

FILED

JUN 09 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
B: _____

**No. 29168-5-III
(consolidated with No. 29183-9-III)**

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

RESPONDENT,

v.

BRIAN DEE WENZ,

APPELLANT.

BRIEF OF RESPONDENT

**D. ANGUS LEE
PROSECUTING ATTORNEY**

**By: Douglas R. Mitchell, WSBA #22877
Deputy Prosecuting Attorney
Attorney for Respondent**

**PO BOX 37
EPHRATA WA 98823
(509)754-2011**

FILED

JUN 09 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
B: _____

**No. 29168-5-III
(consolidated with No. 29183-9-III)**

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

RESPONDENT,

v.

BRIAN DEE WENZ,

APPELLANT.

BRIEF OF RESPONDENT

**D. ANGUS LEE
PROSECUTING ATTORNEY**

**By: Douglas R. Mitchell, WSBA #22877
Deputy Prosecuting Attorney
Attorney for Respondent**

**PO BOX 37
EPHRATA WA 98823
(509)754-2011**

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii-iv
A. IDENTITY OF RESPONDENT	1
B. RELIEF SOUGHT	1
C. STATEMENT OF FACTS	1
D. RESPONSE TO APPELLANT’S ISSUES PRESENTED.....	1
1. The Court did not err in consolidating the cases for trial.	1-4
2. RCW 10.58.090 does not violate the Separation of Powers doctrine, and is not unconstitutional	4-10
3. There was no prosecutorial misconduct in the closing argument.....	10-15
E. CONCLUSION	15-16

TABLE OF AUTHORITIES

Page

STATE CASES

<i>Brown v. Owen</i> , 165 Wn.2d 706, 206 P.3d 310 (2009).....	7
<i>Carrick v. Locke</i> , 125 Wn.2d 129, 882 P.2d 173 (1994).....	6
<i>City of Fircrest v. Jensen</i> , 158 Wn.2d 384, 143 P.3d 776 (2006).....	6, 7, 10
<i>City of Spokane v. County of Spokane</i> , 158 Wn.2d 661, 146 P.3d 893 (2006).....	6, 8
<i>Island County v. State</i> , 135 Wn.2d 141, 955 P.2d 377 (1998).....	5
<i>State v. Ben-Neth</i> , 34 Wn. App. 600, 663 P.2d 156 (1983).....	4
<i>State v. Brown</i> , 132 Wn.2d 529, 940 P.2d 546 (1997).....	11, 14
<i>State v. Bryant</i> , 89 Wn. App. 857, 950 P.2d 1004 (1998).....	2, 4, 11, 15
<i>State v. DiVincentis</i> , 150 Wn.2d 11, 74 P.3d 119 (2003).....	3
<i>State v. Dow</i> , 168 Wn.2d 243, 227 P.3d 1278 (2010).....	9, 10
<i>State v. Ferguson</i> , 100 Wn.2d 131, 667 P.2d 68 (1983).....	9
<i>State v. Gregory</i> , 158 Wn.2d 759, 147 P.3d 1201 (2006).....	15
<i>State v. Grewe</i> , 117 Wn.2d 211, 813 P.2d 1238 (1991).....	12
<i>State v. Henderson</i> , 48 Wn. App. 543, 740 P.2d 329 (1987).....	4
<i>State v. Hughes</i> , 118 Wn. App. 713, 77 P.3d 681 (2003).....	12
<i>State v. Kalakosky</i> , 121 Wn.2d 525, 852 P.2d 1064 (1993).....	2

TABLE OF AUTHORITIES (continued):

	<u>Page</u>
<i>State v. Markle</i> , 118 Wn.2d 424, 823 P.2d 1101 (1992).....	3, 4
<i>State v. McKee</i> , 141 Wn. App. 22, 167 P.3d 575 (2007).....	4
<i>State v. McKenzie</i> , 157 Wn.2d 44, 134 P.3d 221 (2006).....	11, 14
<i>State v. Ramos</i> , 149 Wn. App. 266, 202 P.3d 383 (2009)	4
<i>State v. Ray</i> , 116 Wn.2d 531, 806 P.2d 1220 (1991).....	9
<i>State v. Ryan</i> , 103 Wn.2d 165, 691 P.2d 197 (1984).....	8
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	15, 16
<i>State v. Sears</i> , 4 Wn.2d 200, 103 P.2d 337 (1940).....	7
<i>State v. Stevens</i> , 58 Wn. App. 478, 794 P.2d 38 (1990)	12
<i>State v. Stevenson</i> , 128 Wn. App. 179, 114 P.3d 699 (2005)	4
<i>State v. Stuhr</i> , 58 Wn. App. 660, 794 P.2d 1297 (1990).....	12
<i>State v. Townsend</i> , 147 Wn.2d 666, 57 P.3d 255 (2002).....	15
<i>State v. Walton</i> , 64 Wn. App. 410, 824 P.2d 533 (1992).....	16

FEDERAL CASES

<i>Blakely v. Washington</i> , 124 S. Ct. 2531, 159 L.Ed.2d 403, 542 U.S. 296 (2004).....	13
--	----

TABLE OF AUTHORITIES (continued):

	<u>Page</u>
<u>STATUTES</u>	
CrR 4.3	2
CrR 4.3(a).....	4
CrR 4.4	2
CrR 4.4(a)(2)	4
ER 401.....	10
ER 402.....	10
ER 403.....	9, 10
ER 404(b)	5, 8, 9, 10
RCW 9.94A.....	12
RCW 9.94A.535(3)(n)	12
RCW 10.58.090	2, 4, 5, 6, 7, 8, 9, 10

OTHER AUTHORITIES

5 K. Tegland, Washington Practice, Evidence Law and Practice at V-IX (2 nd ed. 1982)	7
SHB 3055	10
WPIC 3.01	2

A. IDENTITY OF RESPONDENT

The State of Washington was the Plaintiff in the Superior Court, and is Respondent herein. The State is represented by the Grant County Prosecutor's Office.

B. RELIEF SOUGHT

The State is asking this Court to affirm the decisions of the Superior Court and uphold the conviction of the Appellant.

C. STATEMENT OF FACTS

Appellant's Summary of Proceedings describing the facts of the case (Br. of Appellant, at 4-5) is sufficient for the purpose of Respondent's response, and will be accepted as it is, unless otherwise noted below.

D. RESPONSE TO APPELLANT'S ISSUES PRESENTED

1. The Court did not err in consolidating the cases for trial.

RCW 10.58.090 was not the basis for joinder, but argued as additional authority in support of doing so. Thus, the general rules of severance and

joinder pursuant to CrR 4.3 and CrR 4.4 are controlling. Both rules are essentially different sides of the same coin, based on the same underlying principle. *State v. Bryant*, 89 Wn. App. 857, 865, 950 P.2d 1004 (1998). A trial court's refusal to sever is reviewed for manifest abuse of discretion. *State v. Kalakosky*, 121 Wn.2d 525, 537-539, 852 P.2d 1064 (1993).

The principle referred to above is that the defendant receives a fair trial untainted by prejudice. *State v. Bryant*, 89 Wn. App. 857, 865, 950 P.2d 1004 (1998). To the extent that there may be prejudice, which the State of course disputes, there are several factors which may offset any prejudice resulting from joinder. *Id.* at 867-868. Among them is whether the court properly instructed the jury to consider the evidence of each crime, as was done here. Instruction # 3, using WPIC 3.01, does exactly that, and exists for that reason. CP 71. (The instructions have different pagination in the two cases; this page number refers to the clerk's papers in 08-1-00488-3.)

Another factor discussed in *Bryant* is the admissibility of the evidence of the crime(s) pursuant to RCW 10.58.090 and the other relevant rules even if there had not been joinder. The trial court conducted a detailed and careful analysis of the issue. RP, July 6, 2009, at 62-68. (The transcription of

numerous proceedings has consecutive pagination, resulting in the potential for confusion; these pages would be 8-14 if this hearing were separately paginated. The State is not personally aware of the source of these transcripts, but believes they were made from the recordings in the courtrooms at the behest of the Washington Appellate Project.) In conducting its analysis, the Court cited to *State v. DiVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003). Similar to Mr. Wenz's conduct, but about fifteen years apart in time, the evidence of other similar acts was admitted. *Id.* at 21. Certainly if evidence of similar acts after such a great period was admitted in *DiVincentis*, it is admissible here.

Appellant has failed to meet his burden of proof, a burden which has been well established without change for years. Even if evidence related to the separate counts would not be cross admissible, this is not sufficient to show that undue prejudice would result from a joint trial. *State v. Markle*, 118 Wn.2d 424, 439, 823 P.2d 1101 (1992) (citation omitted). The failure to sever would require finding that the trial court engaged in a manifest abuse of discretion, and requires that the Appellant had shown that the risk of prejudice would outweigh the concern for judicial economy. *Id.* The facts in *Markle*

were strikingly similar to those in this case, and the result should be the same. See also *State v. McKee*, 141 Wn. App. 22, 38, 167 P.3d 575 (2007).

The trial court joined the cases for trial pursuant to CrR 4.3(a). Accordingly, denial of a motion to sever would have been proper. Here, no motion to sever was made, and Appellant has thus waived it. *State v. Bryant*, 89 Wn. App. 857, 864-865, 950 P.2d 1004 (1998), citing *State v. Henderson*, 48 Wn. App. 543, 551, 740 P.2d 329 (1987); *State v. Ben-Neth*, 34 Wn. App. 600, 606, 663 P.2d 156 (1983); CrR 4.4(a)(2). A trial court's rulings regarding the admission of evidence may only be reversed if there is a manifest abuse of discretion. *State v. Markle*, 118 Wn.2d 424, 438, 823 P.2d 1101 (1992) (citation omitted).

2. RCW 10.58.090 does not violate the Separation of Powers doctrine, and is not unconstitutional.

A reviewing court presumes the statute is constitutional. *State v. Stevenson*, 128 Wn. App. 179, 189, 114 P.3d 699 (2005). The party challenging the constitutionality of the statute bears the burden to prove the statute is unconstitutional beyond a reasonable doubt. *State v. Ramos*, 149 Wn. App. 266, 270, 202 P.3d 383 (2009).

The reason for this high standard is based on our respect for the legislative branch of government as a co-equal branch of government, which, like the court, is sworn to uphold the constitution. We assume the legislature considered the constitutionality of its enactment and afford some deference to that judgment. Additionally, the Legislature speaks for the people and we are hesitant to strike a duly enacted statute unless fully convinced, after a searching legal analysis, that the statute violates the constitution.

Island County v. State, 135 Wn.2d 141, 147, 955 P.2d 377 (1998).

Appellant fails to sustain his burden to prove RCW 10.58.090 is unconstitutional.

Appellant argues that the legislature's enactment of RCW 10.58.090 violates the separation of powers. A separation of powers violation occurs when the activity of one branch threatens the independence or integrity of another branch or invades the prerogatives of the other. Here, the legislature has authority to create rules of evidence, and its action in this area does not invade the prerogatives of the judiciary. Appellant's claim that the statute irreconcilably conflicts with ER 404(b) overlooks the fact that the evidence rule contains a non-exclusive list of exceptions, and that the statute simply provides another exception to that rule. Given that the statute leaves the ultimate decision whether to admit evidence under RCW 10.58.090 to the trial

court's discretion, the legislature's action hardly threatens the independence or integrity of the judiciary. This Court should reject Appellant's separation of powers challenge to RCW 10.58.090.

The Washington State Constitution does not contain a formal separation of powers clause. *Carrick v. Locke*, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994). Instead, the division of the government into different branches has been presumed to give rise to the separation of powers doctrine. *Id.* at 135. "The doctrine of separation of powers serves mainly to ensure that the *fundamental functions* of each branch remain inviolate." *City of Spokane v. County of Spokane*, 158 Wn.2d 661, 680, 146 P.3d 893 (2006) (emphasis in original). "Though the doctrine is designed to prevent one branch from usurping the power given to a different branch, the three branches are not hermetically sealed and some overlap must exist." *City of Fircrest v. Jensen*, 158 Wn.2d 384, 393-94, 143 P.3d 776 (2006). To determine whether a particular action violates separation of powers, the court looks not to whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the

independence or integrity or invades the prerogatives of another. *Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009).

By enacting RCW 10.58.090, the legislature did not invade a fundamental function of the judiciary. Rather, both the court and the legislature have authority to enact rules of evidence. *Fircrest*, 158 Wn.2d at 394; *State v. Sears*, 4 Wn.2d 200, 215, 103 P.2d 337 (1940). Our Supreme Court has acknowledged that the adoption of the rules of evidence is a legislatively delegated power of the judiciary. *Fircrest*, 158 Wn.2d at 394. Historically, the legislature and the courts have shared the responsibility for enacting rules of evidence; representatives of both the legislature and the judiciary drafted the current rules of evidence. 5 K. Tegland, *Washington Practice, Evidence Law and Practice*, at V-IX (2nd ed. 1982). Currently, numerous statutes supplement the Rules of Evidence on various issues.¹ Several existing statutes govern evidence and testimony in sex offense cases.²

¹ See, e.g., RCW 5.45.020 (business records); RCW 5.46.010 (copies of business and public records); RCW 5.60.060 (evidentiary privileges); RCW 5.66.010 (admissibility of expressions of apology, sympathy, fault).

² RCW 9A.44.020 (rape shield); RCW 9A.44.120 (child hearsay statute); RCW 9A.44.150 (child witness testimony concerning sexual or physical abuse).

Accordingly, the legislature's enactment of RCW 10.58.090 is consistent with its history of involvement with evidentiary matters.

Appellant insists that the statute conflicts with ER 404(b). However, when considering a separation of powers challenge to a statute, our Supreme Court has repeatedly held that "apparent conflicts between a court rule and a statutory provision should be harmonized, and both given effect if possible." *State v. Ryan*, 103 Wn.2d 165, 178, 691 P.2d 197 (1984). The inability to harmonize a court rule with a statute occurs only when the statute directly and unavoidably conflicts with the court rule. *City of Spokane*, 158 Wn.2d at 679.

It is not difficult to harmonize ER 404(b) with RCW 10.58.090 and give effect to both. While ER 404(b) generally prohibits evidence of a defendant's prior bad acts, it contains a list of exceptions. The list of exceptions is not exclusive and many are creatures of common law.³ One of the well-settled common law exceptions to ER 404(b), lustful disposition, allows for the admission of the same type of evidence as in RCW 10.58.090. Under the lustful disposition exception, evidence of a defendant's prior sexual

³ *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995) (discussing the "res gestae" exception to ER 404(b)); *State v. Grant*, 83 Wn. App. 98, 105, 920 P.2d 609 (1996) ("The list of other purposes for which evidence of a defendant's prior misconduct may be introduced is not exclusive.").

misconduct against the same victim is admissible in order to show the defendant's lustful disposition toward that victim. *State v. Ray*, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991); *State v. Ferguson*, 100 Wn.2d 131, 133-34, 667 P.2d 68 (1983). Given that ER 404(b)'s prohibition against prior bad acts evidence is not absolute and this Court's recognition of numerous exceptions to the rule, the Court can harmonize the statute as creating another exception to the rule. The statute and rule do not irreconcilably conflict.

Finally, RCW 10.58.090 is not a mandatory rule of admission, and leaves the determination whether to admit such evidence to the trial court as a discretionary decision. The statute directs the court to consider a variety of factors in deciding whether, under ER 403, the probative value of the evidence is outweighed by the danger of unfair prejudice. Given that the judiciary retains the final say on whether such evidence is admitted, the existence of RCW 10.58.090 does not threaten the independence or integrity of the courts.

The Washington Supreme Court most recently recognized the Legislature's authority to codify or eliminate evidence rules that were either judicially created or which emanated from the common law in *State v. Dow*,

168 Wn.2d 243, 250, 227 P.3d 1278 (2010). The legislature may do so “to the extent it does not violate due process standards or other constitutional principles. *Id.*

When a challenge to the constitutionality of an evidence statute is raised on this ground, the Supreme Court has found no violation of the doctrine where the statute permits the trial court to admit or exclude evidence at its discretion. In *Fircrest* the Court considered whether SHB 3055, which amended the foundational requirements for admissibility of breath tests in DUI prosecutions, violated the doctrine in light of ER 401, 402, 403 and 404(b). This Court reconciled the statute and the court rules by observing the statute was permissive; the trial court could still apply the rules of evidence to exclude the breath results. *Id.* at 399.

This Court should hold that the legislature's enactment of RCW 10.58.090 did not violate the separation of powers doctrine.

3. There was no prosecutorial misconduct in the closing argument.

Appellant's lengthy recitation of authority with regard to “prosecutorial misconduct” (a term which is imprecise and offensive at best;

“prosecutorial error” would be more appropriate in most cases) appears to be generally accurate, but of no merit, as there was no misconduct.

A defendant claiming prosecutorial misconduct bears the burden of establishing both the impropriety of the prosecuting attorney’s comments and their prejudicial effect. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Prejudice is established if the defendant demonstrates a substantial likelihood that the misconduct affected the jury’s verdict. *Id.* A defendant who does not timely object and request a curative instruction waives any claim on appeal unless the argument is “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.” *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

Allegedly improper comments are to be reviewed on appeal in the context of the prosecutor’s entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. *State v. Bryant*, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998). Prosecutorial misconduct is grounds for reversal only when the conduct “was both improper

and prejudicial in the context of the entire record and circumstances at trial.”
State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003).

The fundamental flaw in Appellant’s argument is that there was no misconduct. Appellant refers to “abuse of trust” as a legal term of art. This description is imprecise at best, and the cases cited by Appellant do not assist his argument. *State v. Stevens*, 58 Wn. App. 478, 794 P.2d 38 (1990) and *State v. Stuhr*, 58 Wn. App. 660, 794 P.2d 1297 (1990) refer to and interpret provisions of the Sentencing Reform Act (RCW 9.94A) allowing for the imposition of an exceptional sentence deviating from the standard range. *Stevens* and *Stuhr*, and a similar subsequent case, *State v. Grewe*, 117 Wn.2d 211, 813 P.2d 1238 (1991), did not address the use of the phrase at issue in argument to the jury. Specifically, the appellate review in each case addressed the sufficiency of the trial court’s basis for imposing an exceptional sentence above the standard range using the factor now codified at RCW 9.94A.535(3)(n), abuse of a position of trust. “In the area of criminal law, the Legislature has determined that it *may* be an aggravating factor which *may* serve as the basis for an exception sentence above the standard range.” Br. of Appellant, 26 (emphasis added).

Appellant takes this legislative grant of authority, using phrasing which implicitly acknowledges the permissive discretionary nature of the effort to seek an exceptional sentence by proving that aggravator to a jury, and makes a desperate grasp for straws which as far as can be discerned do not exist. At the time of the cases cited, the aggravator was not considered and determined by the jury; it was considered only by the Court. That did not change until after the legislative response to *Blakely v. Washington*, 124 S. Ct. 2531, 159 L.Ed.2d 403, 542 U.S. 296 (2004). As the “abuse of trust” factor was not considered by a jury during the time period in the cases cited were tried, those cases are not of precedential value in the circumstances presented by this case.

Prior to closing, defense counsel moved to prevent the State from using the phrase “abuse of trust.” RP, April 15, 2010, p 116. The trial court denied the motion without a response from the State. After a short answer, the court went on to give its reasoning.

But to be just a bit more specific in my response, a statutory definition of “breaching the trust” might be different than the dictionary definition. And certainly the prosecutor in closing can use words – can be using words in their ordinary meaning, not just the statutory meaning. And there’s no elements here, meaning any of these crimes, of breaching the trust that we have to cross that bridge of is there evidence to support those words.

RP, April 15, 2010, p117.

Defense counsel further moved to prohibit use of the word “predator” by the State. The Court gave a considered and detailed response also denying that motion. *Id.* pp 118-120. The State informed the Court that the word would not be use unless triggered by the discussion. *Id.* p 120. This level of caution is not consistent with any conduct that is “flagrant and ill-intentioned”, and Appellant cannot sustain his burden of showing both impropriety and prejudice. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). After the motion was denied by the Court, Appellant did not object to the sole use of the phrase “abuse of trust” during closing. RP, April 15, 2010, p 132.⁴ As a result the issue is waived on appeal. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

⁴ As required by our duty of candor to the tribunal, although the same phrase was not used, a similar reference and argument is made in rebuttal closing. RP, April 15, 2010, p 161.

The State is generally afforded wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence. *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006). Given the record in the case as a whole, the argument made was not improper. *State v. Bryant*, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998).

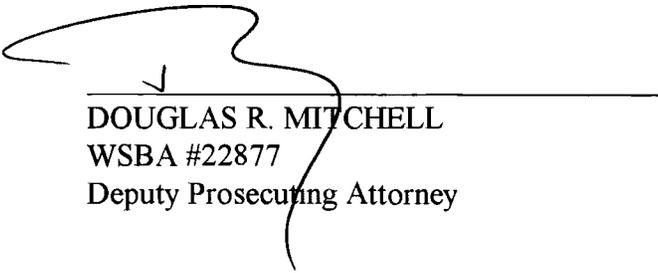
E. CONCLUSION

The Appellant has not raised any supportable claims of error. What Appellant is essentially attempting to do is attack the jury's decision by focusing on irrelevant tangents. This is not proper. The standard for determining whether a conviction rests on insufficient evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. A challenge to the sufficiency of the evidence admits the truth of the evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Further, "all reasonable

inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* at 201. This standard is a deferential one, and questions of credibility, persuasiveness, and conflicting testimony must be left to the jury. *State v. Walton*, 64 Wn. App. 410, 415-416, 824 P.2d 533 (1992).

The joinder of the offenses in these cases was not only within the discretionary decision making authority of the Court, but was made after briefing and a thorough hearing which allowed for a sound decision. There was no error in joining the cases. Accordingly, this Court should uphold the decisions of the trial court and the conviction of the Appellant.

Respectfully submitted this 8th day of June, 2011.



DOUGLAS R. MITCHELL
WSBA #22877
Deputy Prosecuting Attorney