

NO. 41578-0-II

COURT OF APPEALS  
DIVISION II

11 AUG 15 PM 3:00

STATE OF WASHINGTON

BY  DEPUTY

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

BRETT SCHMUS, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Judge Edmund Murphy

No. 10-1-00667-4

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**Brief of Respondent**

MARK LINDQUIST  
Prosecuting Attorney

By  
STEPHEN TRINEN  
Deputy Prosecuting Attorney  
WSB # 30925

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the Court should stay further consideration of the constitutionality of RCW 10.58.090 where two Court of Appeals cases have held the statute is not unconstitutional, and where those cases are currently pending before the Supreme Court?

2. Whether the defendant received a fair trial notwithstanding the admission of V.C.'s testimony regarding his assault of her where the "right to a fair trial" is in fact the right to due process, and thus falls under the arguments raised in the preceding issue?

3. Whether the court properly applied the balancing test(s) and admitted evidence of the defendant's prior sexual assault on V.C. first under RCW 10.58.090, and second under ER 404(b)?

4. Whether the trial court's findings and conclusions regarding the admissibility of the evidence were proper because they did not invade the province of the jury where they were limited to the determination of the admissibility of the defendant's prior misconduct, and where they in any way affected the jury's determination of guilt?

B. STATEMENT OF THE CASE.

1. Procedure

On February 10, 2010, based on an incident that occurred on January 11, 2010, the State filed an information charging the defendant Brett Shmus with: Count I, Rape of a Child in the Third Degree. CP 1; 2.

On October 25, 2010, the case was assigned to the honorable Judge Edmund Murphy. That same day, the State filed an Amended Information and a new declaration for determination of probable cause. CP 70-71; 72. The amended information added Counts II and III, which were both also charges for Rape of a child in the third degree that occurred on the same day as the first count, but based on separate sex acts. *See* CP 70-71; 72.

Prior to the start of trial, the state brought a motion regarding the admissibility under both RCW 10.58.090, and ER 404(b) of testimony by another alleged child victim (V.C.) of the defendant from a separate case involving an allegation of rape of a child that occurred prior to the incidents that formed the basis of this case. CP 8-25; 27-60; RP 10-20-10, p. 22-57; RP 10-21-10, p. 63-71. The court ruled the testimony of the victim from the other incident was admissible. RP 10-21-10, p. 71, ln. 3-19.

A jury was empaneled. CP 193. The jury convicted the defendant as to all three counts. CP 117-119. On December 10, 2010, the court sentenced the defendant to 60 months in prison. CP 138-152.

The defendant timely filed a notice of appeal on December 15, 2010. CP 153-168.

## 2. Facts

C.M. was born on February 12, 1994. RP 10-26-10 p. 97, ln. 4-8. On January 11, 2010 she was 15 years old. RP 10-26-10 p. 97, ln. 11-12. On January 11, 2010, C.M. lived with her mother and her mother's boyfriend at a residence in Milton, Washington. RP 10-26-10 p. 97, ln. 14-17. C.M.'s father lived about a mile away. RP 10-26-10 p. 101, ln. 11-13.

C.M. was a member of the Rockin' Teens, a square dancing club that met on Sundays. RP 10-26-10 p. 98, ln. 24 to p. 99, ln. 8. It's a family club with people of different ages. RP 10-26-10 p. 99, ln. 13-15. C.M. met the defendant, Brett Schmus at one of the dances. RP 10-26-10 p. 98, ln. 17-23; p. 99, ln. 22-24. Schmus had his fiancée, Mary, with him. RP 10-26-10 p. 100, ln. 3-9. Schmus and Mary regularly attended the dances over a period of a few months. RP 10-26-10 p. 100, ln. 10-21. At the dances, C.M. would interact with the defendant and his fiancée, by talking together or being in the same dance. RP 10-26-10 p. 100, ln. 22-24.

On one occasion, in December of 2009, C.M. hung out with the defendant, Mary, and Mary's little brother, at their house in Auburn. RP 10-26-10 p. 101, ln. 16 to p. 102, ln. 17. During that time, they talked,

played video games and messed around on the computer, but nothing inappropriate occurred. RP 10-26-10 p. 102, ln. 10-21.

On January 11, 2010, C.M. stayed home from school because she wasn't feeling well. RP 10-26-10 p. 104, ln. 13-23. She told her mother, who called the school to say that C.M. wouldn't be in. RP 10-26-10 p. 104, ln. 24 to p. 105, ln. 4. However, by mid-morning C.M. began to feel better. RP 10-26-10 p. 105, ln.7-11. At that point C.M. was bored, so she wanted to see if any friends could come over. RP 10-26-10 p. 105, ln. 9-11.

Everyone in the dance club had everyone's phone number because they were all friends. RP 10-26-10 p. 105, ln. 20-22. Because it was a school day C.M.'s school age friend could not come over. RP 10-26-10 p. 105, ln. 12-19. So she called the defendant because he was the first person she thought of. RP 10-26-10 p. 105, ln. 14-19; p. 106, ln. 12-16.

C.M. asked Schmus if he would come over and hang out, and he said he would. RP 10-26-10 p. 106, ln. 6-11. He then drove to C.M.'s house. RP 10-26-10 p. 107, ln. 7-10.

When he arrived they watched T.V. together in the living room on the first floor. RP 10-26-10 p. 108, ln. 20-22; p. 109, ln. 12-17.

As they were sitting on the couch in the living room, Schmus touched C.M. on her legs with his hands. RP 10-26-10 p. 110, ln. 13 to p. 111, ln. 20. Schmus then moved his hands up C.M.'s legs to her inner thighs. RP 10-26-10 p. 112, ln. 1-14, so C.M. scooted away from Schmus

a little bit. RP 10-26-10 p. 112, ln. 15-22. But Schmus then proceeded to touch C.M. between her legs on her crotch. RP 10-26-10 p. 112, ln. 23 to p. 113, ln. 3. C.M. reacted by moving away a little bit more. RP 10-26-10 p. 113, ln. 10-12.

At first Schmus was touching C.M. over her clothes. RP 10-26-10 p. 113, ln. 7-9. But then he progressed to touching C.M. in the same place, her crotch, but under her clothes. RP 10-26-10 p. 113, ln. 15-19. He got under C.M.'s clothes by moving his hand. RP 10-26-10 p. 113, ln. 20-21.

Once Schmus had his hands under C.M.'s clothes, he put a finger inside her vagina. RP 10-26-10 p. 114, ln. 2-9. At that point, Schmus got a phone call on his cell phone and told C.M. to be quiet. RP 10-26-10 p. 114, ln. 10-23. When Schmus got the phone call, he removed his hand from inside C.M.'s pants. RP 10-26-10 p. 115, ln. 4-6.

C.M. then moved away. RP 10-26-10 p. 115, ln. 9. She got up and went upstairs because she didn't want to be by him. RP 10-26-10 p. 115, ln. 9-10. C.M. was scared of Schmus because he was bigger and stronger than her. RP 10-26-10 p. 115, ln. 11-14.

At some point after that C.M. went to go back down stairs. RP 10-26-10 p. 115, ln. 15-19. But at that time Schmus was coming up the stairs and was no longer on the phone. RP 10-26-10 p. 115, ln. 15-22. Schmus stopped C.M. while she was still at the top of the stairs. RP 10-26-10 p. 115, ln. 23 to p. 116, ln. 3. Schmus asked C.M. to show him

around the upstairs, like a tour. RP 10-26-10 p. 116, ln. 4-9. So C.M. showed Schmus her mom's room, the play room and her bedroom, although she did not go in her bedroom. RP 10-26-10 p. 116, ln. 10-15. She did not go inside her bedroom because she was scared of Schmus because of his being pushy and his earlier contact with her. RP 10-26-10 p. 116, ln. 16-23.

Schmus was standing in front of C.M. and pushed her back into the bedroom with her walking backwards. RP 10-26-10 p. 117, ln. 2-9. The bedroom is very small and C.M. was standing in it. RP 10-26-10 p. 117, ln. 12-16. While C.M. was still standing, Schmus started touching C.M. again by placing his hands on her sides by her stomach. RP 10-26-10 p. 118, ln. 17 to p. 118, ln. 17. He was moving both his hands a little bit, but not much, just kind of rubbing them up and down. RP 10-26-10 p. 118, ln. 16-23.

A little after this, Schmus puts his hands inside of C.M.'s pants and again puts a finger inside C.M.'s vagina. RP 10-26-10 p. 119, ln. 7 to p. 120, ln. 4. As Schmus does this, C.M. tries to move away from him, but Schmus doesn't stop. RP 10-26-10 p. 120, ln. 5-9.

At some point, Schmus took his hands out of C.M.'s pants and told her to get on the bed. RP 10-26-10 p. 120, ln. 13-23. C.M. was scared of Schmus, so she sat on the bed. RP 10-26-10 p. 120, ln. 24 to p. 121, ln. 4. C.M. didn't feel she could tell Schmus to stop because she didn't know what he would do if she told him that. RP 10-26-10 p. 121, ln. 7-11.

C.M. was wearing a shirt, bra, pants and panties. RP 10-26-10 p. 121, ln. 14-16. As C.M. was sitting on the bed, Schmus was sitting next to C.M. and he took off all her clothes. RP 10-26-10 p. 121, ln. 17-25.

As C.M. is sitting naked on the bed, Schmus started touching her vagina with his hands again. RP 10-26-10 p. 122, ln. 3-12. And again his hand goes inside her vagina. RP 10-26-10 p. 122, ln. 113-14. While this was going on Schmus still had all his clothes on. RP 10-26-10 p. 122, ln. 22-23.

Then Schmus stopped touching C.M.'s vagina. RP 10-26-10 p. 122, ln. 17-19. Schmus then tells C.M. that he will be right back. RP 10-26-10 p. 123, ln. 1-3. C.M. thought Schmus went outside to his car because she heard the [house] door open and close. RP 10-26-10 p. 123,ln. 4-13. Schmus wasn't gone long, a minute or two. RP 10-26-10 p. 123, ln. 13-14. While Schmus was gone C.M. didn't try to put her clothes back on because she didn't know what he was going to do when he came back. RP 10-26-10 p. 124, n. 1-6.

When Schmus returned, C.M. was still sitting on the bed. RP 10-26-10 p. 124, ln. 10-13. Schmus undressed. RP 10-26-10 p. 124, ln. 14-16. After he undressed Schmus put a condom on his penis. RP 10-26-10 p. 124, ln. 22-23; p. 125, ln. 1-2. C.M. didn't see where Schmus got the condom from. RP 10-26-10 p. 124, ln. 24-25. While he did all this Schmus was still standing. RP 10-26-10 p. 125, ln. 4-6.

Then Schmus sat on the bed next to C.M. RP 10-26-10 p. 125, ln. 7-11. Schmus started touching C.M. again. RP 10-26-10 p. 125, ln. 12-14. Schmus put his hands on C.M. and just kind of pushed her back so she was laying. RP 10-26-10 p. 125, ln. 16-17. Schmus then laid over C.M. so that he is on top of her. RP 10-26-10 p. 126, ln. 5-12.

Schmus then puts his penis inside C.M.'s vagina. RP 10-26-10 p. 126, ln. 13 to p. 127, ln. 3. Schmus begins moving up and down and C.M. believes he ejaculates while still inside her vagina. RP 10-26-10 p. 127, ln. 11-21. After that, Schmus removed his penis from C.M.'s vagina, got up, took off the condom, started getting dressed and put the condom in his pocket. RP 10-26-10 p. 127, ln. 22 to p. 128, ln. 6. Schmus told C.M. not to tell anyone. RP 10-26-10 p. 132, ln. 4-5.

At some point after getting dressed Schmus left without doing or saying anything else to C.M. RP 10-26-10 p. 128, ln. 11-17.

C.M.'s never told her mom what happened with Schmus because she was afraid of Schmus hurting her. RP 10-26-10 p. 132, ln. 13-18. C.M. did end up telling her school counselor about what happened with Schmus. RP 10-26-10 p. 132, ln. 22-23. However, C.M. didn't mean to, it just kind of slipped. RP 10-26-10 p. 134, ln. 15-17. Even then, C.M. didn't give her counselors or police the full details she testified to in court. RP 10-26-10 p. 135, ln. 7-11; ln. 23 to p. 136, ln. 2. C.M. didn't want to talk about it because it is hard for her to talk on the subject, it is

embarrassing and also because Schmus told her not to tell. RP 10-26-10 p. 135, ln. 9-20; p. 136, ln. 4-6.

At a time prior to the incident on January 11, 2010, C.M. had told Schmus her age. RP 10-26-10 p.108, ln. 3-16.

Another person, V.C. testified that she was repeatedly raped by the defendant in a series of incidents preceding his rape of M.C. RP 10-27-10 p. 229, ln. 20-23; p. 235, ln. 4 to p. 245, ln. 8. V.C. met when they were in the same geometry class in high school class when she was a 14-year-old freshman and Schmus was a senior. RP 10-27-10 p. 231, ln. 22 to p. 232, ln. 1; p. 232, ln. 11-25. [def's age.]

One day in the middle of the school year, V.C. couldn't get ahold of anyone to get a ride home from school. RP 10-27-10 p. 233, ln. 18-24. V.C. figured she and Schmus were both school aged and that Schmus might be a nice guy and he could probably drive her home on that one occasion. RP 10-27-10 p. 233, ln. 15-20. Schmus dropped V.C. off at the house. RP 10-27-10 p. 234, ln. 3-4. Schmus did not go inside V.C.'s house as her parents were very strict about boys and very protective of V.C. RP 10-27-10 p. 234, ln. 5-8.

However, some time later, V.C. was at home in her room with her parents gone when she heard a tapping. RP 10-27-10 p. 234, ln. 15-19. V.C. looked around and to her surprise the defendant was there. RP 10-27-10 p. 234, ln. 19-20. V.C. asked Schmus what he was doing there, told him her parents were very strict about no boys, and to go away. RP 10-

27-10 p. 234, ln. 20-22. At that point, Schmus was outside. RP 10-27-10 p. 234, ln. 23-25. V.C. thought Schmus had left. RP 10-27-10 p. 234, ln. 25 to p. 235, ln. 1.

V.C.'s window wasn't locked. RP 10-27-10 p. 235, ln. 4-5. She heard a shuffle in her bedroom and came back in to see Schmus inside. RP 10-27-10 p. 235, ln. 1-10. V.C. was shocked, wanted Schmus to leave and tried to push him out. RP 10-27-10 p. 235, ln. 17-18. However, Schmus was physically much stronger and taller than V.C. which made it difficult if not impossible for her to physically make Schmus leave. RP 10-27-10 p. 235, ln. 7-20. V.C. tried to threaten to say that she would call her mom or dad, but that did not work. RP 10-27-10 p. 235, ln. 20-22.

After V.C. tried to push Schmus out and verbally threatened him he laughed. RP 10-27-10 p. 236, ln. 2-5. That made V.C. feel very uneasy and want to desperately get him out of her room. RP 10-27-10 p. 236, ln. 7-8. Schmus laughed, smiled, and said he would see her and then left afterward. RP 10-27-10 p. 236, ln. 11-23.

This made V.C. very uneasy because he now knew where she lived, knew where her room was and that it was facing the street and that the window could be easily "disarmed" [opened?] from outside. RP 10-27-10 p. 236, ln. 11-16. However, V.C. did not want to say anything to anyone because her parents had a thing where any time a man approached a woman, it would be perceived as the woman's fault for inviting them. RP 10-27-10 p. 236, ln. 16-20. V.C.'s parents are very strict about that,

and V.C. didn't want any problems with them. RP 10-27-10 p. 236, ln. 20-21. V.C. didn't want any misunderstanding from Schmus being there. RP 10-27-10 p. 236, ln. 21-22. V.C. didn't want her parents to think it was her [causing him to be there]. RP 10-27-10 p. 236, ln. 22-23. V.C. didn't tell anyone about the incident, and pretty much just shut herself in. RP 10-27-10 p. 237, ln. 12. V.C. tried to block it out as a bad memory or nightmare and didn't want anyone, absolutely anyone, to find out. RP 10-27-10 p. 237, ln. 12-15.

About two weeks later, Schmus showed up at V.C.'s apartment again. RP 10-27-10 p. 238, ln. 7-12. It was during the night time and once again Schmus came over unannounced. RP 10-27-10 p. 238, ln. 14-15. So he caught her once again completely off guard. RP 10-27-10 p. 238, ln. 14-16. Again, Schmus entered through the window. RP 10-27-10 p. 238, ln. 18-20. The window is large, the lock is broken in the front, however, even so there really is not a[n effective] lock on the window that would keep out a burglar or a thief. RP 10-27-10 p. 238, ln. 22 to p. 239, ln. 2.

They were standing and Schmus ordered V.C. to undress herself. RP 10-27-10 p. 239, ln. 8. Schmus ordered her to do so with the threat that if V.C. did not do as he asked her, V.C.'s father would suffer the consequences. RP 10-27-10 p. 239, ln. 9-12. V.C.'s father was a veteran of the Army who was discharged because of a disability related to his back. RP 10-27-10 p. 239, ln. 19-20. He didn't have a car so he used the

transit system. RP 10-27-10 p. 239, ln. 13-18. V.C.'s father had to walk to and from work with his cane. RP 10-27-10 p. 239, ln. 19-21. So V.C.'s father was very vulnerable at the time. RP 10-27-10 p. 239, ln. 18.

Schmus' threats against V.C.'s father made her nervous and made her comply with what he asked. RP 10-27-10 p. 239, ln. 23. V.C.'s family didn't see her mother very often, as she only lived with them sometimes, and sometimes she wasn't around. RP 10-27-10 p. 239, ln. 15-17. V.C.'s father was the only person she had, and police involvement would put him at risk. RP 10-27-10 p. 247, ln. 5-6.

Schmus ordered V.C. to take her clothes off and as soon as she began to, he finished taking her clothes off. RP 10-27-10 p. 240, ln. 2-5. Then Schmus began touching V.C. on her waist, upper torso, neck, butt, rear end. RP 10-27-10 p. 240, ln. 8-9. Using both hands, pretty much any place Schmus could touch V.C. he did. RP 10-27-10 p. 240, ln. 9-14. That included touching her vagina and using his finger to penetrate inside her vagina, first with one finger, and then with two. RP 10-27-10 p. 240, ln. 17-24.

V.C.'s mom pulled up in the driveway and then V.C. freaked out and said that was her mom. RP 10-27-10 p. 241, ln. 6-7. Schmus immediately reacted. RP 10-27-10 p. 241, ln. 7-8. After touching V.C., Schmus threatened that V.C. should not say anything to anyone unless her father would have an accident. RP 10-27-10 p. 241, ln. 1-4. Once V.C.'s mom got out of the car and headed toward the door, Schmus hopped back

out the window. RP 10-27-10 p. 241, ln. 8-10.

The following weekend, V.C. received an instant message from Schmus in which he indicated that he would be swinging by at approximately ten, and that she had better let him in. RP 10-27-10 p. 241, ln. 18-25. He told her if she didn't let him in, her family and friends and everyone at her school would find out. RP 10-27-10 p. 242, ln. 2-5. This third time, went basically the same as the second time, except that Schmus also undressed himself. RP 10-27-10 p. 242, ln. 6-9. Schmus began to touch V.C. for a longer period of time. RP 10-27-10 p. 242, ln. 12-14. Schmus again penetrated V.C.'s vagina, first with his fingers and later with his penis. RP 10-27-10 p. 242, ln. 15-20. He didn't use a condom, and he did ejaculate. RP 10-27-10 p. 243, ln. 2-5. It ended when Schmus just got tired and left. RP 10-27-10 p. 243, ln. 9-11.

For the next six months, Schmus continued to come over every weekend or every other weekend and everything was pretty much the same as the third time he had come over and he had penile intercourse with V.C. RP 10-27-10 p. 243, ln. 12-19. Schmus would also engage V.C. in oral sex acts on each other. RP 10-27-10 p. 244, ln. 17-23. Typically Schmus would first have V.C. give him a hand job, and then give him a blow job. RP 10-27-10 p. 245, ln. 1-2.

During the six month period, if V.C. was hesitant and would try to push Schmus away because she felt awful and didn't want to do it any more, Schmus would get upset with her attempts to break away from it

and finish it. RP 10-27-10 p. 245, ln. 912. Schmus would shove or push V.C. against the furniture in her room, and on one occasion hit her with his back hand. RP 10-27-10 p. 245, ln. 15-21. Every time Schmus would tell V.C. more details about her father such as what routes he took and what bus numbers he took. RP 10-27-10 p. 245, ln. 22 to p. 246, ln. 6. This made V.C. more nervous every time. RP 10-27-10 p. 245, ln. 24-25.

V.C. didn't want to have sex with Schmus. RP 10-27-10 p. 246, ln. 7-9. She would tell Schmus to stop, but he would only stop to laugh at her and then continue whatever he was doing. RP 10-27-10 p. 246, ln. 13-15. None of V.C.'s acts with Schmus were consensual. RP 10-27-10 p. 248, ln. 21-22. During the time this was going on, Schmus had a girlfriend at school, and everyone at school knew it. RP 10-27-10 p. 251, ln. 4-7.

Schmus' raping of V.C. finally stopped on a night her mom had come to spend the night. RP 10-27-10 p. 247, ln. 9-10. Schmus decided to come over as well. RP 10-27-10 p. 247, ln. 10-11. V.C.'s dad had been out for some time and had not returned and was not picking up his cell phone. RP 10-27-10 p. 247, ln. 12-13. V.C.'s mom came knocking on her door because she wanted V.C. to call her dad and see if maybe he would call back. RP 10-27-10 p. 247, ln. 13-14. When V.C.'s mom came to the door, V.C. didn't respond. RP 10-27-10 p. 247, ln. 14-15. When V.C. did

Respond, she told her mom to wait a minute and V.C.'s mom got suspicious. RP 10-27-10 p. 247, ln. 16.

V.C.'s mom opened the door, and saw the defendant hiding in V.C.'s bed half naked while V.C. was getting dressed. RP 10-27-10 p. 247, ln. 17-18. V.C.'s mom yelled at Schmus and threw his clothes at him, telling him to get dressed and ordered him to leave. RP 10-27-10 p. 247, ln. 22-25. V.C.'s mom was practically screaming at Schmus, asking him if he knew V.C. was under age. RP 10-27-10 p. 248, ln. 1-2. Schmus said something to the effect that he swore to God that he didn't do anything to V.C., that he didn't touch her in any way. RP 10-27-10 p. 248, ln. 2-4. However, it was quite obvious that something had gone on with Schmus being half naked in V.C.'s bed. RP 10-27-10 p. 248, ln. 4-6. Schmus got dressed as quickly as he could and left via the front door. RP 10-27-10 p. 248, ln. 6-7.

C. ARGUMENT.

1. RCW 10.58.090 HAS BEEN HELD NOT TO BE UNCONSTITUTIONAL BY THE COURT OF APPEALS, AND ANY ACTION ON THIS CASE BEYOND BRIEFING SHOULD BE STAYED PENDING A RULING BY THE SUPREME COURT.

The challenges that the defendant raises as to the constitutionality of RCW 10.58.090, with regard to both separation of powers and due process has been considered and rejected by the Court of Appeals. *State*

*v. Scherner*, 153 Wn. App. 621, 643-648, 225 P.3d 248 (2009) (*review granted* 168 Wn.2d 1036, 233 P.3d 888 (2010)); *State v. Gresham*, 153 Wn. App. 659, 665-670, 223 P.3d 1194 (2010) (*review granted* 168 Wn.2d 1036, 233 P.3d 888 (2010)). Accordingly, for the sake of expediency, the State relies upon the analyses in those cases.

Per ACCORDS, the Supreme Court heard oral argument on both cases on March 17, 2011. The Supreme Court ruling on those claims is likely to be issued before this case could reach oral argument, and that ruling is likely to be dispositive of the issues in this case. Accordingly, this Court should stay any action on this case other than completion of the briefing, pending the issuance of the ruling by the Supreme Court in the cases listed above.

In the even that the Supreme Court action leaves any issues open, they can be addressed via supplemental briefing.

2. THE ADMISSION OF THE DEFENDANT'S PRIOR SEXUAL MISCONDUCT DID NOT DEPRIVE HIM OF A FAIR TRIAL.

The "right to a fair trial" is an expression of and rooted in the constitutional right to due process. *See State v. Larson*, 160 Wn. App. 577, 590, 249 P.3d 669 (2011) (citing United States Const. Sixth, Fourteenth Amendments; Const. art. I, §§ 3, 22.). The right to a fair trial is not somehow different from the defendant's right to due process.

Accordingly, this issue is covered by the State's argument in the preceding section.

3. THE COURT DID NOT ABUSE ITS DISCRETION  
WHEN IT ADMITTED EVIDENCE OF THE  
DEFENDANT'S PRIOR SEXUAL MISCONDUCT.

The court may affirm on any ground the record adequately supports even if the trial court did not consider that ground. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

a. The Court's Application Of The Balancing  
Factors Under RCW 10.58.090 Did Not  
Constitute An Abuse Of Discretion

RCW 10.58.090(6) lists a number of factors the trial court should consider when evaluating under ER 404(b) whether to exclude evidence of the defendant's commission of another sexual offense. Here, the trial court applied those factors and concluded that evidence the defendant committed a sex offense against V.C. was admissible. RP 10-21-10, p. 65, ln. 1 to p. 69, ln. 18; CP 181-190.

Here, the defense challenges the court's findings and conclusions with regard to the factors listed in RCW 10.58.090(6)(e), and (g) [and possibly subsection (h) as well]. *See* Br. App. 37-40.

**i. Necessity of the Evidence - Subsection (6)(e)**

As to this factor, the statute states that the trial judge shall consider the following: “[t]he necessity of the evidence beyond the testimony already offered at trial.” RCW 10.58.090(6)(e).

The defense takes great exception to this factor, claiming that it violates due process by conditioning the admissibility of the evidence on its importance to the State’s case. This argument mischaracterizes the language of the statute, is logically flawed, and is also inconsistent with the standards that pertain under ER 403.

First, this factor is merely one among eight factors listed to be “considered” by the court when balancing whether evidence should be admitted. It is not an element, and is therefore, contrary to the description by the defense, it is not an absolute requirement that conditions the use of the evidence on its importance to the State’s case.

Moreover, the defense language mischaracterizes the language of the statute. Again, it says: “[the] necessity of the evidence beyond the testimonies already offered at trial.” RCW 10.58.090(6)(e). This language effectively expands upon the requirement under ER 402 that evidence only be admitted if it is relevant. Indeed, the statutory language works in the defendant’s favor by giving the court a basis to exclude the

evidence if it is not necessary in light of the other evidence in the State's case.

In this case, the court concluded that the testimony of V.C. was necessary because the case did not involve medical, forensic or scientific evidence, and based on the statements of both parties the case would come down to the credibility of the witnesses. CP 188 (Conclusion X). Where V.C. testified that Schmus assaulted her and that assault was in many ways similar to his assault on C.M., the testimony of V.C. was significant for the jury in terms of weighing the credibility of C.M.

ii. **Probative v. Prejudice -  
Subsection (6)(g)**

As to this factor, the statute states that the trial judge shall consider the following:

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

RCW 10.58.090(6)(g). This language is essentially identical to the language of ER 403. The defense claims that the only relevance of V.C.'s testimony was to establish Schmus' propensity to commit the crimes charged. Br. App. 39. However, the court determined that testimony by V.C. was "very probative given the similarity between the acts, given that

it tended to show a common scheme or plan by the defendant, and given the state of the case.” CP 188 (Conclusion XII). The court further concluded that while the evidence was in some degree prejudicial, but not unfairly so “...the prejudicial effect of the evidence did not substantially outweigh its probative value in this case.” RP 10-21-10, p. 69, ln. 6-7; CP 188 (Conclusion XII).

The court did not admit the evidence because it showed propensity. Rather, the evidence was relevant to the credibility of the victim C.M. *See* CP 188 (Conclusion X). The court also determined that evidence also tended to show a common scheme or plan. The defense put on testimony from the defendant’s fiancée that she couldn’t recall him leaving her house that day. The evidence of common scheme or plan was relevant to show that it was in fact the defendant who was present and that he did commit the assault of C.M. in the manner she described because he had previously committed similar assaults on V.C. via similar means.

In addition to the court’s determinations, the physical similarities between the victims, the strictness of their parents regarding contact with males, how the victims were manipulated, as well as the nature of the sexual acts themselves, all tend to demonstrate that the defendant had particular sexual preferences that he acted upon with regard to C.M. *See, e.g.*, RP 10-28-10, p. 316, ln. 7-24.

iii. **Other Facts and Circumstances -  
Subsection (6)(h)**

As to this factor, the statute states that the trial judge shall consider the following: "Other facts and circumstances." RCW 10.58.090(6)(h). The court did not consider any other facts and circumstances. CP 188 (Conclusion 20-21).

In its brief, the defense argues that it is important to note the reasons why the State reduced the charges in V.M.'s case to a non-sex gross misdemeanor. Br. App. 40. The reason the prosecutor gave for amending the charge to a misdemeanor was:

On the date of the alleged incident, the age of the victim (15 years) and age difference between the alleged victim and defendant met the statutory elements, however, the proximity of those numbers to the legal boundaries (16 years and 48 months, respectively) in conjunction with other factors discussed below, which, if known by a jury would cause jury to [sic] great reluctance in finding the defendant guilty, making an acquittal or deadlocked jury a reasonable possibility.

There is no direct evidence, such as a statement by the defendant that the defendant knew the alleged victim's age. The two shared the same peer group. the [sic] defendant and victim met each other in their high school math class.

Some evidence would be presented which could lead a jury to infer that the sexual contact was not made by force or the implied threat of force[.]

The police report states that the defendant made a written statement, submitted with the other reports, however, the statement has never been found and it is not known what the defendant wrote in that statement - - a circumstance that would likely be held against the state.

The defendant has no prior criminal convictions or charges.

In light of the likely liabilities of trial and the questionable benefit of a conviction on the original charge, the state offers the amended information in order to still hold the defendant accountable while preserving state and judicial resources

CP 59-60. Indeed some of these issues were explored in the course of V.M.'s testimony where she acknowledged that she initially didn't tell the police the whole story, told the police that only oral sex occurred, and that it was consensual. RP 10-27-10, p. 248, ln. 8 to p. 249, ln. 24. However, V.C. also explained that she did this because she was afraid of the defendant. RP 10-27-10, p. 248, ln. 13-15.

Even if the court had considered the reasons that the charges against the defendant were reduced, they were of no great consequence where V.C. had always maintained that she had oral sex with the defendant. RP 10-27-10, p. 249, ln. 19-21. The state showed the defendant leniency because the relative ages of Schmus and V.C. made the case one near the statutory limits for the charge, which in turn implicated concerns regarding jury nullification. That fact is not anything that was particularly relevant to the court's decision to admit V.C.'s testimony. This is particularly so because the court admitted V.C.'s testimony, but did not admit evidence regarding the ultimate disposition of the case. RP 10-21-10, p. 71, ln. 5-19.

b. The Defendant's Prior Misconduct Was Admissible Under ER 404(b) As Evidence Of A Common Scheme Or Plan

The trial court separately conducted an analysis of whether V.C.'s testimony would be admissible under ER 404(b). RP 10-21-10, p. 69, ln. 19 to p. 71, ln. 2. The court determined that the evidence was admissible to show a common scheme or plan, a recognized reason for admissibility that is not subject to exclusion under ER 404(b). RP 10-21-10, p. 70, ln. 4-6; CP 189 (Conclusions III, XVI).

The court found that the prior act (V.C.) and the current act (M.C.) were very similar. CP 187 (Conclusion VI). The court found that the acts were similar because they both involved the defendant befriending young females, the females were the same age, the defendant would get them alone in their bedrooms and engage in sexual acts with them. CP 187 (Conclusion VI).

The defense asserted both general and alibi defenses. CP 183 (Finding XV). The assertion of a general defense means the defense challenges the ability of the State to prove each element of the crimes charged. *See, e.g., State v. Sexsmith*, 138 Wn. App. 497, 506, 157 P.3d 901 (2007). The assertion of an alibi defense means the defense is claiming the defendant did not commit the crime because he wasn't present, but was somewhere else. That put at issue the identity of the

defendant as the perpetrator. *See, e.g., State v. Fualaau*, 155 Wn. App. 347, 354, 228 P.3d 771 (2010). The alibi defense also puts at issue the credibility of C.M and her claim that the rapes occurred at all.

As instructed, the elements of the crimes were that:

- 1) On or about January 11, 2010, the defendant had sexual intercourse with C.M.;
- 2) That C.M. was at least fourteen years old, but was less than sixteen years old at the time of the sexual intercourse and was not married to the defendant and not in a state registered domestic partnership with the defendant;
- 3) That C.M. was at least forty-eight months younger than the defendant; and
- 4) That this act occurred in the State of Washington.

*See* CP 111.

The court admitted the testimony of V.C. under ER 404(b) as evidence of a common scheme or plan, because it was relevant to prove an element of the crime, and to rebut the defense of alibi. RP 10-21-10, p. 70, ln. CP 189 (Conclusion XV). The evidence involving the assault with V.C. was admissible under ER 404(b) as evidence of the first element that the defendant did have sexual intercourse with C.M. because of the similarity between the assault on V.C. and the rape of C.M. To the extent that the defendant's general denial was a claim that the State did not have

enough evidence to prove the first element, (presumably because C.M. was not credible) the testimony of V.C. was relevant.

Similarly, the testimony of V.C. was relevant to establish the identity of the defendant insofar as the similarity between the two acts tended to show that it was the defendant who had sex with C.M. *See* Tegland, § 404.22. Identity was at issue insofar as the defense raised alibi as a defense. The testimony of V.C. was also relevant to the defendant's motive with regard to C.M., which in turn was relevant to the question of whether the sexual intercourse occurred. *See* Tegland, §404.24. V.C.'s testimony was also relevant to C.M.'s delay in reporting. *See* Tegland, §404.29.

Because all of these bases support the court's admission of V.C.'s testimony under ER 404(b), the defendant's claim on this issue should be denied.

4. THE TRIAL COURT'S FINDINGS AND CONCLUSIONS DID NOT INVADE THE PROVINCE OF THE JURY.

The defense fails to identify the clerk's papers to which this argument pertains. The court will decline to consider arguments not supported by relevant authority or citations to the record. *See Ensley v. Pitcher*, 152 Wn. App. 891, 906 n. 12, 222 P.3d 99 (2009) (citing RAP 10.3(a)(6)); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Presumably, the defense is referring to CP 181-190, since those are the only findings designated in the record. Those findings are captioned “Findings of Fact and Conclusions of Law Regarding RCW 10.58.010 and ER 404(b) Evidence.”

This argument raised by the defense on this issue is a glaring *non sequitur* and a waste of time of both the court and counsel.

The trial court’s findings and conclusions could not invade the province of the jury where they only apply to preliminary questions of fact regarding the admissibility of the evidence and do not pertain to the ultimate question of guilt. This is especially so where they were never communicated to the jury and in no way affected the ultimate determination of the defendant’s guilt.

Questions regarding the qualification of a person as a witness or the admissibility of evidence are preliminary questions. Tegland, Karl B., WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE, VOL. 5, §§ 104.1, 104.2 (citing ER 104). The admissibility of evidence often turns on the determination of factual questions as foundational to the preliminary questions. *See* Tegland, § 104.1. Generally, preliminary factual determinations are made by a judge. Tegland, § 104.3. In offering evidence for admission, generally the burden is on the proponent to prove the admissibility by a preponderance of the evidence. *See* Tegland, §104.4

(noting however that some preliminary questions such as authenticity and identity require only a *prima facie* showing).

Here, the court's findings and conclusions were entered in support of the court's ruling that V.C. could testify as to Schmus' commission of separate sex offense against V.C. CP 181-190. The hearing on the admissibility of V.C.'s testimony occurred before the jury was even empaneled. *See* RP 10-20-10, p. 20, ln. 3 to p. 58, ln. 5; RP 10-21-10, p. 63, ln.3 to p. 71, ln. 19. Moreover, the court also ruled on the issue prior to the jury being empaneled. RP 10-21-10, ln. 71, ln. 3 to p. 76, ln. 10.

Shortly prior to the testimony of V.C., trial counsel for the defendant preserved objections and proposed a limiting instruction. RP 10-27-10, ln. 8 to p. 228, ln. 22. However, this also occurred outside the presence of the jury. Immediately prior to V.C.'s testimony, the court did read a limiting instruction to the jury:

I am allowing testimony on the subject of an alleged past act by the defendant for the limited purpose of whether there was a common scheme or plan. You must not consider this evidence for any other purpose whatsoever.

RP 10-27-10, p. 228, ln. 24 to p. 229, ln. 7. Finally, the court did not enter its written findings and conclusions until February 3, 2011. CP 181.

That was well after the jury rendered its verdict on October 28, 2010. *See* CP 117-119.

Other than the reading of the limiting instruction, none of the courts actions regarding its ruling were communicated to the jury. The jury never heard the court's findings. Here, the trial court could not have invaded the province of the jury because the court's findings (and conclusions), regarding whether V.C.'s testimony was admissible were in no way ever communicated to the jury and had no affect whatsoever on the jury verdict.

Further, the trial court's findings did not invade the province of the jury as to the ultimate question of guilt because they were limited to issue of preliminary question of admissibility. It is also worth noting that because the State had the burden of establishing the preliminary questions of fact by a preponderance of the evidence, the trial court could have found the State met its burden, and the jury still could have found that the State failed to prove the defendant's guilt beyond a reasonable doubt.

In the final analysis, the court's findings and conclusions were separate from and completely irrelevant to the jury's determination of the defendant's guilt. Because the court's findings were wholly separate from

the jury's determination, it was impossible for the court's findings to invade the province of the jury.

Moreover, even if any of the court's findings had been error, the defendant has failed to show any prejudice resulting therefrom, or to specify what remedy is sought. Accordingly, even if there were error, the defendant is not entitled to any relief.

This claim should be denied as so completely baseless as not only wholly lacking in merit, but as not even worthy of the court's consideration in the first place.

D. CONCLUSION.

This case should be stayed where the Court of Appeals has twice previously held RCW 10.58.090 constitutional, and the issue is now before the Supreme Court and likely to be ruled upon before this Court can issue its opinion.

Because "the right to a fair trial" is an expression of the right to due process, the claim that the admission of the prior sexual conduct under RCW 10.58.090 deprived the defendant of his right to a fair trial should be considered along with the defendant's claim that RCW 10.58.090 violated due process.

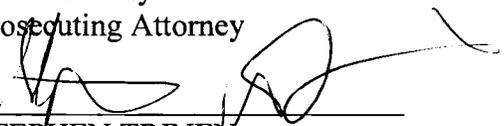
The court properly applied the balancing tests under RCW 10.58.090 and ER 404(b) respectively, and properly admitted the testimony of V.C. regarding the defendant's commission of a prior sex offense against her.

The trial court's findings and conclusions regarding the admissibility of V.C.'s testimony did not invade the province of the jury where they were limited to the admissibility of V.C.'s testimony, involved proof by a preponderance, not beyond a reasonable doubt, and where they never affected the jury's verdict.

The claim that RCW 10.58.090 is unconstitutional appears to be without merit in light of the Court of Appeals ruling, and should be shortly resolved with finality by the Supreme Court. The defendant's remaining issues are without merit and should be denied.

DATED: August 15, 2011.

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney



STEPHEN TRINEN  
Deputy Prosecuting Attorney  
WSB # 30925

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. 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 the date below.

8.15.15 [Signature]  
Date Signature

COURT OF APPEALS  
DIVISION II

11 AUG 15 PM 3:00

STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY