in *Ryan*, the court examined whether the child hearsay statute conflicted with the court's authority to promulgate rules of evidence. The court concluded the statute did not conflict with the Evidence Rules, because "[l]egislative enactment of hearsay exceptions is specifically contemplated by the Rules of evidence"⁵ and because the statute allowed admission of the child's statement only if it bore "particularized guarantees of trustworthiness." *Ryan*, 103 Wn.2d 165, 178-179, 691 P.2d 197.

But where the court determines a statute *does* conflict with an evidence rule, after attempts to harmonize them, it will not hesitate to find the statute invalid. *See. e.g., State v. Pollard*, 66 Wn.App. 779, 783-84, 834 P.2d 51, *review denied* 120 Wn.2d 1015, 844 P.2d 436 (1992) (ER 1101, providing that rules of evidence do not apply at restitution hearings, superseded statute to the contrary); *State v. Saldano*, 36 Wn.App. 344, 350, 675 P.2d 1231, *review denied* 102 Wn.2d 1018, 1984 WL 287629 (1984) (ER 609 superseded pre-existing statute that allowed admission of an accused's prior convictions for the purpose of affecting the weight of his testimony).

Thus, while both the legislature and the courts may adopt procedural rules, including rules of evidence, the ultimate determination

⁵ "ER 802 states: 'Hearsay is not admissible except as provided by these rules, by other court rules, or by statute.'" *Ryan*, 103 Wn.2d at 178 (emphasis in *Ryan*)

of whether or not the rules are lawful rests with the courts. Further, where a court rule and statute are in conflict and the statute and rule cannot be harmonized, the court rule supersedes the statute and the statute will be found to be invalid.

- c. RCW 10.58.090 conflicts with a court rule of evidence and therefore violates the separation of powers doctrine.

As stated above, RCW 10.58.090 permits the court to admit, 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... notwithstanding Evidence Rule 404(b).” The statute permits courts to admit evidence of prior offenses for any purpose, including for the purpose of proving the defendant’s propensity to commit the crime, which ER 404(b) categorically forbids.⁶ The statute therefore conflicts with a court procedural rule and violates the separation of powers doctrine.

Unlike the child hearsay statute examined in *Ryan*, 103 Wn.2d 165, 691 P.2d 197, statutes permitting propensity evidence cannot be harmonized with the Evidence Rules. As discussed above, ER 802 provides that *hearsay* evidence may be admissible pursuant to statute,

⁶ (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.

notwithstanding the Evidence Rules. But no such exception exists for propensity evidence.

Although ER 402 provides that “[a]ll relevant evidence is admissible, except as . . . otherwise provided by statute,” that rule permits the Legislature only to *bar* otherwise relevant evidence. 5 Karl B. Tegland, Washington Practice Series: Evidence Law and Practice, § 402.2, at 275 (5th ed. 2007). It does not permit the Legislature to *allow* admission of evidence that the Evidence Rules prohibit.

Although the statute requires courts to weigh the probative value of the prior offense evidence against the danger of unfair prejudice, using the analysis provided in ER 403, *see* RCW 10.58.090(1), (6)(g), the statute usurps the court’s constitutional authority to ban propensity evidence outright. ER 404(b) reflects the judiciary’s long-standing judgment that the relevance of propensity evidence is simply too attenuated, and its potential for prejudice too great, to be allowed in any prosecution. Indeed, the ban on propensity evidence has been firmly and historically established in the common law since at least the seventeenth century in England and, as evidenced in case law and state and federal codes of evidence, has had continuing validity to the present. Louis M. Natali, Jr. & R. Stephen Stigall, Are You Going to Arraign His Whole Life? How Sexual Propensity Evidence violates the Due Process Clause, 28 Loy. U.

Chi. L.J. 1, 14 (1996); 1A John H. Wigmore, Wigmore on Evidence, § 58.2, at 12 13 (noting ban on propensity evidence received judicial sanction for three centuries).

The common law in Washington has been consistent with the tradition elsewhere. ER 404(b) reflects the traditional common law rule that a person's prior crimes, wrongs, or acts are inadmissible to demonstrate the person's character or general propensities. 5 Tegland, Washington Practice, supra, § 404.9, at 497. Historically, evidence of past sexual misconduct has been admissible in Washington only to show the defendant's "lustful disposition" toward the complainant. *See. e.g., State v. Crowder*, 119 Wn.450,451-52,205 P. 850 (1922) (allowing admission of evidence of prior acts of sexual intercourse *between the parties* to show lustful disposition of defendant). The judiciary in Washington has consistently affirmed its allegiance to ER 404(b)'s general ban on sexual misconduct propensity evidence. *See. e.g., State v. Sutherby*, 165 Wn.2d 870, 886, 204 P.3d 916 (2009) (explaining that pornography evidence is admissible only to show sexual desire for particular victim; otherwise, such evidence "would merely show Sutherby's predisposition toward molesting children and is subject to exclusion under ER 404(b)").

The Washington Supreme Court has repeatedly recognized that the admission of prior acts of sexual misconduct in the trial of a defendant

charged with a sex crime is a situation where prejudice from the admission of the prior acts is at its highest and that such evidence is admissible only for certain purposes which do not include propensity:

ER 404(b) prohibits the use of “other acts” evidence to prove the character of a person in order to show that he acted in conformity with that character. *State v. Smith*, 106 Wn.2d 772, 775, 725 P.2d 951 (1986). Even evidence that is otherwise relevant can be excluded if it is highly prejudicial. *Id.* at 776, 725 P.2d 951. We have previously cautioned about the admissibility of other sex crimes, warning that “[c]areful consideration and weighing of both relevance and prejudice is particularly important in sex cases, where the potential for prejudice is at its highest.” *State v. Coe*, 101 Wn.2d 772, 780-81, 684 P.2d 668 (1984). In cases where admissibility is a close call, “the scale should be tipped in favor of the defendant and exclusion of the evidence.” *Smith*, 106 Wn.2d at 776, 725 P.2d 951 (quoting *State v. Bennett*, 36 Wn.App. 176, 180, 672 P.2d 772 (1983)).

A defendant must be tried **for the offenses charged**, and evidence of unrelated conduct should not be admitted unless it goes to the material issues of motive, intent, absence of accident or mistake, common scheme or plan, or identity. *State v. Goebel*, 36 Wn.2d 367, 368-69, 218 P.2d 300 (1950).

Sutherby, 165 Wn.2d at 886-887, 204 P.3d 916 (emphasis added).

In its statement of purpose, the Legislature asserted it had authority to enact RCW 10.58.090 as part of its authority to enact “rules as substantive law.” Laws 2008, ch. 90, § 1, Statement of Purpose. The Legislature explained:

Purpose--Exception to Evidence Rule--2008 c 90:

In Washington, the Legislature and the courts share the responsibility for enacting rules of evidence. The court's authority for enacting rules of evidence arises from a statutory delegation of that responsibility to the court and from Article IV, section 1 of the state Constitution. (citing *State v. Fields*, 85 Wn.2d 126, 129, 530 P.2d 284 (1975)).

The legislature's authority for enacting rules of evidence arises from the Washington Supreme court's prior classification of such rules as substantive law. (citing *State v. Sears*, 4 Wn.2d 200, 215, 103 P.2d 337(1940) (the legislature has the power to enact laws which create rules of evidence); 4 Wn.2d 200, 215, 103 P.2d 337 (1940) (the legislature has the power to enact laws which create rules of evidence); *State v. Pavelich*, 153 Wn.379, 279 P.1102 (1929) ("rules of evidence are substantive law").

The legislature adopts this exception to Evidence Rule 404(b) to ensure that juries receive necessary evidence to reach a just and fair verdict.

Laws 2008, ch. 90, § 1, Statement of Purpose.

However, as discussed above, Washington courts consistently characterize rules of evidence as rules of procedure subject to the judiciary's ultimate authority. In criminal cases, rules of evidence are central to the courts' core purpose to regulate the manner in which the fact-finder decides guilt or innocence.

The cases cited by the Legislature in its statement of purpose are not inconsistent with the Supreme Court's characterization of rules of evidence as subject to its sole authority.

In *State v. Sears*, 4 Wn.2d 200, 215, 103 P.2d 337 (1940), the court merely recognized that the legislature may create rules of evidence. The Legislature's authority to enact statutory rules of evidence is not in doubt. But under the separation of powers doctrine, evidence statutes must give way to court rules when they directly conflict.

Similarly, in *State v. Pavelich*, 153 Wn.379, 279 P. 1102 (1929), the court did not hold that the Legislature may enact evidence statutes that conflict with court rules. The issue in *Pavelich* was whether a court rule that abolished a trial court's mandatory duty to inform the jury that it could draw no inference of guilt from the accused's failure to testify, was an unconstitutional usurpation of legislative authority. *Pavelich*, 153 Wn.at 385-86, 279 P. 1102. The court stated in dicta that "[r]ules of evidence constitute substantive law, and cannot be governed by rules of court," *Pavelich*, 153 Wn.at 382, 279 P. 1102, but the court did not explain the statement and it was not necessary to its decision. Moreover, the statement is inconsistent with the case law discussed above.

That the explicit purpose RCW 10.58.090 is to permit admission of evidence of prior acts of misconduct of a defendant in a sex case to prove the defendant's propensity to commit sex crimes in direct conflict with ER 404(b) is made clear by the language statute and by the statement of purpose following the statute. RCW 10.58.090(1) explicitly states that

“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.” The statement of purpose following RCW 10.58.090 states that “[t]he legislature adopts this exception to Evidence Rule 404(b) to ensure that juries receive the necessary evidence to reach a just and fair verdict.”

Reading these two provisions together, the clear inference to be drawn is that the legislature believed that “just and fair” verdicts were not being reached in cases where evidence of a defendant’s prior convictions for sex crimes was excluded. This legislative belief flies in the face of decades of Washington jurisprudence finding that such evidence must be excluded in order to preserve and protect the defendant’s right to a fair trial, or, put another way, the defendant’s right to a “just and fair” verdict. *See Sutherby, supra; see also* ER 102 (“These rules shall be construed to secure fairness in administration...and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”)

In *Brim v. State*, 624 N.E.2d 27, 33 n.2 (Ind. Ct. App. 1993) and *State v. Day*, 643 N.E.2d 1 (Ind. Ct. App. 1995), the Indiana Court of

Appeals struck down a statute similar to RCW 10.58.090⁷ because it conflicted with the common law and the evidence rules.

RCW 10.58.090 directly conflicts ER 404(b)'s prohibition of admission of prior misconduct to demonstrate propensity and therefore violates the constitutional separation of powers doctrine. Accordingly, the statute is void. *State v. Thorne*, 129 Wn.2d 736, 762, 921 P.2d 514 (1996) (legislation that violates separation of powers doctrine is void).

2. RCW 10.58.090 violates due process.

Both the United States Constitution and the Washington State Constitution article I, section 22, guarantee the criminal defendant a fair trial by an impartial jury. *State v. Latham*, 100 Wn.2d 59, 62-63, 667 P.2d 56 (1983); U.S. Const. amends. VI, XIV; Wn.Const. art. I, § 22. However strong the government's case, the fundamental right to a fair trial demands minimum standards of due process. *State v. McHenry*, 88 Wn.2d 211, 214, 558 P.2d 188 (1977). "Only a fair trial is a constitutional trial." *State v. Coles*, 28 Wn.App. 563, 573, 625 P.2d 713, *review denied*, 95 Wn.2d 1024 (1981). "[I]t is fundamental to American jurisprudence that 'a defendant must be tried for what he did, not for who he is.'" *United States v Foskey*, 636 F.2d 517, 523, (D.C. Cir. 1980), *quoting United States v Meyers*, 550 F.2d 1036, 1044 (5th Cir. 1977).

⁷ The Indiana statute permitted, in a prosecution for child molestation, the admission of evidence of the defendant's prior sexual molestation of a different victim. Ind. Code 35-37 (cited in Brim, 624 N.E.2d at 33 n.2).

- a. RCW 10.58.090 violates due process because it conditions the admissibility of a defendant's prior acts of sexual misconduct on the importance of that evidence to the State's case.

Under subsection (6)(e) of this statute, judges must evaluate “the necessity of the evidence beyond the testimonies already offered at trial.” By its terms, this provision applies only when one party “needs” the evidence, ostensibly for the purpose of proving up a weak case. This provision violates a defendant's right to a fair trial because it is one-sided and directs judges, in effect, to evaluate the guilt of the defendant.

“The rules of this court concerning admissibility of evidence are premised on allowing evidence which is trustworthy, reliable, and not unreasonably prejudicial...The purpose of the Rules of Evidence is to afford any litigant a fair proceeding.” *State v. Bartholomew*, 101 Wn.2d 631, 640, 683 P.2d 1079 (1984) (internal citations omitted).

The U.S. Supreme Court has weighed in on the constitutionality of evidentiary rules that are premised on the strength of the State's case. In *Holmes v. South Carolina*, South Carolina enacted a rule that precluded defendants from introducing other suspect evidence in cases where “strong evidence” of the defendant's guilt was present, and in particular, forensic evidence. *Holmes v. South Carolina*, 547 U.S. 319, 331, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). The Supreme Court acknowledged

that while courts had much discretion to adopt rules of evidence, “arbitrary” rules that favored the prosecution violated U.S. constitutional guarantees of due process and the defendant’s right to present evidence. *Holmes*, 547 U.S. at 324-27, 126 S.Ct. 1727, 164 L.Ed.2d 503. One-sided rules, like the other suspect rule, were arbitrary:

By evaluating the strength of only one party’s evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt.

Holmes, 547 U.S. at 331, 126 S.Ct. 1727, 164 L.Ed.2d 503.

Like the other suspect rule in *Holmes*, RCW 10.58.090 is similarly one-sided. No other evidentiary rule, whether created by judge or senator, tells a court that it must evaluate and render a judgment regarding the state’s need to introduce evidence to shore up a weak case. No reasonable basis exists to carve out an exception to the rules of evidence that evaluates a case from the perspective of the state alone.

Indeed, such a procedure smacks of an invitation for a judge to render a pretrial determination of the guilt or innocence of the defendant in cases which call for “special” evidentiary considerations. For example, in *Giles v. California*, 554 U.S. 353, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008), the Court struck down the forfeiture by wrongdoing doctrine, which permitted the introduction of hearsay evidence where the defendant

engaged in conduct designed to prevent the witness from testifying. The rule, as the dissent pointed out, was “implicated primarily where domestic abuse is at issue.” *Giles*, 554 U.S. at 405, 128 S.Ct. 2678, 171 L.Ed.2d 488 (Breyer, J., dissenting). The majority stated in unequivocal terms that “a legislature may not ‘punish’ a defendant for his evil acts by stripping him of the right to have his guilt in a criminal proceeding determined by a jury, and on the basis of evidence the Constitution deems reliable and admissible.” *Giles*, 554 U.S. at 375, 128 S.Ct. 2678, 171 L.Ed.2d 488.

The Court was particularly critical of evaluating the need for the evidence based on the category of case prosecuted:

The dissent closes by pointing out that a forfeiture rule which ignores *Crawford* would be particularly helpful to women in abusive relationships - or at least particularly helpful in punishing their abusers...[W]e are puzzled by the dissent’s decision to devote its peroration to domestic abuse cases. Is the suggestion that we should have one Confrontation Clause (the one the Farmers adopted and *Crawford* described) for all other crimes, but a special, improvised, Confrontation Clause for those crimes that are frequently directed against women? Domestic violence is an intolerable offense that legislatures may choose to combat through many means - from increasing criminal penalties to adding resources for investigation and prosecution to funding awareness and prevention campaigns. But for that serious crime, as for others, abridging the constitutional rights of criminal defendants is not in the State’s arsenal.

Giles, 554 U.S. at 376, 128 S.Ct. 2678, 171 L.Ed.2d 488.

A rule of evidence which abrogates the due process rights of criminal defendants in one category of prosecutions - sexual misconduct - similarly affronts the constitutional guarantees of due process.

Finally, this rule is particularly offensive because it permits the introduction of propensity evidence based on conduct that has never been proven to a jury. While criminal convictions must be proven beyond a reasonable doubt, this statute allows a court to admit unproven conduct under a preponderance standard.

- b. RCW 10.58.090 deprives the defendant of a fair trial because it erodes the presumption of innocence.

The presumption of innocence is the bedrock upon which the criminal justice system stands.... The presumption of innocence can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve. This court, as guardians of all constitutional protections, is vigilant to protect the presumption of innocence.

State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008), citing *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007).

RCW 10.58.090 prevents a fundamentally fair trial because it jeopardizes the constitutionally mandated presumption of innocent unless proven guilty. As the Supreme Court commented in *Taylor v. Kentucky*, 436 U.S. 478, 790, 98. S.Ct 1930, 56 L.Ed.2d 468 (1978) the presumption of innocence, though not part of the text of the Constitution or the Bill of

Rights, is embodied in principles of due process. By admitting propensity evidence in sex cases, RCW 10.58.090 eviscerates the presumption of innocence because jurors no longer will presume the accused innocent, despite all instructions to the contrary. Rather, by hearing evidence that the accused committed prior acts of sexual misconduct, jurors will deem the accused reprehensible, perverted, and a “bad person.” What is even more abhorrent is that the new rule does not require that the propensity evidence be a prior conviction, and could include acts in which the accused was acquitted. Thus, the rule permits jurors to conclude that the accused is an evil and perverted person based on mere allegations of sexual misconduct that may have occurred long in the past, even if he was acquitted.

While prior sexual misconduct is admissible under ER 403 and ER 404(b) in certain situations, those situations differ markedly from RCW 10.58.090 because ER 403 and ER 404(b) have limitations and standards for the admission of such evidence in order to protect a defendant’s right to a fair trial. RCW 10.58.090 lacks any such limitations or standards.

RCW 10.58.090 is standardless in several aspects. RCW 10.58.090 instructs the court to disregard ER 404 (b) but requires the court to make certain determinations without providing any significant guidance. For example, RCW 10.58.090 provides no standard as to the

burden of proof required to prove that the prior act occurred. ER 404 (b), which the trial court is now told to ignore, was long and well interpreted by the appellate courts of this state. Under ER 404 (b) the burden of proof was a preponderance of the evidence. *See, e.g. State v. Kilgore*, 147 Wn.2d 288, 292, 53 P.3d 974 (2002) (“We have held that when the State seeks admission of evidence under ER 404(b), that the defendant has committed bad acts that constitute crimes other than the acts charged, the trial court must (1) find by a preponderance of the evidence that the uncharged acts probably occurred before admitting the evidence; (2) identify the purpose for which the evidence will be admitted; (3) find the evidence materially relevant to that purpose; and (4) balance the probative value of the evidence against any unfair prejudicial effect the evidence may have upon the fact-finder.”) What is the State’s burden of proof of establishing the existence of prior acts of misconduct under RCW 10.58.090? We are not told.

RCW 10.58.090 requires the court to consider the “similarity of the prior acts to the acts charged.” How similar is similar? Under ER 404 (b) the degree of similarity depended on the purpose for which the prior act was to be admitted. Identity required a “signature like” stringent test of uniqueness. *See e.g. State v. Thang*, 145 Wn.2d 630, 41 P.3d 1159 (2002). Common plan or scheme required that the state bear a high burden

to show that the prior acts were “substantially similar.” *State v. DeVincentes*, 150 Wn.2d 11, 74 P.3d 119 (2003). The Washington Supreme Court required these standards to comport with fundamental fairness to assure the accused a fair trial. The purpose to these standards was to avoid the possibility that the evidence of prior bad acts would be misused by the jury in all the ways previously discussed in this section. RCW 10.58.090 provides no guidance as to how similar the prior acts have to be. These ambiguities render the rule violative of due process and deprive the defendant of a fair trial.

- c. Two recent cases from Division I upholding RCW 10.58.090 are seriously flawed and should not be followed by this court.

Two companion cases recently decided by Division I of the Court of Appeals have been accepted for review by the Washington Supreme Court. Division I in *State v. Gresham*, 153 Wn.App. 659, 223 P. 3d 1194 (2009), and *State v. Scherner*, 153 Wn.App. 621, 225 P. 3d 248 (2009) upheld RCW 10.58.090 as not being violative of the separation of powers doctrine, due process, and the ex post facto doctrine. First, *Gresham* and *Scherner* are decisions from another division of the Court of Appeals and, therefore, are not binding on this court. *Eriksen v. Mobay Corp.*, 110 Wn.App. 332, 41 P.3d 488 (2002). Second, both *Gresham* and *Scherner* have been accepted for review by the Washington Supreme Court and,

therefore, are not final decisions on the issues. Finally, *Gresham*, and *Scherner* were wrongly decided and this court should wait until the Washington Supreme Court rules on both cases before rendering its opinion in this case.

Regarding the separation of powers issue, the *Gresham* court glossed over the fact that by its very first sentence, RCW 10.58.090 completely destroys ER 404(b). The court held that as long as the trial court under RCW 10.58.090 still has the option to exclude the prior bad acts that there is no conflict with ER 404 (b) and no separation of powers violation. The court even agreed with *Gresham* that the first sentence of RCW 10.58.090 creates an apparent conflict with ER 404(b). *Gresham*, 153 Wn.App. at 667, 223 P. 3d 1194.

The *Gresham* court blindly followed the Legislature's assertion in the notes following RCW 10.58.090 claiming the law is substantive not procedural. This assertion ignores case law from this and other states regarding what is substantive and what is procedural. See Sections 1(a) (b) (c) above.

Substantive law "prescribes norms for societal conduct and punishments for violations thereof." *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. *Smith*, 84 Wn.2d at 501, 527 P.2d 674 (1974). 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.

In Washington, the Supreme Court has ultimate authority, inherent in the state constitution and delegated by statute, to promulgate rules governing procedures in state courts. Although that authority is often shared with the Legislature, it is well settled that where a procedural statute conflicts with a procedural rule promulgated by the court, the rule must prevail.

The Evidence Rules, which “govern the proceedings in the courts of the state of Washington,” ER 101, are unquestionably a valid exercise of the Supreme Court’s rule-making power. Washington courts recognize that rules of evidence are generally rules of procedure subject to the Supreme Court’s ultimate authority and the constitutional separation of powers doctrine.

RCW 10.58.090 directly conflicts with a court rule and therefore violates the constitutional separation of powers doctrine. The statute is

void. *State v Thorne*, 129 Wn.2d 736, 762, 921 P.2d 514 (1996) (legislation that violates separation of powers doctrine is void).

Scherner, while holding that more easily allowing prior bad sex acts does not reduce the quantum of evidence the state needs to convict ignores the fact that there is absolutely no limited purpose to admitting this evidence. The only purpose in admitting this evidence is to show propensity and conformity. RCW 10.58.090 clearly favors the prosecution where ER 404(b) is neutral. The *Scherner* court believes that the modified ER 403 balancing test of RCW 10.58.090 saves the statute from any due process violations. *Scherner*, 153 Wn.App. at 654-655, 225 P. 3d 248. The court ignored that, as previously argued, RCW 10.58.090 is essentially standardless concerning burden of proof and similarity of prior acts. The court failed to address the question of how a determination of the risk of prejudice in a particular case can be legislatively preordained. Mr. Schmus reasserts all of the reasons previously argued as to why RCW 10.58.090 violates state and federal constitution provisions of due process and deprived him of a fair trial. Simply saying a modified ER 403 analysis cures all is a simplistic and result oriented approach.

3. **Even if this court finds RCW 10.58.090 to be constitutional, the trial court erred in admitting evidence of Mr. Schmus' alleged prior sexual misconduct where such evidence would have been excluded by RCW 10.58.090's balancing factors.**

Should this court find RCW 10.58.090 constitutional, it still should find that the trial court erred in allowing evidence of Mr. Schmus' prior alleged incident of sexual misconduct to be admitted at trial. Even under this statute, this evidence is not automatically admissible. The trial court had to determine the relevancy of the evidence and whether its prejudicial effect outweighed its probative value and the state must still justify the lawful purpose for which it offers the evidence. When Mr. Schmus' alleged prior acts are evaluated in light of subsections (6)(e) and (g), the court should not allowed the evidence to be admitted.

Under RCW 10.28.090(6)(a) the first factor the trial judge considers is "The similarity of the prior acts." Under ER 404(b):

Other misconduct may be introduced to show a system of course of conduct that connects the defendant to the crime charged. A mere similarity between the prior misconduct and the crime charged, however, is not sufficient to justify admitting that prior misconduct. The proponent must be able to point to something distinctive or unusual - a characteristic "signature" - that links the defendant to the crime charged.

Tegland's Courtroom Handbook on Washington Evidence 2008-2009 Edition, pg. 292.

While the alleged acts with V.C. can be interpreted to be broadly similar tot he alleged acts against C.M., such evidence is patently propensity evidence and would be barred by ER 404(b). However, even if

the trial court ignored ER 404(b), the evidence would still be barred by RCW 10.58.090(6)(g), discussed below.

Under RCW 10.58.090(6)(e) the trial court is to consider “The necessity of the evidence beyond the testimonies already offered at trial” in determining whether or not V.C.’s testimony would be admissible under RCW 10.58.090. As pointed out in section 2(a) above, this factor violates due process because it conditions admissibility on its importance to the state’s case. Further, the State’s case consisted primarily of the testimony of C.M., the alleged victim of Mr. Schmus. C.M. was able to positively identify Mr. Schmus as the man who allegedly raped her. Mr. Schmus’ defense was that he was with his fiancé the entire day of the alleged rape. Thus, the only issue before the jury was one of credibility- did the jury believe the State’s witnesses or did the jury believe Mr. Schmus’ witnesses? In this context, the only relevance V.C.’s testimony had was to establish that Mr. Schmus’ had the propensity to rape underage girls. Thus, V.C.’s testimony was not necessary beyond the testimony already offered at trial since V.C.’s testimony served only to bolster C.M.’s credibility through the propensity inference that Mr. Schmus did it before to V.C. so he probably did it again to C.M.

Under RCW 10.58.090(6)(g) the court is to look at “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.” As stated above, the only relevance V.C.’s testimony had was to establish Mr. Schmus’ propensity to commit the crimes charged. The danger the jury would convict Mr. Schmus based on an improper propensity inference clearly substantially outweighed any probative value that V.C.’s testimony might have had. Further, V.C.’s testimony confused the issue before the jury by clouding the jury’s credibility determination with evidence that was irrelevant to any inference save propensity. As such, V.C.’s testimony was a waste of time since it was not relevant to any legitimate purpose.

Further, it cannot be denied or overstated enough those trials involving allegations of sexual misconduct, especially with children as the alleged victims, are inherently different than other trials. This difference is rooted in the inherent prejudice of the charge and the difficulty of finding jurors who can be fair and impartial given the nature of the charge(s) and the evidence. Any argument that whatever probative value Mr. Schmus’ prior alleged sexual misconduct has outweighed the danger of unfair prejudice is simply baseless as the reality is that being charged with a sex offense is already more prejudicial than other charges and for the jury to hear that the defendant was previously charged with a sex

offense is not only substantially but overwhelmingly prejudicial and can only result in the jury basing their decision on emotion and prejudice and not on the evidence regarding the current charge.

Under RCW 10.58.090(6)(h) the court is to look at “Other facts and circumstances.” In this case, it is important to note the reasons provided by the state for amending the prior charge and resolving that case with a non-sex gross misdemeanor. CP 58-60. As stated in its reasons filed with the court for that amendment and in support of that resolution are the proximity of ages of the alleged victim and the defendant to each other and to the legal requirements, the evidence of lack of force or threat of force, the lack of direct evidence regarding the defendant’s knowledge of the alleged victim’s age, and the issue with “missing” evidence which the state was obviously concerned about as according to the police reports Mr. Schmus provided a written statement regarding this charge which neither the state nor the police could find. CP 58-60. The prior allegations resolved in a conviction for simple assault, not a sex crime. CP 58-60.

Introduction of the evidence relating to V.C. was far more prejudicial to Mr. Schmus than it was probative of any issue since the evidence relating to V.C. was nothing but propensity evidence.

4. The trial court erred in finding that evidence of Mr. Schmus' prior alleged sexual misconduct was admissible under ER 404(b) as evidence of a common scheme or plan.

A trial court abuses its discretion when its decision is “manifestly unreasonable or based on untenable grounds.” *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn.App. 92, 99, 38 P.3d 1040 (2002). A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *Grandmaster Cheng-Yen Lu*, 110 Wn.App. at 99, 38 P.3d 1040.

ER 404(b) provides,

(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.

The State must meet a substantial burden when attempting to bring in evidence of prior bad acts under one of the exceptions to this general prohibition: the prior acts must be “(1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or

scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial.” *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

There are two different situations wherein the “plan” exception to the general ban on prior bad acts evidence may arise. One is where several crimes constitute constituent parts of a plan in which each crime is but a piece of the larger plan. There is no question that evidence of a prior crime or act would be admissible in such a case to prove the doing of the crime charged. A simple example would be a prior theft to acquire a tool or weapon to perpetrate a subsequently executed crime. The other situation arises when an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes.

State v. Lough, 125 Wn..2d 847, 854-855, 889 P.2d 487 (1995).

The issue in *Lough* was the admissibility of evidence of the second type of common scheme or plan, which involves prior acts as evidence of a single plan used repeatedly to commit separate, but very similar, crimes. The *Lough* court held that evidence of this second type of plan may be admissible if the State establishes a sufficiently high level of similarity:

To establish common design or plan, for the purposes of ER 404(b), the evidence of prior conduct 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.

Lough, 125 Wn..2d at 860, 889 P.2d 487.

In *State v. Smith*, 106 Wn.2d 772, 725 P.2d 951 (1986), the Washington Supreme Court ruled that the trial court abused its discretion by admitting evidence of burglaries in the defendant's trial for rapes for which no assailant had been positively identified, where the State only identified several very *general* similarities between the rapes and the burglaries with respect to the time, manner and location of the crimes, and noted that the rapist and defendant both wore a leather jacket and gloves when committing the crimes. The *Smith* court wrote that, where the State seeks to offer evidence of a prior criminal act to establish the defendant's identity as the perpetrator of the current crime charged, "the method employed in the commission of both crimes *must be so unique* that mere proof that an accused committed one of them creates *high probability* that he also committed the act charged," and that, "[m]ere similarity of crimes will not justify the introduction of other criminal acts under the rule. There must be something *distinctive or unusual* in the *means employed* in such crimes *and the crime charged*." *Smith*, 106 Wn.2d at 777-778, 725 P.2d 951 (emphasis in original), citing *State v. Laureano*, 101 Wn.2d 745, 764-765, 682 P.2d 889 (1984).

Here, the trial court concluded that the circumstances surrounding Mr. Schmus' alleged sexual misconduct with V.C. were sufficiently similar to Mr. Schmus' alleged sexual misconduct with C.M. to permit

evidence of Mr. Schmus' alleged misconduct with V.C. as evidence of a common scheme or plan. RP 70-71. The trial court's analysis of why Mr. Schmus' method of allegedly raping V.C. was sufficiently similar to Mr. Schmus' method of allegedly raping C.M. to be admissible as evidence of a common scheme or plan to rape women was as follows:

they are admissible for proving a common scheme or plan given the similarity of the nature of the conduct in the earlier incidents with the [sic] V.C., given her age, given the relationship, making the acquaintance of her through the school, getting into situations where he's alone with her. Similar to what happened with [C.M.] in this particular case, allegedly, that he had made a relationship with her through this square dancing club and got himself into a situation where he was alone with her.

RP 70-71.

In ruling on the admissibility of the V.C. evidence under RCW 10.58.090, the trial court also found that the sexual activity engaged in between Mr. Schmus and V.C. and C.M. was "very similar in nature." RP 65. Thus, the similarities identified by the trial court as indicating a "common scheme or plan" in the method of committing the alleged rapes of V.C. and C.M. were that the defendant got to know underage girls, got them alone, and then raped them in the same manner.

The "common scheme or plan" identified by the trial court as being Mr. Schmus' "common scheme or plan" in alleged raping V.C. and then C.M. would, therefore, consist of getting to know his victims, getting

his victims in a place where he was alone with them, and then penetrating their vaginas with his fingers and/or penis. An objective review of the court's identified methodology quickly reveals that the courts has described a method so broad as to describe nearly every conceivable method of committing rape. In any rape the perpetrator will identify the victim (get to know them), get the victim in a situation where the perpetrator was alone with the victim, and then rape the victim (penetrate the victim with a finger, penis, or some other object). This is not a "common scheme or plan" of sufficiently distinctive or unusual means under *Smith* as to render the alleged rape of V.C. admissible in Mr. Schmus' trial for allegedly raping C.M.

The trial court abused its discretion in admitting the evidence of Mr. Schmus' alleged rape of V.C. as evidence of a "common scheme or plan" under ER 404(b).

5. The admission of evidence of Mr. Schmus' alleged prior sexual misconduct deprived Mr. Schmus of a fair trial.

"A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." *State v. Miles*, 73 Wn.2d 67, 70, 436 P.2d 198 (1968).

As discussed above, the evidence of Mr. Schmus' alleged sexual misconduct towards V.C. was highly prejudicial to him yet irrelevant to

any issue before the jury. The jurors hearing evidence that Mr. Schmus had raped a minor female before would undoubtedly make the propensity inference that "he did it before so he must have done it here." This inference was particularly damaging here since the only issue before the jury was one of credibility of the various witnesses. The testimony of V.C. would unavoidably bolster C.M.'s credibility.

The admission of the irrelevant evidence relating to V.C. deprived Mr. Schmus of a fair trial.

6. The trial court invaded the province of the jury in entering findings of fact equivalent to finding Mr. Schmus guilty.

It is the province of the jury in criminal cases to pass on the weight and sufficiency of the evidence; and when the court finds there is substantial evidence of a fact it must be left for the jury to say whether its probative force meets the standard required for a conviction, whether it convinces them beyond a reasonable doubt of the defendant's guilt.

State v. Frye, 53 Wn.2d 632, 633, 335 P.2d 594 (1959).

Here, findings of fact regarding RCW 10.58.010 and ER 404(b) evidence numbers II, IV, V, VI, VII, VIII, IX, X, XI, and XII go far beyond rulings on the admissibility of evidence and become, in effect, findings that Mr. Schmus is guilty of the crimes charged. Therefore, these findings are improper in that they invade the province of the jury to determine whether or not Mr. Schmus was guilty. Either through design

or scrivener's error, the trial court invaded the province of the jury and erred when it entered findings of fact which were, in effect, findings that Mr. Schmus was guilty of the crimes charged.

V. CONCLUSION

Because RCW 10.58.090 directly conflicts with a court rule, it violates the separation of powers doctrine and is void. The statute also violates due process because it arbitrarily favors the prosecution by conditioning evidentiary admissibility on its importance to the state's case. Even if the court determines the statute is constitutional, the balancing factors listed in the statute direct the court to exclude this evidence in this case since such evidence was far more prejudicial to Mr. Schmus that it was probative of any issue before the jury.

RCW 10.58.090 violates the separation of powers doctrine, violates Mr. Schmus' due process right to a fair trial, and resulted in highly prejudicial yet irrelevant evidence being admitted at his trial. This court should find RCW 10.58.090 unconstitutional, vacate Mr. Schmus' convictions, and remand Mr. Schmus' case for a new trial where RCW 10.58.090 is not applied. Alternatively, should this court find that RCW 10.58.090 is constitutional, this court should still vacate Mr. Schmus' convictions and remand his case for a new trial since the evidence relating to V.C. was more prejudicial to Mr. Schmus that it was probative of any

issue before the jury and introduction of the evidence deprived Mr. Schmus of a fair trial.

DATED this 3rd day of May, 2011.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Sheri Arnold", is written over a horizontal line.

Sheri Arnold, WSBA No. 18760
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on May 3, 2011, she delivered in person to the Pierce County Prosecutor's Office, County-City Building, 910 Tacoma Avenue South, Tacoma, Washington 98402, and by United States Mail to appellant, Brett A. Schmus, DOC # 344725, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, Washington 98520, true and correct copies of this Opening Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on May 3, 2011.


Norma Kinter
Norma Kinter

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