

**FILED**

MAR 21 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

No. 29168-5-III

Consolidated with No. 29183-9-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

BRIAN DEE WENZ,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR GRANT COUNTY

The Honorable John Antosz

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BRIEF OF APPELLANT

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THOMAS M. KUMMEROW  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
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## A. SUMMARY OF ARGUMENT

Brian Wenz was charged under two different superior court cause numbers with sexually abusing two girls. Over Mr. Wenz's objection, the court consolidated the two cause numbers based primarily upon RCW 10.58.090, finding the evidence in the two cases cross-admissible in separate trials. Subsequently, during the prosecutor's closing argument, over Mr. Wenz's objection, the prosecutor claimed Mr. Wenz violated an "abuse of trust."

Mr. Wenz submits that RCW 10.58.090 is unconstitutional and the error in admitting the evidence of one cause in the trial for the other cause was not harmless. Further, the prosecutor's misconduct denied Mr. Wenz a fair trial.

## B. ASSIGNMENTS OF ERROR

1. The trial court erred in consolidating Mr. Wenz's two pending cases for trial.

2. The evidence of Mr. Wenz's alleged misconduct in one case was not cross-admissible in the other case.

3. Admission of evidence under RCW 10.58.090 violated Mr. Wenz's right to due process.

4. The court erred in determining the evidence of each case was admissible in the other under RCW 10.58.090.

5. The court erred in determining the evidence of each case was admissible in the other as evidence of Mr. Wenz's lustful disposition.

6. The court erred in determining the evidence of each case was admissible in the other as *res gestae* evidence.

7. RCW 10.58.090 violates the doctrine of separation of powers under the state and federal constitutions.

8. Mr. Wenz's Fourteenth Amendment right to due process was infringed by the prosecutor's misstating the law during closing argument.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. RCW 10.58.090 permits a court to admit unrelated sexual offense allegations based upon certain statutory criteria.

Washington has long enforced the principle that a person may be tried only for the charged offense. Did the court's admission of the allegations that did not meet the statutory criteria deny Mr. Wenz a fair trial and violate his right to be tried only for the offense charged?

2. The court admitted allegations against Mr. Wenz without meaningfully weighing the factors mandated by RCW 10.58.090.

Did the court misunderstand or disregard the mandatory statutory criteria of RCW 10.58.090?

3. The *res gestae* exception to ER 404(b) requires that the evidence complete the story by proving the crime's immediate context of happenings near in time and place. Did the two different accusations constitute a single plan of substantial similarity as required by ER 404(b)?

4. The lustful disposition exception to ER 404(b) allows admission of prior conduct by the defendant that reveals a sexual desire for that particular victim. Where the evidence of one act against a different girl was allowed by the trial court to show a lustful disposition against a *different* girl, thus contravening ER 404(b), did the trial court base its decision on consolidating the two cases on an untenable ground?

5. Under the constitutionally required separation of powers, the legislature may not impermissibly intrude into the realm of the judiciary. By enacting RCW 10.58.090, the legislature created new procedural rules that conflict with existing rules created by the judiciary. Does RCW 10.58.090 violate the separation of powers?

6. The Fourteenth Amendment Due Process Clause guarantees an individual a fair trial. Where a prosecutor

intentionally misstates the law to the jury during closing argument, the defendant is denied a fair trial. Did the prosecutor's statement over defense objection during closing argument that Mr. Wenz abused a position of trust where the term "abuse of trust" is a term of art and Mr. Wenz was not charged with an abuse of trust deny him a fair trial?

D. STATEMENT OF THE CASE

The State moved prior to trial to consolidate two cases in which Brian Wenz had been charged. 1RP 46. In one, Mr. Wenz was alleged to have committed Rape of a Child in the Second Degree and Child Molestation in the Second Degree of N.B. 1CP 31-32.<sup>1</sup> N.B., a friend of Mr. Wenz's niece, R.H. alleged that in March 2007, Mr. Wenz had fondled her while the two were at Mr. Wenz's brother-in-law's house watching television. 4/15/10RP 30-38.<sup>2</sup>

In the second case, Mr. Wenz was charged with three counts of Child Rape in the First Degree and three counts of Child Molestation in the First Degree. 2CP 57-59. In this case, Mr.

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<sup>1</sup> "1CP" refers to Appeal No. 29168-5, "2CP" refers to Appeal No. 29183-9.

<sup>2</sup> The transcripts are referred to herein by the date of the hearing except for the transcript containing numerous hearings, which will be referred to as "1RP."

Wenz's brother's adopted daughter, T.W., claimed he forced his hands down her pants while T.W. and Mr. Wenz were watching television with other members of the family. In neither case was there corroborating evidence of the girls' allegations. Over Mr. Wenz's objections, the trial court consolidated the two cases. 1RP 67.

Mr. Wenz's first two jury trials ended in mistrials; the first trial because of the sudden illness of his attorney, and the second trial because of a deadlocked jury. 1CP 30, 65; 2CP 56, 103. Following the third trial, Mr. Wenz was convicted of second degree child molestation in the matter involving N.B., and one count of first degree child molestation in the matter involving T.W. 1CP 81; 2CP 119. The trial court granted Mr. Wenz's motion to dismiss all of the other counts for a failure of the State to offer sufficient evidence. 1CP 103-04; 2CP 101-02.

## E. ARGUMENT

### 1. THE TRIAL COURT ERRED IN CONSOLIDATING THE CASES FOR TRIAL BY FINDING RCW 10.58.090 AUTHORIZED CROSS-ADMISSIBILITY OF THE EVIDENCE

Prior to the first trial, the State moved to consolidate the two cases based upon “judicial economy.” 1RP 46. The State admitted the evidence in the two cases was *not* cross-admissible. 1RP 47. The trial court denied the State’s motion, noting the two incidents occurred approximately one year apart and involved different victims. 1RP 49. The court noted that the enactment of RCW 10.58.090 may allow cross-admissibility despite the language of ER 404(b), and suggested the State could renew its motion if it could establish RCW 10.58.090 applied. 1RP 49.

Taking the court’s suggestion to heart, two weeks later the State renewed its motion to consolidate the cases based upon the cross-admissibility of the evidence under RCW 10.58.090. 1RP 56. The State also argued the evidence was cross-admissible under the *res gestae* doctrine and under ER 404(b) as evidence of a lustful disposition. 1RP 57-58. Mr. Wenz countered that among other things, the evidence was not “necessary,” thus not admissible under RCW 10.58.090 and was simply being offered as propensity

evidence. 1RP 60. The court ruled that the evidence was cross-admissible under RCW 10.58.090, the statute was not unconstitutional as a violation of the separation of powers, and consolidated the two cases for trial. 1RP 62-68.

a. Joinder of offenses is not allowed unless the trial court finds the offenses are similar and the defendant will not be prejudiced by the joining. Under CrR 4.3(a), the trial court may join offenses in one trial if the offenses (1) are the same or similar in character, or (2) are based on the same conduct or on a series of acts that are part of a single scheme or plan. "Prejudice may result from joinder . . . if use of a single trial invites the jury to cumulate evidence to find guilt or infer a criminal disposition." *State v. Russell*, 125 Wn.2d 24, 62-63, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). To attempt to limit any prejudice, the trial court must consider a number of factors: (1) the strength of the evidence on each count, (2) the clarity of the defenses on each count, (3) the court's instructions on considering each count separately, and (4) the cross admissibility of the evidence of each count. *Id.* at 63. Only then does the court weigh any remaining prejudice against the need for judicial economy. *State v. Kalakosky*, 121 Wn.2d 525, 539, 852 P.2d 1064 (1993).

It is important to remember that the joinder of charges can be particularly prejudicial when the alleged crimes are sexual in nature. *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982). In that context there is a recognized danger of prejudice to the defendant even if the jury is properly instructed to consider the crimes separately. *State v. Harris*, 36 Wn.App. 746, 750, 677 P.2d 202 (1984).

Here, the defenses as to each case were the same: denial. The strength of the evidence as to each was the same: as there was no physical evidence, the cases relied solely on the claims of the victims and their relative credibility. Thus, the entire analysis came down to whether the evidence was cross-admissible. The trial court found that consolidation of the cases was appropriate under CrR 4.3, CrR 4.3.1, and CrR 4.4 because “[e]vidence from each case would be cross admissible in separate trials.” CP at 47. Mr. Wenz contends the evidence was *not* cross-admissible and the court erred in consolidating the matters.

b. The right to a fair trial includes the right to be tried for the charged offense, without irrelevant accusations of other wrongful conduct. An accused person's right to a fair trial is a fundamental part of due process of law. U.S. Const. amend. XIV; Const. art. I, § 3, 22; *United States v. Salerno*, 481 U.S. 739, 750, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). Erroneous evidentiary rulings violate due process by depriving the defendant of a fundamentally fair trial. *Estelle v. McGuire*, 502 U.S. 62, 75, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *Dowling v. United States*, 493 U.S. 342, 352, 107 L. Ed. 2d 708, 110 S. Ct. 668 (1990) (the introduction of improper evidence deprives a defendant of due process where "the evidence 'is so extremely unfair that its admission violates fundamental conceptions of justice.'").

Compliance with state evidentiary and procedural rules does not guarantee compliance with the requirements of due process. *Jammal v. Van de Kamp*, 926 F.2d 918, 919-20 (9<sup>th</sup> Cir. 1991); citing *Perry v. Rushen*, 713 F.2d 1447, 1453 (9<sup>th</sup> Cir. 1983), cert. denied, 469 U.S. 838 (1984). Due process is violated where evidence was admitted that renders the trial fundamentally unfair. *Walters v. Maass*, 45 F.3d 1355, 1357 (9<sup>th</sup> Cir. 1995); *Colley v. Sumner*, 784 F.2d 984, 990 (9<sup>th</sup> Cir. 1986).

An accused person has a fundamental right to be tried only for the offense charged. U.S. Const. amend. V; Const. art. I, 22; *State v. Mack*, 80 Wn.2d 19, 21, 490 P.2d 1303 (1971). The “fundamental concept” that a “defendant must be tried for what he did, not who he is,” is violated by introducing evidence designed to show a propensity for committing sex offenses. *State v. Cox*, 781 N.W.2d 757, 769 (Iowa 2010).

The trial court placed great emphasis in granting the motion to consolidate on the admissibility of the evidence under RCW 10.58.090. Although the Division One of this Court has upheld the constitutionality of RCW 10.58.090, the Supreme Court is presently reviewing these challenges.<sup>3</sup> Moreover, even if RCW 10.58.090 was constitutionally applied in those cases, in Mr. Wenz’s case, the court misunderstood and misapplied the critical components of RCW 10.58.090 and thereby denied Mr. Wenz a fair trial.

c. The court misapplied ER 404(b) and RCW 10.58.090. RCW 10.58.090 permits the court to admit, in a criminal action in which the defendant is accused of a sex offense, “evidence of the defendant’s commission of another sex offense or

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<sup>3</sup> *State v. Scherner*, 153 Wn.App. 621, 225 P.3d 248 (2009), review granted, 168 Wn.2d 1036 (2010); *State v. Gresham*, 153 Wn.App. 659, 223 P.3d 1194 (2009), review granted, 168 Wn.2d 1036 (2010). The cases are scheduled to be argued on March 17, 2011.

sex offenses . . . notwithstanding Evidence Rule 404(b).” RCW 10.58.090(1).

Over objection, the court consolidated the two cases after ruling evidence of the two offenses would be cross-admissible at separate trials. 1RP 62-68. The incidents were not related to each other, occurred approximately a year apart, and involved separate victims. The trial court also admitted the accusations under ER 404(b), as evidence of a lustful disposition and as *res gestae* evidence. *Id.*

This Court reviews *de novo* whether a trial court correctly interpreted an evidentiary rule in deciding to admit evidence. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). The question of whether two offenses are properly joined is a question of law which is also reviewed *de novo*. *State v. McCormack*, 117 Wn.2d 141, 143, 812 P.2d 483 (1991), *cert. denied*, 502 U.S. 1111 (1992); *State v. Hentz*, 32 Wn.App. 186, 189, 647 P.2d 39 (1982), *rev'd in part on other grounds*, 99 Wn.2d 538, 663 P.2d 476 (1983). If joinder was not proper but offenses were consolidated in one trial, the convictions must be reversed unless the error is harmless. *State v. Bryant*, 89 Wn.App. 857, 864, 950 P.2d 1004 (1998), *review denied*, 137 Wn.2d 1017 (1999).

*i. The trial court misunderstood and ignored the criteria of RCW 10.58.090.* In order to admit accusations of other offenses under RCW 10.58.090, the statute lists *mandatory* criteria the court must consider. The statute mandates that:

the trial judge shall consider the following factors:

- (a) The similarity of the prior acts to the acts charged;
- (b) The closeness in time of the prior acts to the acts charged;
- (c) The frequency of the prior acts;
- (d) The presence or lack of intervening circumstances;
- (e) The necessity of the evidence beyond the testimonies already offered at trial;
- (f) Whether the prior act was a criminal conviction;
- (g) Whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; and
- (h) Other facts and circumstances.

RCW 10.58.090. The trial court went through each of the circumstances listed in RCW 10.58.090 *except* the necessity prong.

1RP 66-67. Further, contrary to the court's conclusion, the acts were not close in time; they were separated by at least one year.

The court focused on three criteria are: (a) similarity of the prior acts to the acts charged; (e) necessity of the evidence beyond the testimonies already offered at trial; and (g) the mandatory ER 403 balancing test.

Regarding the ER 403 balancing test, courts have cautioned about the admissibility of other sex crimes, warning that “[c]areful consideration and weighing of both relevance and prejudice is particularly important in sex cases, where the potential for prejudice is at its highest.” *State v. Coe*, 101 Wn.2d 772, 780-81, 684 P.2d 668 (1984). In cases where admissibility is a close call, “the scale should be tipped in favor of the defendant and exclusion of the evidence.” *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986), quoting *State v. Bennett*, 36 Wn.App. 176, 180, 672 P.2d 772 (1983).

Here the evidence was extremely prejudicial in light of the lack of any corroborating evidence to support the girls’ claims. Since this was a “close call,” the scale should have been tipped in favor of excluding the evidence as opposed to the trial court’s emphasis on admission.

In evaluating the “necessity” of the evidence, the court failed to determine whether the evidence was necessity but simply found it “would be helpful.” 1RP67.

Although the statute does not define “necessity,” the term should be given its ordinary meaning. *State v. Argueta*, 107 Wn.2d 532, 536, 27 P.2d 242 (2001) (“rules of statutory construction

require that we give undefined words their common and ordinary meaning," which may be taken from the dictionary).

"Necessity" means:

1: the quality or state or fact of being necessary as: a: a condition arising out of circumstances that compels to a certain course of action . . . b: INEVITABLENESS, UNAVOIDABILITY . . . c: great or absolute need: INDISPENSABILITY . . . 3: something that is necessary: REQUIREMENT, REQUISITE

*Webster's Third New International Dictionary*, p. 1511 (1993). The Legislature's use of this specific requirement of necessity should not be interpreted as superfluous, or indicative of a lesser standard such as "helpful." "If the plain language of the statute is unambiguous, then this court's inquiry is at an end. The statute is to be enforced in accordance with its plain meaning." *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007) (citations omitted). If merely being "helpful" was what the Legislature intended when it said "necessary," it would have said so.

*ii. The allegations did not meet the criteria for admission as res gestae.* ER 404(b) prohibits a court from admitting "[e]vidence of other crimes, wrongs, or acts ... to prove the character of a person in order to show action in conformity therewith." *State v. Foxhoven*, 161 Wn.2d 168, 174-75, 163 P.3d

786 (2007). ER 404(b) evidence, may, however, be admissible for another purpose, such as proof of motive, plan, or identity. *Id.* at 175. “Under the *res gestae* . . . exception to ER 404(b), evidence of other crimes or bad acts is admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime.” *State v. Lillard*, 122 Wn.App. 422, 432, 93 P.3d 969 (2004), *review denied*, 154 Wn.2d 1002 (2005).

The *res gestae* exception allows admission of uncharged acts that are “inseparable psychologically” from the charged acts, permitting the introduction of the uncharged acts when “evidence about the charged crime will naturally pique the jury's curiosity about the aspect of the transaction the uncharged misconduct relates to, and forcing the witness to avoid that aspect of the case will leave the jurors dangling and suspicious.” 1 Edward J. Imwinkelried, *Uncharged Misconduct Evidence* § 6:30, at 6-111 (Rev. Ed. Supp.2005) (citations omitted). Under the *res gestae* exception to ER 404(b), evidence of other crimes or bad acts is admissible to complete the story by proving the crime's *immediate context* of happenings *near in time and place*. *State v. Warren*. 134 Wn.App. 44, 62, 138 P.3d 1081 (2006), *aff'd*, 165 Wn.2d 17, 195

P.3d 940 (2008), *cert. denied*, 129 S.Ct. 2007 (2009). Like other ER 404(b) evidence, such evidence must be relevant for a purpose other than showing propensity, and it must not be unduly prejudicial.

*State v. Lane*, is instructive. 125 Wn.2d 825, 889 P.2d 929 (1995). In that case, the Supreme Court held that witness testimony regarding a series of uncharged robberies and firearm crimes occurring within a 48-hour window of a murder was proximate enough in time and place so as to be admissible as *res gestae* evidence. *Id.* at 834-35.

Here, the evidence did not complete the picture because the two acts occurred approximately a year apart, involved separate victims who did not know each other and were in no way related to each other. Rather, the evidence tended to show that Mr. Wenz was more likely to commit one of the offenses because he had committed the other offense as well, which is merely propensity evidence barred by ER 404(a). The trial court erred in admitting the evidence as *res gestae* evidence.

*iii. The allegations did not meet the criteria for lustful disposition under ER 404(b).* Evidence of a defendant's prior sexual acts against the same victim is admissible to show the defendant's lustful disposition toward that victim. *State v. Ray*, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991). "When considering lustful disposition, it is important that the prior conduct reveals a sexual desire for *that particular victim.*" *State v. Ferguson*, 100 Wn.2d 131, 134, 667 P.2d 68 (1983), *quoting State v. Thorne*, 43 Wn.2d 47, 60-61, 260 P.2d 331 (1953) (emphasis added). *See also State v. Medcalf*, 58 Wn.App. 817, 822-23, 795 P.2d 158 (1990) (misconduct directly connected to the woman in question, which does not just reveal merely defendant's general sexual proclivities, is admissible).

In *Ferguson*, the court emphasized that: "Such evidence is admitted for the purpose of showing the lustful inclination of the defendant toward the offended female, which in turn makes it more probable that the defendant committed the offense charged." 100 Wn.2d at 134

This exception to the general rule is founded not so much upon the desire to show the intent with which the offense alleged in the indictment was committed, but upon a broader ground of showing sexual

inclination or lustful disposition of the defendant toward the prosecuting witness and making it more probable that the offense charged was committed. The distinction is partly based upon the fact that in showing the lustful desire or disposition of the defendant for the prosecuting witness you are showing a motive, i. e., a state of feeling impelling toward the act charged while intent is a mental state accompanying an act. \* \* \*

*Thorne*, 43 Wn.2d at 60, *quoting State v. Clough*, 3 W.W.Harr. 140, 33 Del. 140, 132 A. 219, 221 (1925).

Here, the evidence did not show a lustful disposition toward either of the victims specifically. The State was attempting to use the case against one victim as evidence of a lustful disposition in the other victim. But lustful disposition requires the evidence shows a lustful disposition towards a specific victim. By its plain definition, the lustful disposition exception to the admission of propensity evidence simply does not allow the use authorized by the trial court. The court erred in admitting the evidence under this provision.

d. Contrary to the trial court's conclusion, RCW 10.58.090 is unconstitutional as it violates the separation of powers doctrine. The trial court relied primarily on RCW 10.58.090 to find the evidence was cross-admissible, thus finding consolidation of the two cases was proper. 1RP 62-68. The Washington Supreme Court is presently considering the constitutionality of RCW

10.58.090. Division One of this Court found these statutes constitutional in *Schemer* and *Gresham*, both currently on review before the Supreme Court.

“If ‘the activity of one branch threatens the independence or integrity or invades the prerogatives of another,’ it violates the separation of powers.” *Waples v. Yi*, 169 Wn.2d 152, 158, 234 P.3d 187 (2010), quoting *City of Fircrest v. Jensen*, 158 Wn.2d 384, 394, 143 P.3d 776 (2006) and *State v. Moreno*, 147 Wn.2d 500, 505-06, 58 P.3d 265 (2002). This Court has inherent power to govern court procedures, stemming from article IV of the state constitution. Const. art. IV, § 1; *Jensen*, 158 Wn.2d at 394; *State v. Fields*, 85 Wn.2d 126, 129, 530 P.2d 284 (1975). The Court's authority over matters of procedure contrasts with the Legislature's authority over matters of substance. *Fields*, 85 Wn.2d at 129; *State v. Smith*, 84 Wn.2d 498, 501, 527 P.2d 674 (1974). Rules of evidence are rules of procedure that fall under the Court's inherent authority.<sup>4</sup>

The Court's authority to govern the admissibility of evidence in Washington trials is embodied in the Rules of Evidence. ER 101

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<sup>4</sup> The Court also has authority delegated by the Legislature to enact rules of evidence. RCW 2.04.190 (supreme court has power to prescribe procedures for “taking and obtaining evidence”).

makes clear that in the event of an irreconcilable conflict between a rule and a statute, the rule will govern. ER 101 (“These rules govern proceedings in the courts of the state of Washington”). Where the Rules of Evidence do not contemplate a particular statutory exception, an evidence statute that conflicts with the Rules violates the separation of powers doctrine. See e.g., *State v. Saldano*, 36 Wn.App. 344, 675 P.2d 1231, review denied, 102 Wn.2d 1018 (1984) (holding that ER 609 supersedes conflicting statute allowing broader admission of an accused's prior convictions).

RCW 10.58.090 violates the separation of powers because it conflicts with ER 404 (b), which *precludes* a court from admitting evidence of a person's character “in order to show action in conformity therewith.” Its purpose is to limit a court's discretion in admitting such prejudicial evidence without a legitimate purpose.

RCW 10.58.090 allows the State to rely upon inflammatory evidence of a defendant's past sexual misconduct, which would otherwise be inadmissible, in order to convict him of a current sexual offense. The statute permits courts to consider the “necessity” for the evidence in light of the other evidence of guilt, presumably making the evidence admissible in the weakest cases.

RCW 10.58.090(6)(e). The statute effectively alters the standard of proof required for conviction and it should be construed as violating the separation of powers.

For the above stated reasons, including the trial court's misapplication of the mandatory statutory criteria of RCW 10.58.090, its misunderstanding of the parameters of ER 404(b), its erroneous determination that the factual evidence would be cross-admissible under either rule of evidence, and the unconstitutionality of RCW 10.58.090, all of which had a distinct and direct effect on the consolidation of the two trials.

The final factor is whether evidence of each count would be cross admissible under ER 404(b) if severance were granted. ER 404(b) permits evidence of other crimes to show identity, motive, intent, preparation, plan, knowledge, absence of mistake or accident, opportunity, or an alternative means by which a crime could have been committed. *State v. Lord*, 117 Wn.2d 829, 872 n. 11, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992). Such evidence is not admissible "to prove the character of a person in order to show action in conformity therewith". ER 404(b); *State v. Smith*, 106 Wn.2d 772, 775, 725 P.2d 951 (1986).

e. The error in consolidating the two offenses for trial was not harmless. Where the cases were improperly joined in one trial, the convictions must be reversed unless the error was harmless. *Bryant*, 89 Wn.App. at 864.

The State had no additional evidence to offer to corroborate each of the young women's claims other than the additional charge against the other young women. This was a classic case of bootstrapping, using the allegations of one matter to prove the allegations in another matter. This is a serious problem given that the act being used to corroborate the woman's claim is not a conviction but merely an unproven allegation. The admission of the unproven acts was not harmless.

2. THE PROSECUTOR'S REFERENCE TO AN  
"ABUSE OF TRUST" DURING CLOSING  
ARGUMENT VIOLATED MR. WENZ'S RIGHT  
TO DUE PROCESS AND A FAIR TRIAL

Prior to closing argument in the third trial, Mr. Wenz noted that the prosecutor in closing argument in the second trial argued that Mr. Wenz abused a position of trust. 1/15/2010RP 235 ("This case is about an abuse of trust"). Mr. Wenz objected to the prosecutor's anticipated use of this term in the ensuing closing.

4/15/2010RP 116. The court noted it was merely argument and would allow the usage of the term. 4/15/2010RP 117.

During argument, the prosecutor again referred to Mr.

Wenz's "abuse of trust":

Let's talk about what this is about. As Mr. Hill said in his opening, this case is about *abuse of trust*.

...

He's doing similar stuff, Mr. Brian Wenz is, the defendant, as an uncle. Another adult in a position of trust that a kid should be able to trust. And then he went way past the limits that go with being a responsible adult in a caretaker position. Not necessarily truly a caretaker, but certainly similar.

4/15/2010RP 132-33 (emphasis added).

a. Mr. Wenz had a constitutionally protected right to a fair trial free from prosecutorial misconduct. The United States Supreme Court has stated that a prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). Because "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's

judgment rather than its own view of the evidence,” appellate courts must exercise care to insure that prosecutorial comments have not unfairly “exploited the Government's prestige in the eyes of the jury.” *United States v. Young*, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). Because the average jury has confidence that the prosecuting attorney will faithfully observe his or her special obligations as the representative of a sovereignty whose interest “is not that it shall win a case, but that justice shall be done,” his or her improper suggestions “are apt to carry much weight against the accused when they should properly carry none.” *Berger*, 295 U.S. at 88.

Prosecutorial misconduct may deprive a defendant of a fair trial, and only a fair trial is a constitutional trial. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Prosecutorial misconduct which deprives an individual of a fair trial violates the individual's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution. “The touchstone of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause?”

*Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). Therefore, the ultimate inquiry is not whether the error was harmless or not harmless, but rather whether the impropriety violated the defendant's due process rights to a fair trial.

*Davenport*, 100 Wn.2d at 762.

Comments made by a deputy prosecutor constitute misconduct and require reversal where they were improper and substantially likely to affect the verdict. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). To prevail on a claim of prosecutorial misconduct, the defendant must show both improper conduct and resulting prejudice. *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245, *cert. denied*, 518 U.S. 1026 (1995). "Prejudice is established by demonstrating a substantial likelihood that the misconduct affected the jury's verdict." *Id.*

b. The prosecutor misstated the law when arguing Mr. Wenz violated an "abuse of trust." The law grants counsel wide latitude to argue facts in evidence and draw reasonable inferences during closing argument. *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). A prosecutor may not, however, mislead the jury through misstatement of the law or the evidence. *State v. Reeder*, 46

Wn.2d 888, 892, 285 P.2d 884 (1955). Prosecutors commit serious misconduct when they misstate the applicable law. *State v. Fleming*, 83 Wn.App. 209, 213, 921 P.2d 1076 (1996).

“Abuse of trust” is a legal term of art. In the area of criminal law, the Legislature has determined it may be an aggravating factor which may serve as the basis for an exceptional sentence above the standard range. RCW 9.94A.535(3)(n) states in relevant part: “The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.” Washington law is clear that before an abuse of trust can be used as an aggravating factor, the evidence must indicate that the position of trust was used to facilitate the crime. *State v. Stevens*, 58 Wn.App. 478, 500, 794 P.2d 38, *review denied*, 115 Wn.2d 1025 (1990). Mere opportunity created by a person's position is not enough from which to conclude that the position of trust facilitated the commission of the crime. *State v. Stuhr*, 58 Wn.App. 660, 663, 794 P.2d 1297 (1990), *review denied*, 116 Wn.2d 1005 (1991).

Here, Mr. Wenz was not charged with abusing a position of trust, thus the State's argument was simply irrelevant.

c. The prosecutor's argument warrants reversal.

Prosecutorial misconduct requires reversal where the appellate courts are convinced beyond a reasonable doubt that the error contributed to the jury verdict. *State v. Fiallo-Lopez*, 78 Wn.App. 717, 729, 899 P.2d 1294 (1995). The State cannot meet this standard by speculating that a hypothetical juror who did not hear the improper argument could have reached the same verdict, but rather must prove this specific jury would have reached the same verdict. *State v. Anderson*, 112 Wn.App. 828, 837, 51 P.3d 179 (2002), *review denied*, 149 Wn.2d 1022 (2003).

This was a case where a man was convicted based solely on the uncorroborated claim of a young woman that Mr. Wenz molested that women on a single occasion. As a consequence, the credibility of these young women was *the* issue at trial. The prosecutor's misstatement painted Mr. Wenz's conduct in a far worse manner to the jury. This in turn artificially increased the young girls' credibility before the jury, virtually guaranteeing a conviction. Thus, the prosecutor's misstatement was not harmless.

Further, a curative instruction would not have remedied the error. "Reversal is not required if the error could have been obviated by a curative instruction which the defense did not

request.” *Russell*, 125 Wn.2d at 85. This claim regarding the use of curative instructions ignores the behavior of jurors and can lead to absurd results:

If juries could honestly be counted upon to literally construe and obey an instruction that closing arguments are “not evidence,” and that their verdict is to be based solely on the evidence, it would make no sense for the jury to do anything but disregard closing arguments altogether. If that were the case it would be impossible to justify the Supreme Court’s holding that a criminal defendant has a constitutional right to give a closing argument. Nor could one possibly justify the rule that it may be reversible error to grant a jury’s request to read back portions of the prosecutor’s closing. It would also be absurd for attorneys to object at all to improper closings, although we insist that they do so, and redundant for judges to strike improper closing remarks. It would always be pointless for the prosecution to exercise its right to give a rebuttal argument because it would merely be responding to an argument that the jury had been told to disregard. And as one court of appeals has correctly noted, that logic, if taken seriously, “would permit any closing argument, no matter how egregious.”

James Joseph Duane, *What Message Are We Sending To Criminal Jurors When We Ask Them To Send A Message With Their Verdict?* 22 Am. J. Crim. L. 565, 653-55 (1995) (internal footnotes omitted).

Finally, the prosecutor’s argument cannot merely be forgotten or ignored by the jury during its deliberations, even in light

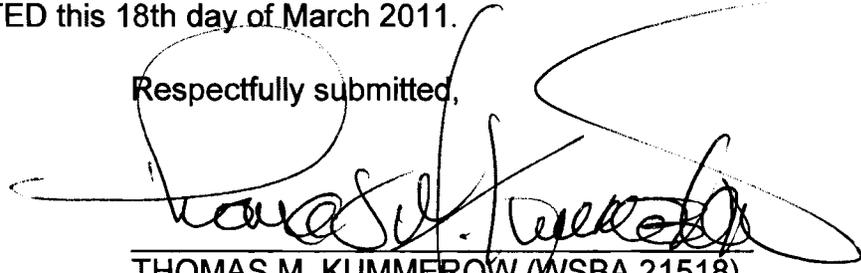
of a curative instruction or an objection. “[A] bell once rung cannot be unring.” *State v. Trickett*, 16 Wn.App. 18, 30, 553 P.2d 139 (1976). This Court must reverse Mr. Wenz’s convictions and remand for a new and fair trial which comports with due process.

F. CONCLUSION

For the reasons stated, Mr. Wenz requests this Court reverse his convictions and remand for retrial.

DATED this 18th day of March 2011.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Tom Kummerow', is written over the typed name and contact information below.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE**

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	NO. 29168-5-III
v.	)	
	)	
BRIAN WENZ,	)	
	)	
APPELLANT.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18<sup>TH</sup> DAY OF MARCH, 2011, I CAUSED THE ORIGINAL **AMENDED BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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EPHRATA, WA 98823-0037		

**SIGNED** IN SEATTLE, WASHINGTON THIS 18<sup>H</sup> DAY OF MARCH, 2011.

X \_\_\_\_\_ 

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