

No. 42848-2-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

vs.

**Ronald Newmiller,**

Appellant.

---

Kitsap County Superior Court Cause No. 11-1-00102-2

The Honorable Judges Karlynn Haberly and Jay B. Roof

**Appellant's Opening Brief**

Jodi R. Backlund  
Manek R. Mistry  
Attorneys for Appellant

**BACKLUND & MISTRY**  
P.O. Box 6490  
Olympia, WA 98507  
(360) 339-4870  
backlundmistry@gmail.com

**TABLE OF CONTENTS**

**TABLE OF CONTENTS ..... i**

**TABLE OF AUTHORITIES ..... iii**

**ASSIGNMENTS OF ERROR ..... 1**

**ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 2**

**STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 3**

**ARGUMENT..... 5**

**I. The trial judge erroneously admitted evidence of Mr. Newmiller’s prior sexual misconduct in violation of ER 403 and ER 404(b)..... 5**

A. Standard of Review..... 5

B. Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice..... 6

C. The trial court applied the wrong legal standard in evaluating the danger of unfair prejudice. .... 7

D. If the trial judge had applied the correct legal standard, a decision to admit the evidence would have been an abuse of discretion. .... 8

**II. Mr. Newmiller’s convictions were based in part on propensity evidence, in violation of his Fourteenth Amendment right to due process..... 11**

A. Standard of Review ..... 11

|             |                                                                                                                                                                                                                   |           |
|-------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|
| B.          | A conviction may not rest on propensity evidence. . .                                                                                                                                                             | 12        |
| C.          | Mr. Newmiller’s convictions were based in part on propensity evidence. ....                                                                                                                                       | 13        |
| <b>III.</b> | <b>Mr. Newmiller was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel.....</b>                                                                                         | <b>15</b> |
| A.          | Standard of Review.....                                                                                                                                                                                           | 15        |
| B.          | The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. ....                                                                                                         | 15        |
| C.          | Defense counsel provided ineffective assistance by proposing an improper instruction and by failing to propose a proper instruction limiting the jury’s consideration of evidence of prior sexual misconduct..... | 17        |
| <b>IV.</b>  | <b>The trial court violated both Mr. Newmiller’s and the public’s right to an open and public trial by conducting proceedings behind closed doors. ....</b>                                                       | <b>19</b> |
| A.          | Standard of Review.....                                                                                                                                                                                           | 19        |
| B.          | Both the public and the accused person have a constitutional right to open and public criminal trials. ....                                                                                                       | 20        |
| C.          | The trial court violated the public trial requirement by holding a hearing behind closed doors prior to giving the jury a supplemental instruction. ....                                                          | 21        |
| D.          | The Court should reject exceptions to the public trial right that have not been recognized by the Supreme Court.                                                                                                  |           |
|             | 22                                                                                                                                                                                                                |           |
|             | <b>CONCLUSION .....</b>                                                                                                                                                                                           | <b>23</b> |

## TABLE OF AUTHORITIES

### FEDERAL CASES

|                                                                                                                                                                   |    |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| <i>Estelle v. McGuire</i> , 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)<br>.....                                                                        | 13 |
| <i>Garceau v. Woodford</i> , 275 F.3d 769 (9th Cir. 2001), <i>reversed on other grounds</i> at 538 U.S. 202, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003). 13,<br>16 |    |
| <i>Gideon v. Wainwright</i> , 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)<br>.....                                                                           | 17 |
| <i>McKinney v. Rees</i> , 993 F.2d 1378 (9 <sup>th</sup> Cir. 1993).....                                                                                          | 13 |
| <i>Old Chief v. United States</i> , 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d<br>574 (1997).....                                                                | 13 |
| <i>Presley v. Georgia</i> , ___ U.S. ___, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010)<br>.....                                                                          | 21 |
| <i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674<br>(1984).....                                                                     | 17 |
| <i>United States v. Salemo</i> , 61 F.3d 214 (3 <sup>rd</sup> Cir. 1995) .....                                                                                    | 17 |

### WASHINGTON STATE CASES

|                                                                                                |    |
|------------------------------------------------------------------------------------------------|----|
| <i>Bellevue School Dist. v. E.S.</i> , 171 Wash.2d 695, 257 P.3d 570 (2011)... 13,<br>23       |    |
| <i>Brundridge v. Fluor Fed. Services, Inc.</i> , 164 Wash. 2d 432, 191 P.3d 879<br>(2008)..... | 9  |
| <i>City of Auburn v. Hedlund</i> , 165 Wash. 2d 645, 201 P.3d 315 (2009) .....                 | 9  |
| <i>City of Bellevue v. Lorang</i> , 140 Wash.2d 19, 992 P.2d 496 (2000) .....                  | 14 |
| <i>In re Fleming</i> , 142 Wash.2d 853, 16 P.3d 610 (2001).....                                | 18 |

|                                                                                        |           |
|----------------------------------------------------------------------------------------|-----------|
| <i>In re Hubert</i> , 138 Wash.App. 924, 158 P.3d 1282 (2007).....                     | 20        |
| <i>State v. Bone-Club</i> , 128 Wash.2d 254, 906 P.2d 325 (1995) .....                 | 3, 24, 26 |
| <i>State v. Burke</i> , 163 Wash.2d 204, 181 P.3d 1 (2008) .....                       | 14        |
| <i>State v. Coe</i> , 101 Wash.2d 772, 684 P.2d 668 (1984) .....                       | 11        |
| <i>State v. Depaz</i> , 165 Wash.2d 842, 204 P.3d 217 (2009).....                      | 7         |
| <i>State v. DeVincentis</i> , 150 Wash. 2d 11, 74 P.3d 119 (2003) .....                | 6, 8      |
| <i>State v. Duckett</i> , 141 Wash.App. 797, 173 P.3d 948 (2007) .....                 | 25        |
| <i>State v. Easterling</i> , 157 Wash.2d 167, 137 P.3d 825 (2006) .....                | 25, 27    |
| <i>State v. Everybodytalksabout</i> , 145 Wash. 2d 456, 39 P.3d 294 (2002)7, 10,<br>12 |           |
| <i>State v. Fisher</i> , 165 Wash. 2d 727, 202 P.3d 937 (2009) .....                   | 8         |
| <i>State v. Gresham</i> , 173 Wash. 2d 405, 269 P.3d 207 (2012) .....                  | 11, 22    |
| <i>State v. Hendrickson</i> , 129 Wash.2d 61, 917 P.2d 563 (1996) .....                | 20        |
| <i>State v. Horton</i> , 136 Wash.App. 29, 146 P.3d 1227 (2006) .....                  | 18        |
| <i>State v. Jury</i> , 19 Wash. App. 256, 576 P.2d 1302 (1978).....                    | 21        |
| <i>State v. Kirwin</i> , 165 Wash.2d 818, 203 P.3d 1044 (2009).....                    | 13        |
| <i>State v. Momah</i> , 167 Wash.2d 140, 217 P.3d 321 (2009) .....                     | 25, 27    |
| <i>State v. Myers</i> , 133 Wash.2d 26, 941 P.2d 1102 (1997) .....                     | 17        |
| <i>State v. Nguyen</i> , 165 Wash.2d 428, 197 P.3d 673 (2008). .....                   | 14, 18    |
| <i>State v. Njonge</i> , 161 Wash.App. 568, 255 P.3d 753 (2011) .....                  | 24        |
| <i>State v. Reichenbach</i> , 153 Wash.2d 126, 101 P.3d 80 (2004) .....                | 20        |
| <i>State v. Rodriguez</i> , 121 Wash. App. 180, 87 P.3d 1201 (2004) .....              | 21        |
| <i>State v. Saltarelli</i> , 98 Wash.2d 358, 655 P.2d 697 (1982).....                  | 10, 23    |

|                                                                                                                                |            |
|--------------------------------------------------------------------------------------------------------------------------------|------------|
| <i>State v. Strode</i> , 167 Wash.2d 222, 217 P.3d 310 (2009) .....                                                            | 25, 27     |
| <i>State v. Sublett</i> , 156 Wash.App. 160, 231 P.3d 231, <i>review granted</i> , 170 Wash.2d 1016, 245 P.3d 775 (2010) ..... | 27         |
| <i>State v. Sutherby</i> , 165 Wash. 2d 870, 204 P.3d 916 (2009).....                                                          | 11         |
| <i>State v. Thang</i> , 145 Wash. 2d 630, 41 P.3d 1159 (2002).....                                                             | 8          |
| <i>State v. Tilton</i> , 149 Wash.2d 775, 72 P.3d 735 (2003) .....                                                             | 21         |
| <i>State v. Toth</i> , 152 Wash. App. 610, 217 P.3d 377 (2009).....                                                            | 14         |
| <i>State v. Walsh</i> , 143 Wash.2d 1, 17 P.3d 591 (2001).....                                                                 | 13         |
| <i>State v. Woods</i> , 138 Wash. App. 191, 156 P.3d 309 (2007).....                                                           | 21, 22, 23 |

**CONSTITUTIONAL PROVISIONS**

|                                         |                                  |
|-----------------------------------------|----------------------------------|
| U.S. Const. Amend. I.....               | 1, 19, 21                        |
| U.S. Const. Amend. VI.....              | 1, 2, 16, 19, 21, 23             |
| U.S. Const. Amend. XIV .....            | 1, 2, 12, 13, 16, 17, 19, 21, 23 |
| Wash. Const. Article I, Section 10..... | 1, 21, 23                        |
| Wash. Const. Article I, Section 22..... | 1, 17, 21, 23                    |

**WASHINGTON STATUTES**

|                     |       |
|---------------------|-------|
| RCW 10.58.090 ..... | 5, 19 |
| RCW 71.09 .....     | 10    |

**OTHER AUTHORITIES**

|              |         |
|--------------|---------|
| ER 402 ..... | 10      |
| ER 403 ..... | 1, 6, 7 |

|                                                                                                                                                                                     |                          |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------|
| ER 404 .....                                                                                                                                                                        | 1, 4, 5, 6, 7, 8, 10, 19 |
| Natali & Stigall, “ <i>Are You Going to Arraign His Whole Life?</i> ”: <i>How Sexual Propensity Evidence Violates the Due Process Clause</i> , 28 Loyola U. Chi. L.J. 1 (1996)..... | 14                       |
| RAP 2.5.....                                                                                                                                                                        | 12, 16                   |
| WPIC 5.05.....                                                                                                                                                                      | 19                       |
| WPIC 5.30.....                                                                                                                                                                      | 19                       |
| WPIC 5.40.....                                                                                                                                                                      | 5, 19                    |

### **ASSIGNMENTS OF ERROR**

1. The trial judge erred by admitting evidence of Mr. Newmiller's prior sexual misconduct.
2. The trial judge misinterpreted ER 403 and ER 404(b), and applied the wrong legal standard for evaluating the prejudicial effect of prior bad acts evidence.
3. The trial judge abused his discretion by admitting unduly prejudicial evidence in violation of ER 403 and ER 404(b).
4. The trial judge abused his discretion by failing to conduct a complete ER 404(b) analysis on the record.
5. Mr. Newmiller's convictions infringed his Fourteenth Amendment right to due process because they were based in part on propensity evidence.
6. Mr. Newmiller was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
7. Defense counsel erroneously proposed an instruction directing jurors to use evidence of prior sexual misconduct as propensity evidence.
8. Defense counsel erroneously failed to propose a proper instruction limiting the jury's consideration of prior misconduct evidence.
9. The trial court violated Mr. Newmiller's First, Sixth, and Fourteenth Amendment right to an open and public trial.
10. The trial court violated Mr. Newmiller's right to an open and public trial under Wash. Const. Article I, Sections 10 and 22.
11. The trial court violated the constitutional requirement of an open and public trial by conducting proceedings behind closed doors.
12. The trial court erred in entering Finding of Fact No. vi.
13. The trial court erred in entering Finding of Fact No. viii.
14. The trial court erred in entering Finding of Fact No. ix.

15. The trial court erred in entering Finding of Fact No. x.
16. The trial court erred in entering Finding of Fact No. xi.
17. The trial court erred in entering Finding of Fact No. xiv.
18. The trial court erred in entering Conclusion of Law No. V.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Evidence of an accused person's prior sexual misconduct may not be admitted in a criminal trial if the probative value is substantially outweighed by the danger of unfair prejudice. Here, the trial judge admitted evidence of Mr. Newmiller's prior sexual misconduct without properly balancing the probative value and prejudicial effect. Did the trial court err by admitting irrelevant and unduly prejudicial evidence of criminal propensity without balancing relevant factors on the record?
2. A criminal conviction may not be based on propensity evidence. In this case, Mr. Newmiller's conviction was based in part on propensity evidence. Were Mr. Newmiller's convictions based in part on propensity evidence, in violation of his Fourteenth Amendment right to due process?
3. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. In this case, defense counsel failed to object to an erroneous jury instruction regarding the jury's consideration of prior misconduct and failed to propose a proper limiting instruction. Was Mr. Newmiller denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?
4. The state and federal constitutions require that criminal trials be administered openly and publicly. Here, the trial judge conducted proceedings *in camera* without engaging in a *Bone-Club* analysis. Did the trial judge violate the constitutional requirement that criminal trials be open and public?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

In February of 2010, Ronald Newmiller's daughter L.N. alleged that he had molested her that month. The state charged him with second-degree child molestation, and he pled guilty. RP (6/14/11) 2; CP 6.

After that case was resolved, L.N. alleged that he had molested her multiple times prior to the February incident. Mr. Newmiller denied these allegations, and took the case to trial. RP (6/14/11) 2-8; RP (10/11/11) 3-8.

At trial, the state sought to admit (pursuant to ER 404(b)) evidence of the guilty plea and details of the incident. Notice of Intent to Offer Evidence, Memorandum of Authorities, Response to State's Notice, Memorandum of Authorities (Defendant's), Supp. CP. Mr. Newmiller objected, arguing (among other things) that the evidence was unfairly prejudicial, that it did not show a common scheme or plan, and that it was unlikely a jury could limit its consideration even with appropriate instruction.<sup>1</sup> RP (6/14/11) 5-8.

After hearing argument, the trial court admitted the evidence to show a common plan and lustful disposition. According to the judge, the

---

<sup>1</sup> The trial court's findings summarize these arguments, incorrectly, as an argument that, given the timing, the acts only show propensity. It is for this reason that error is assigned to Finding No. vi.

evidence was “not unfairly prejudicial given the strong probative value...”  
RP (6/14/11) 10; CP 6-8.

At trial, fifteen-year-old L.N. testified that Mr. Newmiller had repeatedly touched her, starting when she was six years old. RP (10/12/11) 55-59. She also described the February incident, stating that Mr. Newmiller had attempted to have sex with her against her will, and had become angry and aggressive for the first time. She said she had successfully fought him off. RP (10/12/11) 69-72, 74. Later (according to L.N.), he said that she could tell someone and send him to jail, or that he could kill himself. RP (10/12/11) 73.

Mr. Newmiller testified at trial, and denied the charged crimes. RP (10/12/11) 85-94.

Although the evidence of prior bad acts had been admitted under ER 404(b) to prove a common plan and/or lustful disposition, defense counsel proposed an instruction based on WPIC 5.40 (relating to evidence admitted pursuant to RCW 10.58.090). The trial court gave the instruction. Instead of limiting the jury’s consideration of the evidence, Instruction No. 12 told jurors that “[e]vidence of a prior sex offense on its own is not sufficient to prove the defendant guilty of the crimes charged in this case.” Court’s Instructions, Supp. CP.

After jury deliberations commenced, the trial judge consulted with counsel, but not in open court. Jurors were then given a supplemental instruction.<sup>2</sup> RP (10/13/11) 122-123; Supplemental Instruction. At another point, jurors requested an additional copy of a verdict form. The court again consulted with counsel outside the courtroom, and provided the form. Question from Deliberating Jury, Supp. CP; RP (10/13/11) 122-123.

The jury convicted Mr. Newmiller as charged. RP (10/13/11) 124-129. After sentencing, Mr. Newmiller timely appealed. CP 9-18, 19.

## **ARGUMENT**

### **I. THE TRIAL JUDGE ERRONEOUSLY ADMITTED EVIDENCE OF MR. NEWMILLER'S PRIOR SEXUAL MISCONDUCT IN VIOLATION OF ER 403 AND ER 404(B).**

#### **A. Standard of Review**

The correct interpretation of an evidentiary rule is a question of law, reviewed *de novo*. *State v. DeVincentis*, 150 Wash. 2d 11, 17, 74 P.3d 119 (2003). If the rule has been correctly interpreted, the decision to admit or exclude evidence is reviewed for an abuse of discretion. *Id.*

---

<sup>2</sup> The record is unclear whether Mr. Newmiller was present for this closed session. Clerk's Minutes 10/13/11, Supp. CP; RP (10/13/11) 122-123.

A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wash.2d 842, 858, 204 P.3d 217 (2009). An erroneous ruling requires reversal if it is reasonably probable that the error affected the outcome. *State v. Everybodytalksabout*, 145 Wash. 2d 456, 468-69, 39 P.3d 294 (2002).

B. Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice.

Under ER 404(b), “[e]vidence of other... acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b) must be read in conjunction with ER 403, which requires that probative value be balanced against prejudicial the danger of unfair prejudice.<sup>3</sup> *State v. Fisher*, 165 Wash. 2d 727, 745, 202 P.3d 937 (2009).

A trial court “must always begin with the presumption that evidence of prior bad acts is inadmissible.” *DeVincentis*, at 17-18. The

---

<sup>3</sup> ER 403 provides that relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

state bears a “substantial burden” of showing admission is appropriate for a purpose other than propensity. *DeVincentis*, at 18-19. Prior to the admission of misconduct evidence, the court must (1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose for which the evidence is offered, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect. *Fisher*, at 745.

Doubtful cases must be resolved in favor of exclusion. *State v. Thang*, 145 Wash. 2d 630, 642, 41 P.3d 1159 (2002).

C. The trial court applied the wrong legal standard in evaluating the danger of unfair prejudice.

Before admitting evidence under ER 404(b), the trial court must balance the probative value and prejudicial effect of the evidence. This balancing must be performed on the record. *Brundridge v. Fluor Fed. Services, Inc.*, 164 Wash. 2d 432, 444-45, 191 P.3d 879 (2008). Evidence causes unfair prejudice when it is more likely to produce an emotional response than a rational decision. *See City of Auburn v. Hedlund*, 165 Wash. 2d 645, 654, 201 P.3d 315 (2009).

Here, instead of determining the likelihood of an emotional response, the trial court opined that “it’s not unfairly prejudicial given the strong probative value...” RP (6/14/11) 10. The court’s findings reflect

the same analytical approach. CP 6-8. In other words, the trial court considered only the probative value, found it to be high, and admitted the evidence. Thus the trial court's Findings Nos. viii, ix, x, xi and xiv, are without sufficient basis, and should be stricken. CP 7-8.

But evidence that is highly probative can also be unfairly prejudicial. The trial judge should have examined the evidence, considered the likelihood of an emotional response, and weighed this likelihood against the value of the evidence in proving a fact of consequence to the prosecution. Its failure to do so was error, as was Conclusion No. V, that "the probative value outweighs any prejudice." CP 8.

Furthermore, because of the extreme potential for prejudice inherent in allegations of sexual misconduct, there is a reasonable possibility that the error materially affected the outcome of the case. *Everybodytalksabout*, at 468-69. Accordingly, the convictions must be reversed and the case remanded for a new trial. *Id.*

D. If the trial judge had applied the correct legal standard, a decision to admit the evidence would have been an abuse of discretion.

As the Supreme Court has noted, evidence of prior sexual misconduct is extremely prejudicial:

[I]n sex cases... the prejudice potential of prior acts is at its highest. "Once the accused has been characterized as a person of

abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise.”

*State v. Saltarelli*, 98 Wash.2d 358, 363, 655 P.2d 697 (1982) (citation omitted) (quoted with approval in *State v. Gresham*, 173 Wash. 2d 405, 433-34, 269 P.3d 207 (2012)). Accordingly, “[c]areful consideration and weighing of both relevance and prejudice is particularly important in sex cases...” *State v. Sutherby*, 165 Wash. 2d 870, 886, 204 P.3d 916 (2009) (quoting *State v. Coe*, 101 Wash.2d 772, 780–81, 684 P.2d 668 (1984)).

Sex crimes are considered to be among the most heinous of all offenses.<sup>4</sup> It is likely that the average juror has great difficulty applying the presumption of innocence to any person charged with a sex offense. No reasonable juror, upon hearing that the accused person has already been convicted of a similar crime, would ever vote to acquit. Because of the unique loathing most people have for sex offenders, evidence of prior sexual misconduct should be inadmissible under ER 402 and 404(b), except under compelling circumstances.

In this case, L.N.’s allegations of uncharged sexual misconduct had little probative value with respect to the elements of the charged offenses.

---

<sup>4</sup> Indeed, it is only sex offenders who are detained indefinitely because of the possibility they might commit crimes in the future. See RCW 71.09. The same treatment is not provided for serial burglars or those who are likely to drive while under the influence of alcohol.

The jury could choose to believe or disbelieve her testimony about the charged crimes; evidence relating to other incidents had little bearing on the issues at trial. At the same time, the testimony was highly likely to provoke an emotional response: if jurors believed there was even a possibility that Mr. Newmiller molested L.N. multiple times, they would have been inclined to convict even absent proof beyond a reasonable doubt on the two charged crimes.

The same is true of Mr. Newmiller's guilty plea. Having heard that he pled guilty to molesting L.N., no reasonable juror would vote to acquit him of the charged crimes, regardless of the weakness of the prosecution's case. This is because the evidence, although probative (i.e. of a common plan or lustful disposition), was also unfairly prejudicial: jurors inevitably would have an emotional response to the knowledge that Mr. Newmiller was a confessed sex offender who had previously molested L.N.

If the trial judge had applied the correct legal standard, a decision admitting the evidence would have been an abuse of discretion. There is a reasonable probability that the error materially affected the outcome of trial. *Everybodytalksabout*, at 468-69. Accordingly, the convictions must be reversed and the case remanded for a new trial, with instructions to exclude the evidence. *Id.*

**II. MR. NEWMILLER’S CONVICTIONS WERE BASED IN PART ON PROPENSITY EVIDENCE, IN VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.**

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011).

A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wash.2d 818, 823, 203 P.3d 1044 (2009). A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wash.2d 1, 8, 17 P.3d 591 (2001). An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. *State v. Nguyen*, 165 Wash.2d 428, 433, 197 P.3d 673 (2008).

Constitutional error is presumed to be prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Toth*, 152 Wash. App. 610, 614-15, 217 P.3d 377 (2009). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wash.2d 19, 32, 992 P.2d 496

(2000). The state must show that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wash.2d 204, 222, 181 P.3d 1 (2008).

B. A conviction may not rest on propensity evidence.

The use of propensity evidence to prove a crime may violate due process under the Fourteenth Amendment.<sup>5</sup> U.S. Const. Amend. XIV; *Garceau v. Woodford*, 275 F.3d 769, 775 (9th Cir. 2001), *reversed on other grounds* at 538 U.S. 202, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003); *see also McKinney v. Rees*, 993 F.2d 1378 (9<sup>th</sup> Cir. 1993). A conviction based in part on propensity evidence is not the result of a fair trial. *Garceau*, at 776, 777-778; *see also Old Chief v. United States*, 519 U.S. 172, 182, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997) (“There is, accordingly, no question that propensity would be an ‘improper basis’ for conviction...” (citation omitted)).

Propensity evidence is highly prejudicial, and there are numerous justifications for excluding it:

For example, courts, reasoning that jurors may convict an accused because the accused is a “bad person,” have typically excluded propensity evidence on grounds that such evidence jeopardizes the

---

<sup>5</sup> The U.S. Supreme Court has expressly reserved ruling on a very similar issue. *Estelle v. McGuire*, 502 U.S. 62, 75 n. 5, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

constitutionally mandated presumption of innocence until proven guilty. The jury, repulsed by evidence of prior “bad acts,” may overlook weaknesses in the prosecution’s case in order to punish the accused for the prior offense. Moreover, as scholars have suggested, jurors may not regret wrongfully convicting the accused if they believe the accused committed prior offenses. Courts have also barred admission of propensity evidence on grounds that jurors will credit propensity evidence with more weight than such evidence deserves. Researchers have shown that character traits are not sufficiently stable temporally to permit reliable inferences that one acted in conformity with a character trait. Furthermore, courts have excluded propensity evidence because such evidence blurs the issues in the case, redirecting the jury’s attention away from the determination of guilt for the crime charged.

Natali & Stigall, *“Are You Going to Arraign His Whole Life?”: How Sexual Propensity Evidence Violates the Due Process Clause*, 28 Loyola U. Chi. L.J. 1, at 11-12 (1996).

In the absence of a limiting instruction, the jury is likely to use the prior “bad acts” as propensity evidence; this is especially true when jurors are required to consider “all of the evidence” relating to a proposition, “in order to decide whether [that] proposition has been proved...” No. 1, Court’s Instructions, Supp. CP.

C. Mr. Newmiller’s convictions were based in part on propensity evidence.

Although the court ruled evidence of prior sexual misconduct admissible to prove a common plan and/or to show lustful disposition, the evidence was admitted without limitation, and the jury was not instructed to consider it solely for its intended purpose. *See* Court’s Instructions,

*generally*, Supp. CP. Instead, the court instructed jurors that “[e]vidence of a prior sex offense on its own is not sufficient to prove the defendant guilty of the crimes charged in this case.” No. 12, Court’s Instructions, Supp. CP.<sup>6</sup> No reference was made in the court’s instructions to a “common plan” or to “lustful disposition.”

The court’s instructions permitted the jury to consider the evidence for any purpose, including as substantive evidence of guilt. *State v. Myers*, 133 Wash.2d 26, 36, 941 P.2d 1102 (1997). Furthermore, in light of the court’s instruction to “consider all of the evidence,” it is highly likely that the jury erroneously used evidence of prior misconduct as propensity evidence. No. 1, Court’s Instructions, Supp. CP. This is especially true because Instruction No. 12 implied that propensity evidence, while insufficient by itself, could be considered along with other evidence to establish guilt. No. 12, Court’s Instructions, Supp. CP.

This error was manifest, because it had practical and identifiable consequences at trial. By permitting the jury to consider Mr. Newmiller’s prior conviction and other prior sexual misconduct as substantive evidence of guilt, the court tipped the balance in favor of conviction. Accordingly,

---

<sup>6</sup> The instruction was proposed by defense counsel. Defendant’s Proposed Instructions, Supp. CP. Counsel’s error is addressed elsewhere in this brief.

the error can be reviewed for the first time on appeal. RAP 2.5(a)(3); *Nguyen*, at 433.

Evidence of Mr. Newmiller’s prior sexual misconduct suggested that he had a propensity to commit sex crimes. Instruction No. 12, when considered along with the language of Instruction No. 1, encouraged jurors to convict based (in part) on propensity evidence, in violation of Mr. Newmiller’s Fourteenth Amendment right to due process. *Garceau*, *supra*. Accordingly, his convictions must be reversed and the case remanded for a new trial. *Id.*

**III. MR. NEWMILLER WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.**

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wash.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wash.App. 29, 146 P.3d 1227 (2006).

B. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of

Counsel for his defense.” U.S. Const. Amend. VI. This provision applies to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3<sup>rd</sup> Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

The strong presumption of adequate performance is only overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, at 130. Any trial strategy “must be based on reasoned decision-making...” *In re Hubert*, 138 Wash.App. 924, 929, 158

P.3d 1282 (2007). In keeping with this, “[r]easonable conduct for an attorney includes carrying out the duty to research the relevant law.” *State v. Kyllo*, 166 Wash.2d 856, 862, 215 P.3d 177 (2009). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.”)

- C. Defense counsel provided ineffective assistance by proposing an improper instruction and by failing to propose a proper instruction limiting the jury’s consideration of evidence of prior sexual misconduct.

The reasonable competence standard requires defense counsel to be familiar with the instructions applicable to the representation. *See, e.g., State v. Tilton*, 149 Wash.2d 775, 784, 72 P.3d 735 (2003); *State v. Jury*, 19 Wash. App. 256, 263, 576 P.2d 1302 (1978). A failure to propose proper instructions constitutes ineffective assistance of counsel. *State v. Woods*, 138 Wash. App. 191, 156 P.3d 309 (2007); *see also State v. Rodriguez*, 121 Wash. App. 180, 87 P.3d 1201 (2004).

Instead of proposing an instruction based on WPIC 5.30 (“Evidence Limited as to Purpose”),<sup>7</sup> defense counsel proposed an instruction based on WPIC 5.40 (“Evidence of Prior Sex Offense.”)<sup>8</sup> This instruction, which the trial court incorporated into its charge to the jury, relates only to evidence admitted under RCW 10.58.090.<sup>9</sup> Defendant’s Proposed Instructions, Court’s Instructions, Supp. CP. Instead of limiting the jury’s consideration of Mr. Newmiller’s prior conviction, the instruction encouraged jurors to use the evidence as propensity evidence (as authorized under the now-invalid RCW 10.58.090).<sup>10</sup>

Counsel’s error infringed Mr. Newmiller’s right to effective assistance under the Sixth and Fourteenth Amendments. First, by proposing the wrong instruction, counsel’s performance fell below an objective standard of reasonableness. *Woods, supra*. There was no

---

<sup>7</sup> WPIC 5.30 reads as follows: “Certain evidence has been admitted in this case for only a limited purpose. This [evidence consists of and] may be considered by you only for the purpose of \_\_\_\_\_. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.”

<sup>8</sup> Defense counsel also proposed an instruction suggesting that Mr. Newmiller’s prior convictions could be considered “only in deciding what weight or credibility to give to the defendant’s testimony, and for no other purpose.” Defendant’s Proposed Instructions, p. 11, Supp. CP (based on WPIC 5.05). In light of the trial court’s decision admitting the evidence, this instruction should have applied only to Mr. Newmiller’s prior tampering conviction. The court apparently declined to give the instruction.

<sup>9</sup> RCW 10.58.090 has recently been found unconstitutional. *Gresham, supra*.

<sup>10</sup> The prosecution declined to offer the evidence under RCW 10.58.090, opting instead to have it introduced under ER 404(b) to show a common plan and lustful disposition. RP (6/14/11) 2.

strategic reason to propose the instruction, which, as noted, allowed the jury to convict based on propensity evidence rather than forbidding them to consider propensity evidence.

Furthermore, the error prejudiced Mr. Newmiller: the erroneous instruction encouraged jurors to consider Mr. Newmiller's prior conviction (and uncharged misconduct) as propensity evidence, thereby increasing the evidence available to establish guilt and the likelihood that jurors would vote to convict. As the Supreme Court noted 30 years ago, the potential for prejudice "is at its highest" when evidence of a prior sex crime is disclosed to the jury. *Saltarelli*, at 363. The improper instruction magnified the inevitable prejudice by removing any limitation on the jury's consideration of the evidence.

Accordingly, Mr. Newmiller was deprived of the effective assistance of counsel. *Woods, supra*. His convictions must be reversed and the case remanded for a new trial.

**IV. THE TRIAL COURT VIOLATED BOTH MR. NEWMILLER'S AND THE PUBLIC'S RIGHT TO AN OPEN AND PUBLIC TRIAL BY CONDUCTING PROCEEDINGS BEHIND CLOSED DOORS.**

A. Standard of Review.

Alleged constitutional violations are reviewed *de novo*. *E.S., at* 702. Whether a trial court procedure violates the right to a public trial is a

question of law reviewed *de novo*. *State v. Njonge*, 161 Wash.App. 568, \_\_\_, 255 P.3d 753 (2011). Courtroom closure issues may be argued for the first time on review. *Id.* at \_\_\_.

B. Both the public and the accused person have a constitutional right to open and public criminal trials.

The state and federal constitutions require that criminal cases be tried openly and publicly. U.S. Const. Amend. I, VI, XIV; Wash. Const. Article I, Sections 10 and 22; *State v. Bone-Club*, 128 Wash.2d 254, 259, 906 P.2d 325 (1995); *Presley v. Georgia*, \_\_\_ U.S. \_\_\_, \_\_\_, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) (*per curiam*). Proceedings may be closed only if the trial court enters appropriate findings following a five-step balancing process. *Bone-Club*, at 258-259. Failure to conduct the proper analysis requires automatic reversal, regardless of whether or not the accused person made a contemporaneous objection. *Bone-Club*, at 261-262, 257.<sup>11</sup> In addition, the court must consider all reasonable alternatives to closure, whether or not the parties suggest such alternatives. *Presley*, 130 S.Ct., at 724-725.

The public trial right ensures that an accused person “is fairly dealt with and not unjustly condemned.” *State v. Momah*, 167 Wash.2d 140,

---

<sup>11</sup> See also *State v. Strode*, 167 Wash.2d 222, 229, 235-236, 217 P.3d 310 (2009) (six justices concurring); *State v. Brightman*, 155 Wash.2d 506, 517-518, 122 P.3d 150 (2005).

148, 217 P.3d 321 (2009). Furthermore, “the presence of interested spectators may keep [the accused person’s] triers keenly alive to a sense of the responsibility and to the importance of their functions.” *Id.* The public trial right serves institutional functions: encouraging witnesses to come forward, discouraging perjury, fostering public understanding and trust in the judicial system, and exposing judges to public scrutiny. *State v. Strode*, 167 Wash.2d 222, 226, 217 P.3d 310 (2009); *State v. Duckett*, 141 Wash.App. 797, 803, 173 P.3d 948 (2007). The Supreme Court has never recognized any exceptions to the rule, either for violations that are allegedly *de minimis*, for hearings that address only legal matters, or for proceedings are merely “ministerial.” *See, e.g., Strode, at 230.*<sup>12</sup>

C. The trial court violated the public trial requirement by holding a hearing behind closed doors prior to giving the jury a supplemental instruction.

Here, the trial court met with counsel in chambers to address concern “that the jurors may have felt some pressure to reach a verdict.” RP (10/13/11) 122. Following that meeting, the court provided the jury with a supplemental instruction to relieve any pressure jurors might have felt. Supplemental Instruction, Supp. CP. These proceedings were not put on the record until the following day, at which time the judge revealed that

---

<sup>12</sup> (“This court, however, ‘has never found a public trial right violation to be [trivial or] *de minimis*’”) (quoting *State v. Easterling*, 157 Wash.2d 167, 180, 137 P.3d 825 (2006)).

jurors had also requested an additional verdict form, which had been supplied following consultation with counsel. RP (10/13/11) 122.

The court did not analyze the *Bone-Club* factors.

These *in camera* proceedings, conducted outside the public's eye without the required analysis and findings, violated Mr. Newmiller's constitutional right to an open and public trial. U.S. Const. Amend. VI, U.S. Const. Amend. XIV; Wash. Const. Article I, Sections 10 and 22; *Bone-Club, supra*. They also violated public's right to an open trial. *Id*. Accordingly, Mr. Newmiller's convictions must be reversed and the case remanded for a new trial. *Id*.

D. The Court should reject exceptions to the public trial right that have not been recognized by the Supreme Court.

The public trial right "applies to all judicial proceedings." *Momah, at* 148. The Supreme Court has never recognized any exceptions to the rule, either for violations that are allegedly *de minimis*, for hearings that address only legal matters, or for proceedings are merely "ministerial." *See, e.g., Strobe, at* 230.<sup>13</sup>

The Court of Appeals has held that the public trial right only extends to evidentiary hearings. *See, e.g., State v. Sublett, 156 Wash.App.*

---

<sup>13</sup> ("This court, however, 'has never found a public trial right violation to be [trivial or] *de minimis*'") (quoting *State v. Easterling, 157 Wash.2d 167, 180, 137 P.3d 825 (2006)*).

160, 181, 231 P.3d 231, *review granted*, 170 Wash.2d 1016, 245 P.3d 775 (2010).<sup>14</sup> This view of the public trial right is incorrect, and should be reconsidered. *Momah*, at 148; *Strode*, at 230.

### **CONCLUSION**

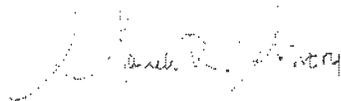
For the foregoing reasons, Mr. Newmiller's convictions must be reversed and the case remanded for a new trial.

Respectfully submitted on April 18, 2012,

### **BACKLUND AND MISTRY**



Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922  
Attorney for the Appellant

---

<sup>14</sup> The Supreme Court heard oral argument in *Sublett* in June of 2011.

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Ronald Newmiller, DOC #339957  
Monroe Corrections Center  
P.O. Box 777  
Monroe, WA 98272

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Kitsap County Prosecuting Attorney  
rsutton@co.kitsap.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 18, 2012.



Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant