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Division III  
State of Washington

NO. 28953-2  
(Consolidated with 28955-9)

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DIMITRI REY MANDAPAT,

Appellant.

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BRIEF OF RESPONDENT  
(AMENDED)

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## I. ASSIGNMENTS OF ERROR

### A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes numerous assignments of error. These can be summarized as follows;

- 1) The trial court abused its discretion when it ruled certain evidence was admissible pursuant to ER 404(b)
- 2) The trial court abused its discretion when it allowed certain evidence in pursuant to RCW 10.58.090
- 3) The court violated appellant's due process rights to a fair trial when it allowed this evidence into appellant's trial.
- 4) RCW 10.58.090 is unconstitutional.
- 5) The court erred when it allowed the consolidation of appellant's two causes.

### B. ANSWERS TO ASSIGNMENTS OF ERROR.

- 1) The trial court did not abuse its discretion when it allowed the admission of the prior bad act information under ER 404(b) Evidence seized from appellant's car was legally seized.
- 2) The admission under RCW 10.58.090 has been addressed by the Washington State Supreme Court and that Statute has been declared unconstitutional.
- 3) RCW 10.58.090 was ruled unconstitutional
- 4) The court properly allowed the consolidation of appellant's two cases.

## II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to the record as needed.

### III. ARGUMENT.

The State shall address some of the issues “out of order” in order to clarify the States position with regard to the actions of the trial court.

In the initial brief filed by appellant set forth allegations designated as ‘2’ and ‘4’ which address RCW 10.58.090, appellant also addressed this statute in his supplemental brief in section ‘1’ of his argument.

The State will not waste court nor opposing counsel’s time attempting to argue the constitutionality of RCW 10.58.090. There is no doubt that RCW 10.58.090 was declared unconstitutional in State v. Gresham, 173 Wn.2d 405, 269 P.3d 207, (2012); “In sum, RCW 10.58.090 is an unconstitutional violation of the separation of powers doctrine because it irreconcilably conflicts with ER 404(b) regarding a procedural matter.” (Gresham at 433) ... “Only in those rare cases where a legislative enactment irreconcilably conflicts with a court rule and the rule is procedural in nature will we invalidate the enactment. This is one such circumstance. Because RCW 10.58.090 irreconcilably conflicts with ER 404(b), we hold that the statute violates the separation of powers doctrine and declare it unconstitutional.” (Gresham at 434)

This case obviously must be reviewed in context of State v. Gresham, supra. Because the Supreme Court declared RCW 10.58.090 unconstitutional this court can not analyze this case using the steps set

forth in RCW 10.58.090. However the analysis used by the trial court throughout this case uses both ER 404(b) and RCW 10.58 and in many respects the analysis does cross over.

It must be noted that the judge in this case raised an issue which was not addressed by appellant;

This statute seems to me to be aimed toward undue prejudice of the presentation of this evidence to a jury. Is there any case law that has anything to do with prejudicing the judge? Because judges are trained to compartmentalize, you know, and the Courts of Appeal seem to defer to judges when it comes to bias, prejudice, they seem to say that judges are trained to set aside different things. It's almost presumed that they will, so how do you think 403 applies in terms of prejudice when you're talking about a judge not a jury?  
(RP 011609-0093009, pg 17)

...

I think when you're looking at prejudicial effect as it applies to a judge only, there has to be a different standard but I don't think that there's any case law that deals with that. But just looking at how the Court of Appeals deals with it, I think they grant great deference to the court, to judges, and as I've asked in questions here just during argument, I think that they do believe that judges are more able to compartmentalize and understand that there are prejudicial effects that they should be aware of and make sure that they don't get sucked into and they're certainly indicating that the Court of Appeals believes that judges are quite capable of doing that and we've seen that in a number of decisions out of the Court of Appeals, probably out of the Supreme Court as well, although no case is hitting me right now in terms of naming one....  
It is probative. Is it potentially prejudicial?

Absolutely, if there was a jury and then we would get into a serious argument about probative versus prejudicial effect. I don't think there's that much prejudicial effect when it comes to a judge, and I think it's very probative. From what I understand, and I don't have a complete offer of proof, but the indication is is that the -- that the defense is going to be consent to all of the charges --  
(RP pgs 28-9)

...

And then whether the probative value is substantially outweighed by the danger of unfair prejudice and I've already mentioned that I think that with a jury it would be certainly. With a judge, I don't think it is.  
(RP pg 33)

State v. Carlin, 40 Wn. App. 698, 704, 700 P.2d 323 (1985)

answers that question; "Moreover, in a bench trial a trial judge is presumed to have considered only the evidence properly before the court. In re Wilson, 91 Wn.2d 487, 490, 588 P.2d 1161 (1979); State v. Carlson, 27 Wn. App. 387, 390, 618 P.2d 531 (1980), review denied, 95 Wn.2d 1001 (1981). State v. Carlson, 27 Wn. App. 387, 390, 618 P.2d 531 (1980):

Judges routinely rule on evidentiary matters in bench trials and are not found "prejudiced" by the exposure to inadmissible evidence. Trial judges are presumed to have considered only the evidence properly before the court and for proper reasons. In re Harbert, 85 Wn.2d 719, 538 P.2d 1212 (1975); State v. Jefferson, 74 Wn.2d 787, 446 P.2d 971 (1968). We are satisfied that the trial judge's consideration of evidence in support of a violation of probation was not impermissibly tainted by receipt of evidence

addressed to appropriate sanctions even though the latter evidence was received before a determination that a violation had occurred.

It is of great importance that the court raised this question and the time it was raised. Because the court raised this question, sua sponte, before the parties addressed the admission of the information of the other acts in the companion cases and the fact that the trial court judge specifically recognized that sitting as she was in this juvenile matter, as the sole decider of the outcome, and further the fact that the court determined that it would consider the admissibility of the information in under both ER 404 and RCW 10.58 allows this court to evaluate the actions of the trial court based on the edicts of Carlin and Carlson, supra. This analysis using the standards set forth in Gresham will support the actions of the trial court and will allow this court to dismiss this appeal.

Also of great importance is the fact that at no time did appellant move to sever the two counts which were filed in cause number 08-8-00424-5, the information in those two cases would have been cross-admissible and this has never been challenged either in the trial court or now on appeal. (CP case 08-8-00424-5 pgs 60-1, 130) In both the original information listed at CP 130 and the subsequent second amended

information the State alleged that the charged acts, rape and indecent liberties, were committed against “K.M.” and “S.M.J.”

The court subsequently joined the two causes, 08-8-00424.5 and 08-8-00617-5, CP 134. This joinder was objected to by appellant at the time it occurred but there was never a subsequent motion to sever at the beginning of the trial or at any time throughout the trial nor at the end.

The Juvenile Court Rules indicate the use of the Superior Court Criminal Rules as needed. (See Appendix ‘A’) Using the analysis of CrR 4.4 the appellant waived this issue because his attorney made no motion to sever at any time. CrR 4.4(a)(2) clearly states that "[i]f a defendant's pretrial motion for severance was overruled he may renew the motion on the same ground before or at the close of all the evidence. Severance is waived by failure to renew the motion." The appellant moved to sever before trial, but failed to renew his motion at or before the close of trial. He therefore waived the issue. State v. Bryant, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998).

In this case the defendant did not even attempt to sever the counts which were filed together in the initial information nor when the State amended that information on several other occasions. Once again there is not a single request by the defendant throughout the numerous hearings or

the trial objecting to or requesting that the counts in 08-8-00424-5 be severed.

ADMISSIBILITY PURSUANT TO ER 404(b)

The issue before this court is whether the analysis, without RCW 10.58.090, done by the trial court is supported by ER 404(b). It is the State's position that clearly the facts set forth in the hearings support the admission of this other information. This trial court judge was acutely aware that RCW 10.58.090 could well be determined to be unconstitutional and set forth a decision aimed from the beginning to withstand review.

THE COURT: ...I'm going to say that it's constitutional because of the safeguard, which requires the Court to still make the 403 analysis to incorporate the relevance evidence rule, and I think that keeps it from being unconstitutional, so I think that 10.58.090 allows this evidence to come in **but I'm also going to analyze it under 404(b), and specifically common scheme or plan.**  
(RP 011609-093009 pg 30)(Emphasis mine.)

The trial court took great pains to analyze this ruling with regard to the admission of the prior rapes under ER 404(b) and therefore as stated in Gresham at 419-20;

Issues of constitutional and statutory interpretation are questions of law, and we review questions of law de novo. Optimer Int'l, Inc. v. RP Bellevue, LLC, 170 Wn.2d 768, 771, 246 P.3d 785 (2011). Similarly,

"[i]nterpretation of an evidentiary rule is a question of law, which we review de novo." State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). Provided the trial court has interpreted the rule correctly, we review the trial court's determination to admit or exclude evidence for an abuse of discretion. Id.

B. Alternative Admissibility of Scherner's Prior Sex Offenses

For Scherner, the admissibility of evidence of his prior sex offenses under the Washington Rules of Evidence is dispositive. We may affirm the trial court on any correct ground. Nast v. Michels, 107 Wn.2d 300, 308, 730 P.2d 54 (1986). Even absent RCW 10.58.090, the trial court ruled that evidence of Scherner's prior sex offenses was admissible for the proper purpose of showing a common scheme or plan. Scherner argues that the evidence of prior sex offenses is inadmissible under ER 404(b) and that the absence of a limiting instruction is reversible error. We find that the trial court did not abuse its discretion in admitting the evidence. We further hold that, while the trial court erred in refusing to give an appropriate limiting instruction upon Scherner's request, that error was harmless in the context of the case.

The court entered oral findings with regard to the admission of the other bad acts information, there were never any actual written findings and conclusions entered. The actual ruling is at the end of the hearing. However the court interacts with the parties throughout this ruling and the

totality of the ruling is included in within this entire hearing. (RP 011609-093009, pgs 16-33)

If a trial court's written findings are incomplete or inadequate, this court need only look to the trial court's oral findings to aid in review. State v. Robertson, 88 Wash.App. 836, 843, 947 P.2d 765 (1997), review denied, 135 Wash.2d 1004, 959 P.2d 127 (1998).

Mandapat contends that the evidence of prior bad acts was highly prejudicial. Mandapat argues the admission of evidence of the other acts in trial was err. ER 404(b) prohibits using evidence of other acts 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).

The trial court may admit evidence of a common scheme or plan to prove that the conduct actually occurred. State v. Lough, 125 Wn.2d 847, 862, 889 P.2d 487 (1995). Appellant cites to Lough and suggests that the evidence of the prior bad acts must, in effect, show plans to perpetrate separate but very similar crimes. (See, page 13 Apps. brief) He argues that the cases cited, State v. Krause, 82 Wn. App. 688, 919 P.2d 123 (1996), State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003), State v. Baker, 89 Wn.App. 726, 950 P.2d 486 (1997) are dissimilar to the present case because “In each case, common scheme or plan evidence was admissible because it demonstrated a premeditated scheme that was used

repeatedly to perpetrate separate but very similar crimes.” (Appellant’s brief at 13)

The State is hard pressed to understand how anyone can claim that the acts that were testified to were not “very similar.” These were three young or very young females who were either involved personally with athletics, they did not have boyfriends, they were all approached by the defendant initially in public places or in the company of others, they were then isolated by the defendant, who then began to “flirt” with them, this involved kissing and hugging which then progressed to actual touching, for the most part consensual, which then inevitably led to more intimate touching, most of which was eventually universally rejected. This rejection was not accepted by the defendant who continued his actions to the point that he had digital penetration of the victims and in one instance and actual penal penetration. He invariably attempted to elicit promises of future sex or sex of a nature refused on the initial contact. The defense was that it was all consensual and also to a certain extent ‘it did not happen.” He confessed to all of the acts just not to the degree testified to by the actual victims. (CP 5- 12)

These actions occurred in both cases and with all three victims. Mandapat’s defense was that they consented or that they consented to a portion of the acts but the actual act of penetration – rape- did not actually

occur, this was his defense from the beginning. These acts testified to in this case meet the test set forth in State v. DeVincendis, 150 Wn.2d 11, 74 P.3d 119 (2003). The court in DeVincendis stated “We agree with Division One and hold that to admit evidence of prior bad acts as evidence of a common scheme or plan under ER 404(b), the trial court need only find that the prior bad acts show a pattern or plan with marked similarities to the facts in the case before it.” (*Id* at 13) The grooming process used by Mandapat is strikingly similar to that used in DeVincendis.

Our Supreme Court has decided the standard for admission of this type of evidence therefore “Once the rule is correctly interpreted, the trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. See Lough, 125 Wash.2d at 856, 889 P.2d 487. (*Id* at 17) The Court then cites the test set out in Lough:

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. We have established the analysis for admission of evidence of prior bad acts to prove a common scheme or plan in Lough, 125 Wash.2d 847, 889 P.2d 487. 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." Lough, 125 Wash.2d at 852, 889 P.2d 487.

Here the acts were admitted to by the defendant, the State specifically stated in the analysis under 404(b) that it was using this to prove common scheme or plan, the planned defense was consent therefore the State had to prove that this common scheme or plan was just that, therefore rebutting the allegation that this was all consensual and that these three girls were all, “freaks, sluts or booty calls” as alleged by appellant. Lastly they were obviously prejudicial, however because of the nature of the allegations and the planned consent defense the probative value clearly outweighed the prejudice.

The holding in Lough has evolved to something more than requiring the former acts be in essence identical. State v. Kennealy, 151 Wn.App. 861, 887, 214 P.3d 200 (2009). Evidence of a common scheme or plan is admissible when it shows that a person committed "markedly similar acts of misconduct against similar victims under similar circumstances." Lough, 125 Wn.2d at 856 (quoting People v. Ewoldt, 7 Cal.4th 380, 399, 867 P.2d 757, 27 Cal.Rptr.2d 646 (1994)). Once again proof of such a plan is admissible if (1) the State can show the prior acts by a preponderance of the evidence, (2) the evidence shows a common plan or scheme, (3) the evidence is relevant to prove an element of the crime charged, and (4) the evidence is more probative than prejudicial. *Id.* at 852. There is no doubt that these were all met by the facts in this case.

As was stated in State v. Williams, 156 Wn.App. 482, 490, 234

P.3d 1174 (Div. 3 2010):

The trial court concluded that the evidence was relevant and appropriate since Mr. Williams claimed that his current victims consented to sexual intercourse. Report of Proceedings (RP) at 57. We agree. The evidence was relevant to the element of forcible compulsion. *Id.*; RCW 9A.44.040; see State v. Saltarelli, 98 Wash.2d 358, 368, 655 P.2d 697 (1982) (evidence of prior attempted rape admitted to prove defendant used force and the victim did not consent). The court concluded that the 1995 rape conviction showed a common scheme involving similar victims (women of a similar age, involved with drugs) and a similar method of attack (promise of drugs, attacked from behind with a forearm across the throat, strangled into unconsciousness during the rape). The trial court also noted that the current rapes occurred within days of each other and only 14 months after Mr. Williams was released from prison for the 1995 rape conviction.

Finally, the trial court balanced the probative value of the evidence against its likelihood of prejudice. Vy Thang, 145 Wash.2d at 642, 41 P.3d 1159. The court noted that two charges of rape against two separate victims were being tried together and that a level of prejudice attached. So the court concluded that any additional prejudice would be minimal. RP at 57. (Williams at 491-92) (Emphasis mine.)

Even if this court determined the admission of the other acts was  
err the court would then determine if the test set forth by the court in  
Gresham was applicable “When the support of RCW 10.58.090 is

removed, we are simply left with evidence admitted in violation of ER 404(b). It is well settled that the erroneous admission of evidence in violation of ER 404(b) is analyzed under the lesser standard for nonconstitutional error. Smith, 106 Wn.2d at 780. The question, then, is whether, ““within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.”” *Id.* (quoting Cunningham, 93 Wn.2d at 823, 831, 613 P.2d 1139 (1980). Gresham at 433.

The trial court in this case stated that it presumed it was required and capable of compartmentalizing the facts. This court need merely look to the findings and conclusions of guilt set forth by the court to determine that the admission of the other acts while considered by the court were not in and of themselves the determining factor used by the court to find the appellant guilty. These findings do in fact compartmentalize the actions of appellant. There can be no doubt based on these findings and conclusions that the trial court would make the same decision if these three acts were tried separately and the court remained ignorant of the other acts when coming to a final determination of guilt in all three matters. “State v. Carter, 127 Wn.2d 836, 904 P.2d 290 (1995), “Remanding for an evidentiary hearing on that issue would not likely

achieve a different result from her conviction. State v. Carter, 127 Wn.2d 836, 904 P.2d 290 (1995).”

In each section where the court set forth facts sufficient to find Mandapat guilty on each count there are at best minor references in the Findings and Conclusions to the other acts. Clearly the State proved each and every count beyond a reasonable doubt. The facts set forth clearly stand on the evidence presented for each individual act. There is absolutely no indication that the court was swayed by the “other acts” information which was presented.

#### JOINDER OF CAUSES OF ACTION.

##### STANDARD OF REVIEW

The decision to proceed with joint or separate trials is entrusted to the sound discretion of the trial court and will not be disturbed on appeal absent a manifest abuse of discretion. State v. Grisby, 97 Wash.2d 493, 507, 647 P.2d 6 (1982)

Separate trials are not favored in Washington and are granted only where a defendant demonstrates that a joint trial would be "so manifestly prejudicial as to outweigh the concern for judicial economy." State v. Hoffman, 116 Wash.2d 51, 74, 804 P.2d 577 (1991); State v. Jones, 93 Wash.App. 166, 171, 968 P.2d 888 (1998), review denied, 138 Wash.2d 1003, 984 P.2d 1033 (1999). To prevail, a defendant must show specific,

undue prejudice from the joint trial. State v. Grisby, 97 Wash.2d 493, 507, 647 P.2d 6 (1982). A trial court's decision regarding severance of trials is discretionary. This court will review a trial court's decision on a motion for severance under CrR 4.4(c)(2) for manifest abuse of discretion. State v. Wood, 94 Wash.App. 636, 641, 972 P.2d 552 (1999).

Once again it must be noted that the charges under cause number 08-8-424-5 were “joined” from the very beginning of this case. They were filed in one information with one cause number. There was **never** a motion to sever those two counts, either at the trial court or in this appeal. That matter involved two separate victims, on two separate dates and more than one type of charged offense.

There was never ever a motion to sever after the initial objection by Appellant. The trial court's decision regarding severance of trials is discretionary and this court will review a trial court's decision on a motion for severance under CrR 4.4(c)(2) for manifest abuse of discretion. State v. Wood, 94 Wash.App. 636, 641, 972 P.2d 552 (1999).

When analyzing severance with a codefendant a defendant can show specific prejudice from denial of his severance motion by showing one of four factors: (1) antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive; (2) a massive and complex quantity of evidence making it almost impossible for the jury to separate evidence

as it relates to each defendant when determining each defendant's guilt or innocence; (3) a codefendant's statement inculcating the moving defendant; or (4) gross disparity in the weight of the evidence against the defendants. State v. Larry, 108 Wn.App. 894, 911-12, 34 P.3d 241 (2001) (denial of severance affirmed based on the fact that the defendants did not demonstrate any of these examples of prejudice). None of these four factors are present here.

First Mandapat must show that he moved for severance, he did not. Secondly Mandapat cannot demonstrate that the trial court would have granted a severance had such a request been made. Severance is to be granted whenever the trial court "determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b).

To determine whether to sever charges to avoid prejudice to a defendant, a court considers "(1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial." Sutherby, 165 Wn.2d 870, 884-85, 204 P.3d 916 (2009), (quoting State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994)). "No one factor is preeminent; all must be assessed in determining whether potential

prejudice requires severance." State v. Warren, 55 Wn.App. 645, 655, 779 P.2d 1159 (1989) (citing State v. Watkins, 53 Wn.App. 264, 272 n.3, 766 P.2d 484 (1989)).

The State presented strong evidence as to each charge against Mandapat. Where there is strong evidence on each charge, "there is no necessity for the jury to base its finding of guilt on any one count on the strength of the evidence of another." State v. Bythrow, 114 Wn.2d 713, 721–22, 790 P.2d 154 (1990). Mandapat's defenses to each count were not made unclear by joinder, nor did he argue that he wanted to present inconsistent defenses as to the different charges. In addition, the trial court made it abundantly clear that it was more than capable of compartmentalizing the evidence and decide each count separately and to not improperly infer guilt. This can be readily seen from the Findings of Fact and Conclusions of Law addressing Mandapat's guilt on each count.

A court may even join factually dissimilar counts, "[t]he fact that separate counts would not be cross admissible in separate proceedings does not necessarily represent a sufficient ground to sever as a matter of law." State v. Kalakosky, 121 Wn.2d 525, 538, 852 P.2d 1064 (1993). Even where the evidence on one count would not be admissible in a separate trial on the other count, severance is not required in every case. Bythrow, 114 Wn.2d at 720. Rather, severance is required only where the

defendant can demonstrate that specific prejudice results from joinder. Bythrow, 114 Wn.2d at 720; State v. Grisby, 97 Wn.2d 493, 507, 647 P.2d 6 (1982).

Obviously the court is going to take the same action even if this court were to return it to the trial court on remand because the court considered the cross admissibility of the information under ER 404(b) and those reasons are valid even after the removal of the factors under RCW 10.58. Just as "Juries are presumed to have followed the trial court's instructions, absent evidence proving the contrary." Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007) and therefore, a jury is presumed to have considered the ER 404(b) evidence for only the limited purposes for which it was introduced. So too is a judge. Considering the strong evidence on each charge and each count, Mandapat's harmonious defenses, consent, as to each charge, Mandapat has not demonstrated that undue prejudice resulted from joinder of the two cases against him.

Moreover, even had Mandapat demonstrated that undue prejudice resulted from the joinder of the counts against him; he had also to demonstrate that the joint trial was so prejudicial as to outweigh concerns for judicial economy. State v. Philips, 108 Wn.2d 627, 640, 741 P.2d 24 (1987). Given that the State's evidence on each count was strong, that the charges were not difficult to distinguish, that the trial court specifically

addressed the courts ability to consider the crimes separately, and that considerations of judicial economy would have been offended if these matters would have been severed into two or three trials, Mandapat has not demonstrated that a severance would have been granted **even if such a request had been made.**

As indicated above Mandapat has waived his right to address this severance; using the analysis of CrR 4.4 the appellant waived this issue because his attorney made no motion to sever at any time. CrR 4.4(a)(2) clearly states that " [i]f a defendant's pretrial motion for severance was overruled he may renew the motion on the same ground before or at the close of all the evidence. Severance is waived by failure to renew the motion." The appellant moved to sever before trial, but failed to renew his motion at or before the close of trial. He therefore waived the issue. State v. Bryant, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998).

#### IV. CONCLUSION

While there is no doubt that RCW 10.58.090 has been declared unconstitutional that definitely does not preclude the use of the type of information which was presented in this case nor the method of use.

The court in this matter took great pains to understand the law in this area. The court went one step further realizing that there was a substantial possibility that the law could be declared unconstitutional. The

Court set forth a ruling that relied not just on the RCW but on the tried and true use of ER 404(b). This bifurcated act allows this court to easily see that the acts which were admitted fit within the law which has been in use for years and years before our legislature enacted RCW 10.58.090.

The court purposefully did this to ensure the viability of this case.

The allegation by appellant that the two causes should never have been joined is not supported by the facts nor the law. The court was well within its discretion when it entered this order, based on judicial economy. As indicated above, appellant never asked for the combined case to be severed and never renewed his request that the cases not be joined. He has waived his ability to appeal this issue.

This appeal should be dismissed and the matter remanded to the trial court.

Respectfully submitted this 10<sup>th</sup> day of July 2012,

s/David B. Trefry

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# Appendix A

The Juvenile court rules indicate that the court should look to the Superior Court Rules;

JuCR Rule 1.4. Applicability of Other Rules

(b) Criminal Rules. The Superior Court Criminal Rules shall apply in juvenile offense proceedings when not inconsistent with these rules and applicable statutes.

Rule 7.9. Joinder of Offenses and Consolidation of Adjudicatory Hearings

(a) Joinder of Offenses. The joinder of offenses in an information is governed by CrR 4.3(a) and (c), where applicable.

(b) Consolidation of Adjudicatory Hearing. On motion of the prosecutor or the alleged juvenile offender, or on its own motion, the court may, for purposes of conducting the adjudicatory hearing, order that two or more informations naming different juveniles be consolidated and heard at the same time when two or more defendants could be joined in the same charge pursuant to CrR 4.3(b).

JuCR 7.10. Severance of Offenses and Consolidated Hearings

The severance of offenses and severance of consolidated hearings is governed by CrR 4.4, where applicable.

CrR 4.3 Joinder of Offenses and Defendants.

(a) Joinder of Offenses. Two or more offenses may be joined in one charging document, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:

(1) Are of the same or similar character, even if not part of a single scheme or plan; or

CrR 4.3.1 Consolidation for Trial.

(a) Consolidation Generally. Offenses or defendants properly joined under rule 4.3 shall be consolidated for trial unless the court orders severance pursuant to rule 4.4.

CrR 4.4 Severance of Offenses and Defendants.

(a) Timeliness of Motion--Waiver.

(1) A defendant's motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require. Severance is waived if the motion is not made at the appropriate time.

(2) If a defendant's pretrial motion for severance was overruled he may renew the motion on the same ground before or at the close of all the evidence. Severance is waived by failure to renew the motion.

DECLARATION OF SERVICE.

I, David B. Trefry state that on July 10, 2012, emailed a signed copy of the Respondent's Amended Brief, in PDF format, by agreement of the parties to: Marie Trombley, Attorney At Law, at marietrombley@comcast.net and to Dimitri R. Mandapat, 4410 S. Rozalee Way, Yakima WA 98901

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 10<sup>th</sup> day of July, 2012 at Spokane, Washington.