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NO. 62507-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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STATE OF WASHINGTON

Respondent,

Vs.

ROGER ALLEN SCHERNER

Appellant.

APPEAL FROM KING COUNTY SUPERIOR COURT
Judge Richard D. Eadie

BRIEF OF APPELLANT

Lindell Law Offices, PLLC
By: Eric W. Lindell
Attorney for Appellant

Address:

4409 California Ave. SW, Suite 100
Seattle, WA 98116
(206) 230-4922

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I. NATURE OF THE CASE

Following a jury trial, the appellant Roger Scherner was convicted of three counts of Child Molestation in the First Degree. Mr. Scherner appeals his conviction.

During Mr. Scherner's trial, the trial court, relying on RCW 10.58.090, a recent legislative amendment to Evidence Rule 404(b), allowed the prosecutor to present testimony from four women who alleged they had been molested by the appellant decades earlier. At trial the prosecutor used that evidence to argue that, based on his history of prior acts of molestation, Mr. Scherner was likely guilty of the crimes charged. The new law, RCW 10.58.090, is unconstitutional in several respects, and evidence admitted pursuant to the new law deprived Mr. Scherner of a fair trial.

In addition to errors related to RCW 10.58.090, the trial court committed a variety of other errors, including: compelling Mr. Scherner's wife of 56 years to testify in violation of the spousal privilege contained in RCW 5.60.060; allowing the Mr. Scherner's jury to consider a recorded conversation between Mr. Scherner and the complaining witness even though the recording was taken in violation of Washington's Privacy Act, RCW 9.73; failing to properly investigate jury misconduct committed when one juror brought a newspaper article about Mr. Scherner's trial into

the jury room prior to jury deliberations; and, relying on inadmissible evidence when sentencing Mr. Scherner. Mr. Scherner requests that his conviction be reversed based upon the legal errors noted herein.

II. ASSIGNMENT OF ERROR

1. The Superior Court erred by admitting evidence of a phone call recorded by a Washington law enforcement officer in violation of the State Privacy Act, RCW 9.73, et. seq.

2. The Superior Court erred by admitting testimony from the appellants wife of 56 years after the appellant had informed the court that he was exercising the spousal privileges contained in RCW 5.60.060(1).

3. The Superior Court erred both by failing to properly investigate jury misconduct and by allowing jurors to proceed to deliberations after a juror brought a newspaper article about the appellants trial into the jury room during trial.

4. The Superior Court erred by admitting unproven allegations of sexual misconduct from four women who claimed that decades earlier they had been molested by the appellant.

5. The Superior Court erred by committing sufficient cumulative errors that those errors combined to deprive the appellant of a fair trial.

III. STATEMENT OF THE ISSUES

1. Whether the trial court erred by admitting evidence of a phone call recorded by a Washington law enforcement officer in violation of the State Privacy Act, RCW 9.73, et. seq.

2. Whether the Superior Court erred by compelling testimony from the appellants wife of 56 years after the appellant had informed the court that he was exercising the spousal privileges contained in RCW 5.60.060(1).

3. Whether Mr. Scherner's right to a fair trial was violated when his jurors were exposed to newspaper story about Mr. Scherner and when the trial court failed to investigate the effect that story had on some of the jurors who had seen it.

4. Whether RCW 10.58.090 is constitutional.

a. Whether RCW 10.58.090 violates the prohibition against *ex post facto* laws.

b. Whether RCW 10.58.090 violates the Separation of Powers Doctrine.

c. Whether RCW 10.58.090 violates the Equal Protection Clause.

d. Whether RCW 10.58.090 violates Due Process.

e. Whether the uncharged prior misconduct evidence was alternatively admissible under ER 404(b)'s traditional "common scheme or plan" theory when there was no link between the crime charged and the prior misconduct alleged to have occurred decades earlier and when the court refused to issue a limiting instruction.

f. Whether the uncharged prior misconduct evidence should have been admitted regardless of the constitutionality of RCW 10.58.090 or traditional notions of admissibility under ER 404(b) when the court failed to properly consider and weigh enumerated factors that were created to prevent overly prejudicial evidence from being admitted at trial.

5. Whether cumulative error committed by the trial court deprived the appellant of his right to a fair trial.

IV. STATEMENT OF CASE

Roger Scherner is a 79-year-old man with no prior criminal convictions. RP 236- 245. In 2007 in King County, Washington, Mr. Scherner was charged with three counts of Child Molestation in the First Degree, alleged to have occurred between May 1, 2001 and September 1, 2002. RP 130-131. The complaining witness in the case was Mr. Scherner's 13-year-old granddaughter, M.S. RP 130-131. Following a jury trial, Mr. Scherner was convicted on all three counts. CP 236-245.

Factual History of the Accusation: Some time prior to 2002, Mr. Scherner and Joanne Scherner, his wife of 56 years, drove with M.S. from California to Bellevue, Washington to visit with Mr. Scherner's sister, Sue Tillotsen. RP 690-91. All three stayed in Ms. Tillotsen's home in Bellevue for approximately one week. RP 698. At the end of the week Mr. Scherner and his wife drove M.S. back to the home she shared with her parents in Napa, California, and then they returned to their own home in nearby Monterey. RP 535, 564-572.

Approximately one year later, Jolene, M.S.'s mother, received a phone call from an acquaintance who informed her that M.S. told some friends that Mr. Scherner had used his tongue when he kissed her. RP 574. After Jolene Scherner confronted M.S. about the kissing allegation, M.S. confirmed that, while she was at Mr. Scherner's home in Monterey County, California, the kissing had occurred. RP 575-77.

After calling the Monterey County Sherriff, Jolene Scherner arranged for M.S. to visit a counselor, Margaret Hill, in order to determine what had actually occurred between Mr. Scherner and M.S. RP 576-577. Shortly thereafter, at the request of the Monterey County Sheriff, M.S. met with a second counselor, Susan Gleason. RP 578-79, 402-405. Subsequently, M.S. indicated that, while she was on the trip to Bellevue, Washington visiting with Mr. Scherner's sister, Mr. Scherner had

molested her one night. RP 579. Because that particular act occurred in Washington, the investigation was referred to the Bellevue Police Department. CP 159.

In the course of investigating M.S.'s claims against Mr. Scherner, law enforcement officers located several adults who claimed that decades earlier in states other than Washington they had been improperly touched by Mr. Scherner while they were children¹. Mr. Scherner was never charged or prosecuted for any of that alleged wrongdoing. RP 111.

History of the Phone Call Recorded in California by Washington Detective: In May of 2004, Bellevue Police contacted Monterey Sheriff's Detective Kaye in California and asked her to make contact with Mr. Scherner. RP 8-1-09 p.13. Detective Kaye apparently drove to Mr. Scherner's home and discovered that Mr. Scherner lived in a gated community, making it difficult for Detective Kaye to enter the grounds and actually contact Mr. Scherner. RP 42. Detective Kaye left without trying to make contact with Mr. Scherner. RP 42.

The following year, on November 30, 2005, Bellevue Detective Faith alleges that she called the Scherner home. RP 8-1-09 p.13. She did not leave a message when no one answered. RP 8-1-09 p. 13. On

¹ E.g. Naseema Kahn, Sean Oducado, Jobbie Spillane, and Susie O'Niel (aka Williamson). At the time of Mr. Scherner's trial, four were well beyond the age of 18.

December 6, 2005 and December 7, 2005, Detective Faith alleges that she again called the Scherner home and this time she left a message asking Mr. Scherner to call her without specifying why. Id. He apparently did not call and no other attempts to reach Mr. Scherner were made. CP 64.

Two years later, in 2007, Bellevue Detective Jenny Robertson was assigned to the Scherner investigation. RP 783. Shortly thereafter, she petitioned the King County Superior Court for an Order allowing her to tape record a private phone conversation between M.S. and Mr. Scherner down in California. RP 785-786. In her petition, Detective Robertson alleged that “[n]ormal investigative techniques have been tried and failed.” CP 115, “Petition”. The detective asserted to the court that there had been “repeated attempts” to interview Mr. Scherner. CP 115. Detective Robertson also stated that, on November 30, 2005, Detective Faith left “several messages on Scherner’s home phone with a request to call her back” advising the court that “[Scherner] did not do this.” CP 113.

Based on Detective Robertson’s assertions, a King County judge signed an Order authorizing the interception and recording of the phone conversation between the two California residents, M.S. and Mr. Scherner. CP 120-121.

Without consulting California authorities, Detective Robertson went to California where she arranged and supervised the recording of a

private phone conversation between M.S. and Mr. Scherner. RP 785-792. The recording was made without Mr. Scherner's knowledge or consent. During the recorded phone conversation, Mr. Scherner appears to have apologized to M.S. for touching her. RP 122-123.

Mr. Scherner was subsequently arrested in California by Detective Robertson with assistance from California officers. RP 173-74. During his interrogation Mr. Scherner denied M.S.'s claims of molestation. RP 835-836. Mr. Scherner was transported to Seattle to stand trial.

Although Mr. Scherner was scheduled to start trial in February of 2008, he did not appear for trial. RP 859. On March 4, 2008, law enforcement officers apprehended Mr. Scherner in Panama City, Florida. RP 862-863. Arresting officers performed a warrantless search of the car Mr. Scherner was driving when he was taken into custody. RP 339. RP 863. RP 872. After the warrantless search, officers transported Mr. Scherner to a nearby police precinct where they had him sign a consent to search form which granted them permission to search the car that the officers had already searched. RP 259-60.

Relevant Facts Relating to Trial: During trial, the prosecution called Joanne Scherner, Mr. Scherner's wife, to testify against him. RP 763. The trial court denied Mr. Scherner's assertion of the spousal privilege and compelled Mrs. Scherner to testify against her husband even

though, in addition to the spousal privilege, she had asserted her 5th Amendment right against self-incrimination. RP 712-718. RP 759. RP 742-763.

The trial court denied various defense motions to exclude testimony from four prosecution witnesses who claimed that Mr. Scherner had molested them decades earlier when they were minors living in California. RP 105-132. In addition, despite a defense motion to prohibit the prior misconduct witnesses from testifying about either “victim impact evidence,” CP 103, or non-sexual “prior bad act” allegations, CP 88, the trial judge allowed the prosecutor to introduce a variety of emotionally compelling evidence including, but not limited to, photographs of how the four women looked decades earlier when they were children (RP 65), how the mere mention of Mr. Scherner’s name caused one witness to break into tears (RP 854-855), how during discussions with family members Mr. Scherner was referred to as a “pedophile” (RP 622), the emotions one witness felt after learning of M.S. claimed she had been molested by Mr. Scherner (RP 631), how Mr. Scherner was verbally abusive to the grandmother of one witness (RP 623), whether or not it was difficult for witnesses to tell boyfriends or husbands they had been molested by Mr. Scherner (RP 667), the emotional feelings resulting from learning that one

of the other misconduct witnesses claimed she also had been molested by Mr. Scherner (RP 683-684), etc.

During trial the credibility of M.S., the prosecutor's complaining witness, was compromised after she testified that she lied to Detective Robertson when describing what happened with Mr. Scherner (RP 555), that she lied to the prosecutor when she described what happened with Mr. Scherner (RP 556), and that she lied to defense counsel when she described what happened with Mr. Scherner (RP 554).

After the four prior misconduct witnesses testified, Mr. Scherner took the stand. In cross-examination, Mr. Scherner denied any misconduct with three of the uncharged misconduct witnesses. RP 967, 976. Although Mr. Scherner admitted to improper conduct with one of the four prior misconduct witnesses two decades ago, Ms. Scherner also explained that, after that incident occurred, he received treatment for his problem at Kaiser Hospital in California. RP 971, 979.

Facts Relating to Jury Misconduct: Near the end of trial, the *Seattle Times*, one of Seattle's two major newspapers, carried a front-page story about the trial accompanied by a color photograph of Mr. Scherner being led down the courthouse hall by uniformed corrections officers. RP 802-804, RP 856-857. The article included a headline declaring "Rape trial

lets family share decades of pain, secrets.” (Supp. CP ____, Pre-Trial Ex. 28). The body of the article contained information that had already been ruled inadmissible at trial. RP 802. The defense requested that the trial judge inquire about whether or not jurors had seen the article. RP 802-804. After four jurors announced they had seen the *Times* that morning but none of them admitted in open court to reading the story, the court ended its inquiry². RP 810. When the defense asked the court to go further, for example, by inquiring what impressions jurors formed from the article, the court declined to expand its inquiry. RP 935. After additional defense requests caused the court to individually question jurors, the first juror asked by the court whether he could decide the case only on the evidence submitted at trial, responded by explaining that he brought the paper into the jury room and “somebody saw it, and kind of freaked out and I put it down”. RP 937-938. After that disclosure, the trial court stopped questioning that juror and instructed him to return to court the next day to resume service. RP 938. Rather than asking any of the remaining jurors how they had been affected by the article, and rather than making any effort to find out which juror had “freaked out,” the trial

² That jurors had previously been advised via standard jury instruction that they should not review information about the case from any source other than what was learned in court during trial, likely contributed to jurors’ initial reluctance to admit having reviewed the article. See, RP 393.

court individually asked jurors to affirm that they could “base their decision solely on the evidence that has been submitted here through testimony and exhibits and uninfluenced by any pictures or headlines you may have observed”. RP 938. Jurors addressed in that manner by the court agreed with the court’s statement. RP 938-939.

Sentencing: At sentencing the trial court openly stated that it was considering the damage Mr. Scherner had done to the “other victims”. RP 1064, 1065. The court noted that it wanted to impose a sentence that would not minimize the damage done to “them”. RP 1066. The court then sentenced Mr. Scherner to the high end of the sentencing range. RP 1066, CP 236-245.

V. ARGUMENT

1. **The Trial Court Erred by Admitting Evidence of a Phone Call Recorded by a Washington Law Enforcement Officer in Violation of the State Privacy Act, RCW 9.73, et. seq.**

The private telephone conversation occurring between M.S. and Mr. Scherner, recorded in California without Mr. Scherner’s knowledge or consent, violated the State Privacy Act, RCW 9.73, and should not have been admitted.

The State Privacy Act makes it unlawful to for any individual to intercept, or record any: “[p]rivate communication transmitted by telephone, . . . between two or more individuals between points within or without the state by any device . . . designed to record and/or transmit said

communication...without first obtaining the consent of all the participants in the communication.

RCW 9.73.030(1)(a) (emphasis added). Evidence obtained in violation of the act is inadmissible for any purpose at trial. RCW 9.73.050.

The telephone conversation between M.S. and Mr. Scherner was private³. At the start of the conversation M.S. even asked Mr. Scherner to leave the room he was standing in while talking so that his wife could not overhear even his half of the conversation. CP 123.

There can be no dispute that the conversation was recorded by a Bellevue detective investigating a crime occurring in Washington, CP 175, that the conversation was recorded without the consent of Mr. Scherner, and that both parties to the private conversation were present within California when the conversation was recorded.

Generally, when a private conversation is intercepted or recorded in another state, the law of the recording state applies to determine the legality of the interception.⁴ *State v. Fowler*, 157 Wn.2d 387, 139 P.3d 342 (2006).

³ For Privacy Act purposes, a "private conversation" is one "intended only for persons involved"...not open to the public." See, *State v. DJW*, 76 Wn. App. 135, 140-141 882 P.2d 1189 (1994) (citations omitted).

⁴ See *State v. Fowler*, 157 Wn.2d 387, 139 P.3d 342 (2006) (Oregon police investigating sex offenses occurring in Oregon recorded private conversation between victim in Oregon and defendant in Washington. RCW 9.73 found inapplicable because Oregon allows for one party consent to record.); *State v. Mayes*, 20 Wn. App. 184, 579 P.2d 999 (1978) (California police investigating crime occurring in California intercept phone

The recording at issue in Mr. Scherner's trial took place in California, and California allows private conversations to be recorded with the consent of only one party in "felon[ies] involving violence against a person"⁵. See, CA. Penal Code §633.5.

Even so, Washington's Privacy Act will determine the legality of recordings made in other states when the recordings were made by an agent of the State of Washington for use as evidence in Washington courts. See, *State v. Fowler*, 157 Wn.2d at 396. Here, there is no question that, although the recording itself took place in California, a Washington officer, Bellevue Detective Robertson, made the recording with the intent that it be used in a Washington court to prosecute a crime that is alleged to have occurred in Washington. Washington's Privacy Act applies here and

conversation between consenting informant and defendant occurring in California does not implicate RCW 9.73); *Kadoranian v. Bellingham Police Dept.*, 119 Wn.2d 178, 186, 829 P.2d 1061 (1992) (interceptions and recordings deemed to occur where recording is made and lawfulness is determined according to laws of that jurisdiction).

⁵ "Nothing in Section 631, 632, 632.5, 632.6, or 632.7 prohibits one party to a confidential communication from recording the communication for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication of the crime of extortion, kidnapping, bribery, any felony involving violence against the person, or a violation of Section 653m. Nothing in Section 631, 632, 632.5, 632.6, or 632.7 renders any evidence so obtained inadmissible in a prosecution for extortion, kidnapping, bribery, any felony involving violence against the person, a violation of Section 653m, or any crime in connection therewith." CA Penal Code §633.5. Child Molestation in the First Degree, the crime charged against Mr. Scherner, likely constitutes a "felony involving violence against the person." CA. Penal Code §288, RCW 9A.44.083(2), RCW 9.94A.030 (50)(a)(I).

under the Act, the recording violated the two-party consent requirement and was, therefore, inadmissible at trial. RCW 9.73.030.

The prosecutor at trial argued that the recording should be admitted because the Privacy Act allows for the recording of a private conversation with only one-party consent, so long as a court authorizes the recording prior to its making. See e.g. RCW 9.73.090. Even so, a lawful authorization for one party recording must first be supported by an application showing that “normal investigative techniques...have been tried and failed...” RCW 9.73.130(3)(f). The application itself must contain more than “boilerplate assertions” about the value of having a statement from the defendant. See, *State v. Manning*, 81 Wn. App. 714, 720, 915 P.2d 1162 (1996), *rev den.*, 130 Wn.2d 1010 (1996). “[B]oilerplate justifications” are insufficient because they merely support the truism that having a recording in the defendant’s own words is advantageous to the State in obtaining a conviction. Boilerplate justifications,

do not inform the issuing judge of reasons why, in [a] particular case, other procedures will not successfully resolve the investigation. Boilerplate is antithetical to the statute's particularity requirement set forth in RCW 9.73.130(3)(f). The requirement for a "particular statement of facts" reflects the Legislature's desire to allow electronic surveillance under certain circumstances but not to endorse it as routine procedure. *Before resorting to an application under RCW 9.73.130, the police must either try or give*

serious consideration to other methods and explain to the issuing judge why those other methods are inadequate in the particular case. This is the critical inquiry to which the issuing judge and the trial judge must give their attention when reviewing an application. To approve an application that contains nothing more than general boilerplate declarations...would undermine the restrictive intent of the statute.

State v. Manning, 81 Wn. App. 714, 720-721, 915 P.2d 1162 (1996)

(citation omitted), *rev den*, 130 Wn.2d 1010 (1996) (emphasis added);

State v. Porter, 98 Wn. App. 631, 636, 990 P.2d 460 (1999) (affidavit

supporting issuance of authorization to record was insufficient to establish that “normal investigative techniques were tried and failed”).

Here, the application contained boilerplate assertions about how the best evidence in the case would be a recorded conversation involving the defendant. The application did generally claim that “normal investigative techniques had been tried and failed. However, the investigative techniques that police “tried and failed” consisted of one attempt three years before the wiretap was requested where a California officer drove by the gated community where Mr. Scherner lived, and, a year after that having another officer leave two voice mail messages at Mr.

Scherner's home number without specifying the purpose of the call⁶. CP 30, RP 8-1-09 p.13, 35-36, RP 41-42. In the two years before seeking the authorization to record the telephone call, police had done nothing as far as "investigative techniques".

Mr. Scherner's trial judge noted that, "...normal techniques were very limited; and they were tried and failed." RP 44. In place of requiring any actual investigative techniques other than a drive-by and leaving a non-specific voice mail message, the trial court concluded that Bellevue Police were right to assume Mr. Scherner would not speak with them because he must have known he was being investigated for a crime, RP 43. The trial court apparently reasoned that its assumption that Mr. Scherner would not speak with police if asked was sufficient to satisfy the "investigative techniques have been tried and failed" requirement of the statute⁷.

The Privacy Act requires more than two non-specific voicemail messages and a drive past the suspects neighborhood in three years before

⁶ Although the Application states that, on 11/30/05 a detective left several messages with a request that Mr. Scherner call back, there was actually only 1 phone call made from police that day and no message was left. However, a detective did claim that one phone message was left on the Scherner phone on December 6, 2005 and another message was left on December 7, 2005. RP 8-1-09, p. 13, 35-36. Neither message identified the purpose of the call.

⁷ The trial court ignored the fact that, after his arrest, Mr. Scherner spoke with the police for roughly an hour and five minutes until they terminated their interrogation. RP 183.

a court is justified in concluding that “other investigative techniques” less intrusive than tape recording a private phone conversation without consent of both parties have been tried and failed.

Washington’s Privacy Act applied to the one-party recording in this case. The facts submitted in the application for interception of a private phone conversation were not sufficient to support intrusion into a private phone conversation. The fact and content of that recorded conversation should not have been admitted at trial in this case. RCW 9.73.050.

2. The Superior Court Erred By Compelling Testimony From the Appellant’s Wife of 56 Years After the Appellant Had Informed the Court That He Was Exercising the Spousal Privileges Contained in RCW 5.60.060(1).

The Superior Court erred by requiring Roger Scherner’s spouse of 56 years to testify against him at trial in violation of RCW 5.60.060(1). RP 759. See e.g., *State v. Wood*, 52 Wn. App. 159, 163, 758 P.2d 530 (1988) (statute reflects the “natural repugnance” against having spouses testify against each other); *Fortun v. Mcree*, 19 Wn. App. 7, 9, 573 P.2d 815 (1978); *State v. Thorne*, 43 Wn.2d 47, 55, 260 P.2d 331 (1953); *Lyen v. Lyen*, 98 Wash. 498 (1917).

The sanctity of the spousal privileges are such that “the possibility that a criminal may not be convicted for the commission of a crime

because of the [spousal] privilege is the price which the judicial system accepts in order to further the societal goal of preserving marital harmony." *In re: Grand Jury Matter*, 673 F.2d 688, 694 (3d Cir. 1982).

1. Spousal Incompetence: Section 5.60.060(1)⁸ RCW contains Washington's two separate spousal privilege rules. The first, the rule of spousal incompetence, prohibits one spouse from testifying in court against the other. Once Roger Scherner asserted that privilege (see CP 71-74), his spouse was deemed legally incompetent to testify for or against him as to all matters, and the restriction was not limited merely to confidential communications between them. See, *Barbee v. Luong Firm PLLC*, 126 Wa. App. 148, 159, 107 P.3d 762 (2005) (citation omitted).

Because the rule of spousal incompetence bars not only the testimony of a party's spouse but also the use of a substitute for such testimony, it was also error for the trial court to admit Mrs. Scherner's statements through Detective Robertson. RP 768-69, RP 848-852. See *Lyen v. Lyen*, 98 Wash. 498 (1917).

⁸ A husband shall not be examined for or against his wife without the consent of the wife, nor a wife for or against her husband without the consent of the husband nor can either during marriage or afterward, be without consent of the other, examined as to any communication made by one to the other during marriage. But this exception shall not apply to...a criminal action or proceeding for a crime committed by said husband or wife against any child of whom said husband or wife is the parent or guardian. RCW 5.60.060(1).

2. Confidential Communications Privilege: The second and entirely distinct privilege contained in RCW 5.60.060(1), the “confidential communications privilege,” provides that neither spouse shall, without the consent of the other, be examined as to any communication made by one to the other during marriage. See RCW 5.60.060(1). Marital communications are presumptively confidential. *Blau v. United States*, 340 U.S. 332, 71 S.Ct. 301 (1951); *Breimon v. General Motors Corp.*, 8 Was App. 747, 750, 509 P.2d 398(1973). The confidential communications privilege “belongs to, or may be asserted by, the communicating spouse; the hearing or receiving spouse is ordinarily not entitled to object”. *Swearingen v. Vik*, 51 Wn.2d 843, 848, 322 P.2d 530 (1958).

The trial court erred when compelling Roger Scherner’s spouse to testify to confidential communications that occurred during their marriage⁹. Further, it was error to allow testimony from Mrs. Scherner that, during their marriage, she talked with Mr. Scherner about molesting his grandchildren, and that she told him how “young children felt about it” (RP 769), and how “this inappropriate touching is very difficult for young women” (RP 852), and that, in response to her statements, Mr. Scherner

⁹ In addition to Mr. Scherner exercising the spousal privilege, Mrs. Scherner retained counsel and asserted her 5th Amendment Right against self-incrimination. RP 710-759.

“probably said he was sorry” (RP 769). At that point, the court was not only erroneously allowing Mrs. Scherner to testify about confidential communications she had with Mr. Scherner, but it was allowing testimony about victimizing young girls in general and grandchildren other than M.S.¹⁰.

Mr. Scherner was not the legal guardian of M.S.: The trial court justified admitting privileged communications by concluding that Mr. Scherner was M.S.’s guardian and, therefore, the spousal privilege did not apply. RP 759. See, RCW 5.060.060.

Mr. Scherner was not M.S.’s guardian. Whether a person is a guardian within the ordinary meaning of the privilege statute depends on the facts and circumstances of each case and stands on a determination of whether a party stands *in loco parentis* to the child at issue. See *State v. Waleczek*, 90 Wn.2d 746, 585 P.2d 797 (1978).

The term "in loco parentis" means, “[i]n the place of a parent; instead of a parent; charged, factitiously, with a parent's rights, duties, and responsibilities" (citation omitted). It refers to a person who has put himself or herself in the situation of a lawful parent by assuming all obligations incident to the parental relation without going through the formalities of legal adoption and embodies the two ideas of assuming the status and discharging the duties of parenthood.

¹⁰ There was no evidence that Mr. Scherner was ever acting in the capacity of guardian for any of his grandchildren when he was alleged to have committed any act of misconduct.

Zellmer v. Zellmer, 164 Wn.2d 147, 164, 188 P.3d 497 (2008).

Exercising temporary custody or control over a child does not establish an *in loco parentis* relationship. See, *Zellmer* at 168 (multiple citations omitted). The intention required to create an *in loco parentis* relationship should not lightly or hastily be inferred. *Zellmer* at 167. In *Zellmer*, the Supreme Court determined that, even though a step-parent had lived with his step-daughter for portions of the three months before the child died, the evidence there was insufficient to prove an *in loco parentis* relationship existed between the two.

Mr. Scherner did not live with M.S. and did not provide her with financial support. Significantly, Mrs. Scherner was aware of stories that her husband molested their grandchildren, and Mrs. Scherner had previously agreed to take on the obligation of ensuring that, on a family outing, he would not touch one of their grandchildren. RP 742.

Accordingly, it is difficult to imagine that, when as occurred here, Mr. Scherner traveled with his wife and a grandchild, Mr. Scherner would be allowed all of the same rights and responsibilities as the child's parent.

Because the prosecutor did not sufficiently establish that Mr. Scherner was M.S.'s guardian at the time M.S. alleges she was molested in

Washington, it was error for the court to admit Mrs. Scherner's testimony over Mr. Scherner's assertion of the spousal privilege.

3. Mr. Scherner's Right to a Fair Trial Was Violated Because His Jurors Were Exposed to a Newspaper Story About Mr. Scherner and the Trial Court Failed to Investigate the Effect That Story Had On Some of the Jurors Who Had Seen It.

Mr. Scherner's Due Process right to a fair trial by an impartial jury was violated when, during trial, jurors were exposed to extraneous evidence consisting of a newspaper photo, article, and headline about Mr. Scherner's case. See, U.S. Const. Amends. VI, XIV §1; Wash. Const. Art. I, §§3, 21, 22; *State v. Jackson*, 75 Wn. App. 537, 543, 879 P.2d 307 (1994).

Extraneous evidence is "information that is outside all the evidence admitted at trial." *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 270, 796 P.2d 737 (1990). When a jury considers extraneous evidence, "[A] new trial must be granted unless it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict." *State v. Briggs*, 55 Wn. App. 44, 56, (1989), citing to *United States v. Bagley*, 641 F.2d 1235, 1242 (9th Cir. 1981); see also *United States v. Bagnariol*, 665 F.2d 877, 887 n. 6 (9th Cir. 1981); *Llewellyn v. Stynchcombe*, 609 F.2d 194, 195 (5th Cir. 1980) ("a defendant is entitled to a new trial unless there is no reasonable possibility that the jury's

verdict was influenced by the material that improperly came before it"). In fact, once established, juror misconduct gives rise to a presumption of prejudice that the State has the burden of disproving beyond a reasonable doubt. *State v. Murphy*, 44 Wn. App. 290, 296, 721 P.2d 30, review denied, 107 Wn.2d 1002 (1986); and see, *State v. Rinke*, 70 Wn.2d 845 (1967).

In *State v. Rinke*, 70 Wn.2d 854, 425 P.2d 658 (1967), the defendants were charged with theft. During trial a general editorial unrelated to Rinke appeared in the local paper about how judges in that county had been too lenient when sentencing defendants. That article was inadvertently provided to jurors in the jury room along with trial exhibits. In reversing Rinke's conviction, the Supreme Court noted that it would "not speculate at great risk to the defendants" to what use the jurors had put the article to. *Id.* at 863. The court felt "compelled to assume the requisite balance of impartiality was upset". *Id.* at 863. The trial court in Mr. Scherner's case should have exercised similar caution and reached a similar conclusion.

In addition to the prosecutor's failure in Mr. Scherner's case to disprove the presumption of prejudice beyond a reasonable doubt, the trial court erred in failing to properly investigate the effect the offending article had on Mr. Scherner's jurors. See, *United States v. Rigsby*, 45 F.3d. 120,

124-125 (6th Cir. 1995) (when there is a credible allegation of extraneous influence, the court must investigate sufficiently to assure itself that constitutional rights of the criminal defendant have not been violated.); *Smith v. Phillips*, 455 U.S. 209, 217, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982) (due process requires “a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen”).

Here, four jurors admitted they had seen the *Times* story which included a prejudicial headline, photograph, and an article that contained information already ruled inadmissible at trial. One juror, in a non-responsive answer to the court’s inquiry, declared he brought the article into the jury room, and that when another juror saw the article, that juror “freaked out.” Instead of performing an investigation sufficient to assure that Mr. Scherner’s constitutional rights had not been violated, the trial court glossed over the matter, merely asking jurors to agree with the court that they could decide the case on what they heard in court as opposed to what they saw in the paper.

It was misconduct for the jurors to have the article in the jury room. The court should have conducted a thorough inquiry with more in mind than getting on with the trial. Any doubts about the effect of the

misconduct must be resolved against the verdict. See, *State v. Cummings*, 31 Wn. App. 427, 430, 642 P.2d 415 (1982) (citations omitted); *State v. Briggs*, 55 Wn. App. 44, 55 (1989); *Halverson v. Anderson*, 82 Wn.2d 746, 752, 513 P.2d 827 (1973). Accordingly, Mr. Scherner should receive a new trial, free from the potential taint resulting from exposing jurors to the *Times* article.

4. RCW 10.58.090 is Unconstitutional.

There is no more insidious and dangerous testimony than that which attempts to convict a defendant by producing evidence of crimes other than the one for which he is on trial.

State v. Smith, 103 Wash. 267, 268 (1918).

A prosecutor's invitation to convict a defendant on propensity is never appropriate argument.

State v. Fisher __ Wn.2d 15 (Madsen concurring) (slip op. 3-12-09.)

Last year Washington legislators enacted RCW 10.58.090¹¹, thereby amending Evidence Rule 404(b). The legislative amendment to ER 404(b) allowed prosecutors in trials where the defendant is accused of a sex offense to present evidence that the accused committed prior acts of sexual misconduct with others even if no conviction resulted and no charges had ever even been filed. Significantly, the amendment allows

¹¹ The amendment to ER 404(b) was approved by the Legislature on March 20, 2008 and took effect on June 12, 2008. The statute provides that, the Act applies to "any case that is tried on or after its adoption". Reviser's note. RCW 10.58.090.

jurors for the first time to consider unproven misconduct evidence for any purpose, including reasoning that the defendant is most likely guilty of the charge at issue because his past history indicates a propensity to commit such acts. (Compare, *State v. Fisher*, __ Wn.2d 15 (Opinion of Fairhurst) (slip op. 3-12-09) (“Generally, evidence of a defendant’s prior misconduct is inadmissible to demonstrate the accused’s propensity to commit the crime charged”).

The purpose of the amendment was clear from its inception. Supporters of the amendment in both the House and Senate plainly declared that the change in Evidence Rule 404(b) was necessary because sex offense trials were not ending often enough with convictions¹².

The trial judge in Mr. Scherner’s case relied on RCW 10.58.090 to admit testimony from four prosecution witnesses who presented unproven allegations that they had been molested by Mr. Scherner between 20 and 40 years earlier. RP 105-118. Section RCW 10.58.090 violated Mr. Scherner’s constitutional rights in several respects.

¹² “We need to allow for admission of evidence that did not result in conviction because the nature of [sex] offenses often result in no charges being filed and no convictions”. House Bill Report, SB 6933, 3-5-08, p.4. “In the recent trial in King County of *State v. Darboe*, the jury could not reach a verdict after a trial where the judge, under ER 404(b), excluded evidence of prior sexual misconduct that was similar to that for which he was charged. This is an example of why ER 404(b) should be changed as it applies to trials of sex offenses”. Senate Bill Report, SB 6933, 3-5-08, p.3.

- a. RCW 10.58.090 violates the prohibition against *Ex post facto* laws:

The legislative amendment to ER 404(b), codified as RCW 10.58.090, is an *ex post facto* law. The enactment of *ex post facto* laws is prohibited by both the federal and state constitutions¹³.

“To fall within the *ex post facto* prohibition, a law must be retrospective - that is ‘it must apply to events occurring before its enactment’” *State v. Aho*, 137 Wn.2d 736, 741-742, 975 P.2d 512 (1999) (citations omitted). Section 10.58.090 RCW is retrospective because the events for which Mr. Scherner was on trial occurred between June 2001 and September 2002, six years before the new law was enacted¹⁴.

The seminal *ex post facto* case in the U.S. is *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 1 L. Ed. 648 (1798). The *Calder* court identified four

¹³ The United States Constitution declares that “[n]o State shall . . . pass any . . . *ex post facto* law.” U.S. CONST. Art. I, §10. The Washington State Constitution similarly declares that “[n]o . . . *ex post facto* law . . . shall ever be passed.” CONST. Art. I, §23.

¹⁴ Although the “Application” note attached to RCW 10.58.090 purports to apply the new law to “any case that is tried on or after its adoption” the law actually applies retroactively to cases like Mr. Scherner’s where the events at issue occurred before the enactment of the new law. Had the new law been expressly applied to “any case wherein the charging period commenced after the effective date of the statute”, the *ex post facto* violation would be less clear.

categories of laws that constitute an *ex post facto* violation¹⁵. The United States Supreme Court and Washington courts have repeatedly endorsed the *ex post facto* analysis utilized by the *Calder* court. See *Carmell v. Texas*, 529 U.S. 513, 525, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000) (collected cases); See *State v. Edwards*, 104 Wn.2d 63, 70-71, 701 P.2d 508 (1985). Washington recently applied the *Calder* analysis when concluding that legislative changes to the law regulating the type of evidence needed to admit a breath test result (eliminating the requirement that the BAC thermometer be certified) could not be retroactively applied without violating *ex post facto* prohibitions. See, *City of Seattle v. Ludvigsen*, 162 Wn.2d 660, 174 P.3d 43 (2007).

In Mr. Scherner's case, RCW 10.58.090 violated the fourth category of *ex post facto* law prohibited by *Calder* because the new law "alters the legal rules of evidence [to receive] less or *different* testimony than the law required at the time of the commission of the offence, in order to convict the offender." See, *Calder*, 3 U.S. (3 Dall.) at 390 (emphasis added).

¹⁵ 1st Every law that makes an action done before the passing of the law and which was innocent when done, criminal; and punishes such action. 2nd Every law that aggravates a crim, or makes it greater than it was when committed. 3rd Every law that changes the punishment and inflicts greater punishment than the law annexed to the crime when committed. 4th Every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender. *Calder*, 43 U.S. (3 Dall.) at 390.

In Mr. Scherner's case, the new law altered the legal rules of evidence by allowing the prosecutor to admit evidence of unproven prior acts of sexual misconduct without requiring that the evidence be admitted for, or limited to, a particular purpose, as was the requirement before the new law took effect¹⁶.

Second, the new law altered the legal rules of evidence by allowing the prosecutor to admit prior misconduct evidence as substantive evidence of Mr. Scherner's guilt, thereby supporting the argument to jurors that they should know that Mr. Scherner was guilty because he has a pattern of molesting children¹⁷. That type of propensity evidence was prohibited by ER 404(b) prior to the new law. See, *State v. Fisher*, __ Wn. 2d __ (slip op. 3-12-09)

Finally, RCW 10.58.090 alters the definition of criminal conduct by changing the definition of what a "sex offense" is. The new law, at RCW 10.58.090(5), includes uncharged, unconvicted conduct when defining a "sex offense", whereas RCW 9.94A.030(42), the law in effect

¹⁶ See, e.g. *State v. Wilson*, 144 Wn. App. 166, 177, 181 P. 3d 887 (2008) (if misconduct evidence is admitted, the court must instruct the jury as to the limited purpose for which it may be considered).

¹⁷ E.g. Prosecutor: "And ladies and gentlemen of the jury, the Instruction specifically says you may consider the testimony of prior victims for whatever purpose you deem relevant. I am suggesting to you a relevant purpose for the consideration of that evidence... There is a pattern in the practice on the part of this man." RP1021-1022. Prosecutor: We, unfortunately, have learned what this man's motivations were. He is a child molester. He is sexually attracted to children. RP 1011.

at the time the acts Mr. Scherner is alleged to have committed occurred, did not.

- (i). The legislative amendments to 404(b) are substantive, not procedural in nature:

Although no *ex post facto* violation occurs when a change in the law is merely procedural, when, as is the case here, a change in the law is substantive, *ex post facto* prohibitions apply. See, *City of Seattle v. Ludvigsen*, 162 Wn.2d 660, 671, 174 P.3d 43 (2007).

One clear indicator that RCW 10.58.090 constitutes a substantive change in the law is that the legislature itself identified the new law as a substantive change. See, Final Bill Report, SB 6933.

Furthermore, RCW 10.58.090 does not adopt an “ordinary rule of evidence” that is simply “procedural and neutral”. Instead, the statute targets one particular type of case - sex offenses - with the stated purpose of assisting prosecutors in securing convictions at trial by eliminating barriers to the admissibility of unproven evidence of sexual misconduct.

In addition, applying the new law requires the trial court to determine if there is a “necessity” to admit the unproven misconduct evidence “beyond the testimonies already offered at trial”. RCW 10.58.090(6)(e). In light of the stated purpose of the statute - to increase convictions in sex crimes - the “necessity” the trial court has to weigh is

whether or not the uncharged misconduct evidence is needed in order for the prosecutors to secure a conviction. With that purpose in mind, when prosecution evidence offered at trial is weak or not credible, the new law is intended to trigger the admission of the unproven incidents of misconduct, thereby transforming the unproven misconduct evidence from “secondary” character evidence, admissible only for a limited purpose under pre-10.58.090, ER 404(b), into the primary evidence supporting the defendant’s guilt. Under that circumstance the new law is a substantive change, not a procedural one.

The legislative amendment to ER 404(b) enacted in RCW 10.58.090 altered the rules of evidence to allow different evidence to be admitted at trial than would have been allowed when the offenses at issue are alleged to have been committed. In addition, the change was substantive and was applied retroactively. Accordingly the legislative amendment to ER 404(b), codified in RCW 10.58.090, violates constitutional prohibitions against the enactment of *ex post facto* laws.

b. RCW 10.58.090 violates the Separation of Powers Doctrine:

In the event the legislature was in error by declaring RCW 10.58.090 is a substantive change when it was actually procedural, the statute is still invalid. The legislative amendment to ER 404(b) would then constitute a violation of the Separation of Powers Doctrine.

The Separation of Powers Doctrine represents a fundamental principle of our American constitutional system, that governmental powers are divided among three separate and independent branches - legislative, executive, and judicial - and that it is unconstitutional for one branch to “encroach” or “trench” upon the powers of another branch. See, *State v. Osloond*, 60 Wn. App. 584, 587, 805 P.2d 263, *review denied*, 116 Wn.2d 1030 (1991); see also *State v. Moreno*, 147 Wn.2d 500, 505, 58 P.3d 265 (2002).

In formalizing the Separation of Powers Doctrine, the Washington Constitution designates the “legislative authority” in Article II, §1, the “executive power” in Article III, §2, and the “judicial power” in Article IV, §1¹⁸. *State v. Moreno*, 147 Wn.2d at 505.

¹⁸ “The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide”. Art. 4, §1, Wa. Const.

The designation of judicial power contained in Article IV of Washington's Constitution grants the Supreme Court the inherent power to adopt the rules that govern the "practice and procedure pertaining to the essential mechanical operation of the courts by which substantive law and rights are effectuated". *Christianson v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007). In RCW 2.04.190¹⁹, the legislature affirmed the authority of the judicial branch to adopt rules of procedure for the courts. The legislature has even recognized, via RCW 2.04.200 that, when the court promulgates a rule pursuant to its granted authority, "all laws in conflict therewith shall be and become of no further force and effect." RCW 2.04.200.

Consistent with its authority to regulate procedures of the court, the Supreme Court adopted the Rules of Evidence governing proceedings in courts in the State of Washington²⁰. Title IV of the Rules of Evidence, entitled "Relevancy and its limits," includes ER 404(b), the rule at issue

¹⁹ ... "[t]he supreme court shall have the power to prescribe . . . the forms of writs and all other process, . . . of *taking and obtaining evidence*; . . . and generally to regulate and prescribe by rule the forms for and the kind and character of the entire pleading, practice and procedure to be used in all suits, actions, appeals and proceedings of whatever nature. . . ." RCW 2.04.190 (emphasis added).

²⁰ Significantly, although Washington's Rules of Evidence largely mirror the Federal Rules, our Supreme Court has not chosen to adopt FRE 413 or FRE 414, the Federal Evidence Rules upon which RCW 10.58.090 is apparently modeled.

here. Notably, Title IV does not contain a provision allowing the legislature to adopt rules that supplement or conflict with the relevancy rules contained in Title IV. By contrast, Title VIII, defining hearsay, specifically allows the legislature to enact rules regarding hearsay²¹. See, e.g. ER 802 (hearsay is not admissible except as provided by these rules, by other court rules, *or by statute*) (emphasis added).

The separation of powers is violated when "the activity of one branch threatens the independence or integrity or invades the prerogatives of another." *State v. Moreno*, 147 Wn.2d 500, 505-06 (2002); See also, *Carrick v. Locke*, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994) (although branches are not "hermitically sealed", attempts by one branch to "trench" upon the powers of another are unconstitutional). Here, by enacting RCW 10.58.090 the legislature has "invaded the prerogative" of the judicial branch²² by addressing the "practice and procedure by which substantive rights are effectuated." Specifically, RCW 10.58.090 amends a Title IV

²¹ It was this specific grant in Title XIII that allowed the Supreme Court to uphold the child hearsay statute. *State v. Ryan*, 103 Wn.2d 165, 178, 691 P.2d 197 ("Legislative enactment of hearsay exceptions is specifically contemplated by the rules of evidence").

²² Although the Supreme Court has, on occasion, taken into consideration the desires of the legislature when making determinations about the enactment of procedural rules involving relevance, the court has made clear it affirms legislative enactments only after a legislative enactment passes the courts own independent analysis, and, the court does not affirm such enactments simply because they were adopted by the legislature. See e.g. *State v. Long*, 113 Wn.2d 266, 272, 778 P.2d 1027 (1989) (when agreeing with the legislature in allowing evidence of refusal to submit to a breath test, the court specifically declared "...we retain our power to determine the relevancy and thus the admissibility of

rule of relevance by allowing for the first time that evidence of unproven prior acts of misconduct be admitted without limitation as to their use, including use to establish that because the defendant has a propensity towards sexual misconduct he is likely guilty of the crime charged²³. The legislative enactment, contained in RCW 10.58.090, conflicts with judicially enacted ER 404(b), which prohibits the admission of that same type of evidence for that purpose. Compare, e.g., *State v. Fisher*, ___ Wn.2d 17 (slip op. 3-12-09).

Where a rule of the court is inconsistent with a procedural statute, the power of the court to establish the procedural rules for the courts of this state is supreme. *Petrarca v. Halligan*, 83 Wn.2d 773, 776, 522 P.2d 827 (1974); *Wash. State Council of County & City Employees v. Hahn*, 151 Wn.2d 163, 168-69, 86 P.3d 774 (2004) (concerning a matter related to the court's inherent power, court rule will prevail in conflicts with a statute); RCW 2.04.200.

certain types of evidence. ...[but] we perceive no reason not to accept the legislatures recognition in this instance.” The court went on to note that the desires of the legislature should be recognized in that circumstance since the right to refuse a breath test was a matter of legislative grace in the first place); see also, *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983).

²³ Further, the legislative amendment in RCW 10.58.090 creates a new and different version of ER 403 to be used just in sex offense cases. Compare ER 403 with RCW 10.58.090(6).

The legislative amendment to ER 404(b) contained in RCW 10.58.090 was enacted because the legislature was dissatisfied with the results reached in sex offense trials when judges applied ER 404(b) (see page 27, fn. 12, supra.). In an effort to alleviate their dissatisfaction, the legislature invaded the prerogative of the judiciary and simply enacted its own version of ER 404(b) to be applied in sex offense cases. The legislative amendment to ER 404(b) constitutes an improper infringement on the court's inherent power to promulgate rules of evidence. The legislative amendment conflicts with the evidence rule previously adopted by the court. Accordingly, the legislative amendment to ER 404(b) violates the Separation of Powers Doctrine.

c. RCW 10.58.090 violates the Equal Protection Clause:

The legislative amendment to ER 404(b) violates Mr. Scherner's rights under the Equal Protection Clause of both the State²⁴ and Federal²⁵ Constitutions.

²⁴ No law shall be passed granting to any citizen [or] class of citizens... privileges and immunities which upon the same terms shall not equally belong to all citizens..." Art. I, §12, Wa. Const.

²⁵ Fourteenth Amendment to the U.S. Constitution, Section 1, states in relevant part that, "No State shall make or enforce any law which shall abridge the privileges and immunities of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

A denial of equal protection occurs when a law is administered in a manner that unjustly discriminates between similarly situated persons. *State v. Handley*, 115 Wn.2d 275, 290, 796 P.2d 1266 (1990); *Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525 (2000).

Here, persons like Mr. Scherner, who are charged with violating section 9A.44 (Sex Offenses) of Washington's criminal code, are treated differently because of RCW 10.58.090 than are persons charged with violating any other section of the criminal code. Specifically, RCW 10.58.090 allows prosecutors in sex offense trials to introduce evidence of a defendant's prior unproven sexual misconduct to support the argument that the accused is likely guilty because he or she has a propensity to engage in sex crimes. Guilt due to propensity cannot lawfully be argued against persons accused with violating any other chapter of the criminal code. Further, RCW 10.58.090(6)(e) requires the court, in cases where a violation of RCW 9A.44 is alleged, to make decisions on the admissibility of evidence at trial depending on whether the court concludes the evidence is "necessary" for one party to win. Because RCW 10.58.090 only applies to sex offenses the trial court is not required (or allowed) to engage in a "necessity" analysis in cases wherein violations of any section of the criminal code other than RCW 9A.44 are alleged.

Accordingly, the legislative amendment to ER 404(b), codified in RCW 10.58.090, violates Mr. Scherner's rights under the Equal Protection Clause.

d. RCW 10.58.090 violates Due Process.

Both the State and Federal Constitutions declare that a person shall not be deprived of life, liberty, or property without due process of law. U.S. Const. Amends²⁶ 5, 14; Wash. Const. Art.1, §3. An individual's liberty interest and his right to a fair and unbiased trial is important and a fundamental part of due process. *United States v. Salerno*, 481 U.S. 739, 750, 95 L.Ed.2d 697, 107 S.Ct. 2095 (1987). The legislative amendment to ER 404(b), codified in RCW 10.58.090, violates Mr. Scherner's Due Process rights under the State and Federal Constitutions.

At the outset the new statute conflicts with a centuries old judicial prohibition against determining a person's guilt by relying on "propensity" evidence. See, *McKinney v. Rees*, 993 F. 2d 1378, 1380-81 (9th Cir. 1993) (the rule against using character evidence to show propensity has persisted since at least 1684) (also citing to *Rex v. Doaks*, Quincy Mass. Reports 90 (Mass. Super. Ct. 1763) and *Boyd v. U.S.* 142 U.S. 450, 458 (1892)); *Spencer v. Texas*, 385 U.S. 554, 574, 87 S. Ct. 648

²⁶ ...nor shall any state deprive any person of life, liberty, or property, without due process of law... U.S. Const, Amend. 14. "No person shall be deprived of life, liberty, or property, without due process of law." Art. I, §3, Wash. Const.

(1967) (introduction of prior offenses for “no purpose other than to show criminal disposition would violate the Due Process Clause”); see also, *State v. Fisher*, __ Wn.2d __ (Slip Op. 3-12-09). Consistent with the historical prohibition, it is virtually impossible to imagine evidence that would have a greater inflammatory or unfairly prejudicial effect on a jury in a child molestation trial than the introduction of evidence that the accused previously molested other children, especially when that evidence is coupled with the argument that “we know he did it this time because he has a history of having done it before.” At that point it defies human nature to assume that jurors, even if they have *significant* doubts about the guilt of the accused, would not be swayed towards convicting. The bare effect of RCW 10.58.090 is that if the trial judge concludes, not by proof beyond a reasonable doubt, but by a preponderance²⁷, that evidence of prior allegations of sexual misconduct should be admitted, the evidence is so overly prejudicial that it is virtually impossible for the accused to get a

²⁷ The practice of utilizing something other than the proof beyond a reasonable doubt standard, even for sentencing enhancement purposes, *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), has been declared constitutionally offensive in criminal cases, yet RCW 10.58.090 allows evidence meeting only the “preponderance” standard to support convicting persons on trial for sex offenses. See also, *State v. Bartholomew*, 101 Wn.2d 631, 640, 683 P.2d 1079 (“We deem particularly offensive to the concept of fairness, a proceeding in which evidence is allowed which lacks reliability”).

fair and unbiased trial. The introduction of testimony from four misconduct witnesses in Mr. Scherner's trial, admitted pursuant to the new statute, resulted in a fundamental deprivation of Mr. Scherner's right to a fair trial.

Additionally, the new law violates due process because it requires the traditionally neutral trial court to push down on one side of the scales of justice in order to tip things towards one party - here, the prosecution - if it appears that that party's evidence may be insufficient for it to win. That type of judicial scale tipping is clearly not what the constitutional right to a fair trial and due process contemplates. See, e.g.; *Giles v. California*, 128 S. Ct. 2678 (2008). In fact, Due Process has always required just the opposite; that the trial judge remain neutral and unbiased²⁸. Our courts have consistently prohibited judges from entering the "fray of combat" or "assuming the role of counsel". *State v. Ryna Ra*, 142 Wn. App. 868, 884-885, 175 P.3d 609 (2008) (Appearance of Fairness Doctrine). By contrast, consistent with its purpose (p. 27, fn. 12, supra), RCW 10.58.090 requires the trial court to evaluate the testimonies offered at trial and to admit otherwise inadmissible misconduct evidence if

²⁸ "...a judicial proceeding is valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing." *State v. Perala*, 132 Wn. App. 98, 112-113, 130 P.2d 852 (2006) (citations omitted).

it is necessary for the prosecutor to secure a conviction. That procedure, requiring the trial court to make decisions based on what's best for one side, violates Due Process.

The new law also violates Due Process because it requires the trial court to prejudge the strength of one party's case in order to decide whether or not a type of evidence should be admitted. Evidentiary schemes that admit or exclude evidence depending on a judicial predetermination of the strength or weakness of one party's case are unconstitutional. See, e.g. *Holmes v. South Carolina*, 574 U.S. 319, 126 S. Ct. 1727 (2006).

In *Holmes* the U.S. Supreme Court reversed a murder conviction because South Carolina judges were allowed to exclude "other suspect" evidence from trial if the court predetermined that evidence of the defendant's guilt was strong. *Id.*, 328-329. The *Holmes* court, in concluding that the South Carolina evidentiary scheme was "arbitrary" and therefore a due process violation, noted that, under the South Carolina rule, the critical inquiry regarding admissibility became the strength of the prosecutor's case, not the probative value or the prejudicial effect of the evidence at issue. *Id.* at 329. The *Holmes* court also criticized the rule because it allowed the trial court to make determinations about the credibility of one party's evidence without first assessing contrary

evidence from the opposition. *Id* at 330; see also, *State v. Rohrich*, 149 Wn.2d 647, 659, 71 P.3d 638 (2003) (the credibility of the witnesses' testimony should not be predetermined by the trial or appellate court but should reasonably remain a matter for the trier of fact).

Similarly, in *Giles v. California*, 128 S. Ct. 2678 (2008), the U.S. Supreme Court noted that due process is violated when the admission of evidence depends on a judicial predetermination that the defendant is likely guilty. *Giles*, 128 S. Ct. at 2692-2693. In the *Giles* case, the Supreme Court struck down an attempt to limit a defendant's right of confrontation in domestic violence cases pursuant to a California rule that expanded the doctrine of "forfeiture by wrongdoing" to instances beyond those wherein the defendant engaged in conduct specifically intended to prevent a witness from testifying at the defendant's trial.

Like the rule criticized in *Giles*, RCW 10.58.090 requires the trial court to make a predetermination that the accused is guilty. Under RCW 10.58.090, in order to reach the point where the court determines that it is "necessary" to admit evidence of prior acts of misconduct against the defendant, the court first must predetermine that the defendant is likely guilty. Without a predetermination of likely guilt, there would be no "necessity" to admit misconduct evidence, the primary purpose of which is to increase the likelihood of conviction at trial. In criticizing the process

of prejudging guilt as part of assessing the admissibility of evidence, the

U.S. Supreme court in *Giles* stated that,

a legislature may not punish a defendant for his evil acts by stripping him of the right to have his guilt in a criminal proceeding determined by a jury, and on the basis of evidence the Constitution deems reliable and admissible”

128 S. Ct. at 2691-92.

Additionally, the *Giles* court observed that the rules of evidence and constitutional protections should not be “crime specific”, declaring that the law cannot, for example, have one Confrontation Clause for domestic violence cases and one Confrontation Clause for all other cases. *Giles*, 128 S. Ct. at 2692-93. Likewise, our Rules of Evidence should not have one rule of relevance for sex offense and one rule of relevance for all other cases.

Finally, RCW 10.58.090 violates due process because it is unconstitutionally vague. A statute which fails to provide explicit standards to prevent arbitrary and discriminatory enforcement is unconstitutionally vague. *State v. Rhodes*, 92 Wn.2d 755, 758, 600 P.2d 1264 (1979); *Spokane v. Fischer*, 110 Wn.2d 541, 543, 754 P.2d 1211 (1988). Section 10.58.090(6) of the new statute requires the court to consider eight enumerated factors when making its determination of whether evidence of uncharged acts of sexual misconduct should be

admitted. Factor (6)(g) requires that the court consider, “other facts and circumstances” in making its determination of admissibility. Although consideration of “other facts and circumstances” is mandatory, the new law provides no definition or limit as to what “other facts and circumstances” might be. Furthermore, RCW 10.58.090(6)(e) requires the court to consider the “necessity of the evidence beyond the testimonies already offered at trial.” But the statute fails to provide guidance as to when the decision of “necessity” ought to be made²⁹ and it does not identify what the necessity is that the court ought to examine in making its decision³⁰. In other words, the new law does not provide “explicit standards to prevent arbitrary enforcement,” rendering it unconstitutionally vague.

For the reasons noted above, relying on RCW 10.58.090 to admit misconduct evidence resulted in a violation of Mr. Scherner’s right to due process.

²⁹ In Mr. Scherner’s case the trial court made the decision to admit misconduct evidence prior to trial without having heard any “testimony already offered at trial.” Instead, the trial court determined the prosecutor needed the evidence because the credibility of the complaints accusation might be called into question due to her significant delay in reporting the alleged offense. RP 111.

³⁰ Based upon legislative history pertaining to RCW 10.58.090, the appellant concedes that the statute was enacted with the stated purpose of assisting the State in winning convictions in sex offense trials and that, consistent with that mandate, “necessity” likely means determining whether the otherwise inadmissible evidence is admissible because the prosecutor might not win a conviction at trial without it.

- e. The uncharged prior misconduct evidence was not alternatively admissible under ER 404(b)'s traditional "common scheme or plan" theory.³¹

Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise.

State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982).

Because of the extraordinarily prejudicial effect of "prior bad act" evidence in cases involving allegations of sexual misconduct, our courts have repeatedly found reversible error when such evidence is admitted at trial.³²

Since evidence of uncharged acts of misconduct is so prejudicial, any doubt about whether evidence of prior misconduct should be admitted

³¹ Evidence of other crimes, wrongs, or acts, is *not admissible to prove the character of a person in order to show that he acted in conformity therewith*. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Emphasis added.

³² See e.g. *State v. Goebel*, 36 Wn.2d 367,368, 218 P.2d 300 (1950) (introduction of evidence of unrelated crimes can be grossly and highly prejudicial); *State v. Saltarelli*, 98 Wn.2d 358 (1982) (stating that in rape prosecutions, evidence of other sexual offenses is particularly prejudicial, court reversed rape conviction after trial court allowed evidence of defendant's attempted rape of different woman four years earlier); *State v. Dewey*, 93 Wn. App. 50, 966 P.2d 414 (1998) (rape conviction reversed because court allowed admission of evidence that the defendant had previously sexually assaulted another woman); *State v. Bowen*, 48 Wn. App. 187, 738 P.2d 316 (1987) (indecent liberties conviction reversed because evidence of two prior sexual assaults by defendant of other women admitted at trial); *State v. Smith*, 106 Wn.2d 772, 725 P.2d 951 (1986) (conviction for three rapes reversed because court allowed evidence of prior burglary in violation of ER 404(b)); *State v. Whyde*, 30 Wn. App. 162, 632 P.2d 913 (1981) (rape conviction reversed because court allowed evidence that defendant had tried to kiss another woman at the same apartment building where rape occurred).

should be resolved in favor of exclusion of the evidence. See, *State v. Myers*, 49 Wn. App. 243, 742 P.2d 180 (1987).

Here, the trial court admitted the testimony of four prosecution witnesses under RCW 10.58.090, but then apparently also admitted the evidence under the common scheme or plan exception to ER 404(b). RP 118-119. It was error to admit the misconduct evidence under the common scheme or plan exception.

To prove common scheme or plan, the proponent must demonstrate a specific design or system that included the crime charged....A mere general similarity between the other offenses and the crime charged is insufficient to show a plan to commit the offense charged... *The scope of this exception is limited to evidence which shows some causal connection between the two offenses.*

State v. Bacotgarcia, 59 Wn. App. 815, 820, 801 P.2d 993 (1990) (citation omitted) (emphasis added); *State v. Harris*, 36 Wn. App. 746, 677 P.2d 202 (1984) (reversing conviction where evidence to two rapes were admitted, but did not “qualify as links in a chain forming a common design, scheme or plan”); *State v. Lough*, 70 Wn. App. 302, 315-316 (1993) *aff’d* 125 Wn.2d 847, 854-55, 889 P.3d 847 (citing to McCormick §190) (each crime should be an integral part of an over-arching plan explicitly conceived and executed). Nor was this an instance where the defendant could be said to have devised a plan and used it repeatedly to perpetuate separate but very similar crimes. See e.g. *State v. Lough*, 125

Wn.2d 847, 854-55, 889 P.3d 847 (1995) (court found common scheme where defendant drugged each of his victims before he sexually assaulted them).

Here, there was a gap ranging from 21 to 36 years between the time the four prior misconduct witnesses allege they were molested until M.S. alleges she was molested. Even assuming, only for the sake of this argument, that Mr. Scherner committed all of the alleged acts decades ago, it can hardly be said that those acts served as an “integral part” of an “over-arching plan” culminating in abuse of M.S. in the State of Washington after a lull in such activity of more than two decades. Nor could it be established that a particular plan was utilized repeatedly. At most, the events show proclivity or predisposition to commit rape. Propensity evidence is, and has been, expressly prohibited by ER 404(b). The testimony and evidence relating to the four unproven misconduct witnesses was not admissible under traditional concepts of ER 404(b). It was error for the trial court to admit the evidence.

- (i). It was error for the trial court to refuse to give a limiting instruction pursuant to ER 404(b).

After erroneously admitting uncharged misconduct evidence pursuant to the “common scheme or plan” exception to ER 404(b), the trial court erred by refusing to give a proposed limiting instruction to

jurors that advised them that they could only consider the prior misconduct evidence for the limited purpose of demonstrating a common scheme or plan. RP 612-614. See, *State v. Wilson*, 144 Wn. App. 166, 177 (2008); *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

- f. Regardless of the constitutionality of RCW 10.58.090 or traditional notions of admissibility under ER 404(b), the trial court committed error by failing to properly weigh and apply factors created to prevent overly prejudicial evidence from being admitted at trial.

Evidence from the four witnesses who were allowed to testify to decades old uncharged, allegations of acts of sexual misconduct involving Mr. Scherner was inadmissible under ER 403, regardless of RCW 10.58.090 or ER 404(b).

Evidence otherwise admissible under either RCW 10.58.090 or ER 404(b) is limited by the requirements of ER 403. See, *State v. Sanford*, 128 Wn. App. 280, 285, 115 P.3d 168 (2005); and see, 10.58.090(1) (evidence of prior acts of sexual misconduct are only admissible if they are not inadmissible under ER 403); RCW 10.58.090(6); see also, *United States v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1998) (interpreting FRE 413, which has language similar to that used in RCW 10.58.090, the court declared, “without the safeguards embodied in Rule 403 we would hold the rule unconstitutional”).

Section RCW 10.58.090(6) requires the trial court to review eight listed factors to determine if uncharged acts of prior sexual misconduct are admissible under ER 403's relevancy standards. Those factors are as follows and demonstrate how admission of the uncharged prior misconduct evidence in this case was error:

(6)(a) The similarity of the prior acts to the acts charged -

Although the allegations involving M.S. and the four misconduct witnesses all involved some type of improper sexual contact with a minor, the specifics vary greatly. For example, three of four of the "propensity" witnesses (Spillane, RP 909, 913) (Oducado 681) (Kahn 624) assert that Mr. Scherner had oral sex with them. M.S. has never made that assertion. At least one of the witnesses was told to keep the contact a secret, RP 910. M.S. never said that. Although the accusers are generally similar in that they were minors, the specifics of the prior *acts* are different from the acts charged.

(6)(b) The closeness in time of the prior acts to the acts charged -

The four propensity witnesses alleged that they had improper contact with Mr. Scherner 21 years ago for Ms. Kahn (RP 634), 36 years ago for Ms. Oducado (RP 688), 33 years ago for Ms. Williamson (RP 672), and 21 years ago for Jobbie Spillane (RP 929-930).

Presumably, the logic behind requiring the trial court to consider “closeness in time” is that an uncharged wrong has more relevance the closer in time it occurred to the act at issue. Recognizing in Mr. Scherner’s case that the prior alleged misconduct preceded the date of the allegations involving M.S. by more than 20 years, the trial court ignored this statutory requirement and applied its own test, reasoning somehow that Mr. Scherner was a “persistent” offender decades ago, and therefore the “closeness in time” factor was satisfied³³.

It was error for the trial court to create and then consider “persistence” as a test. Because of the significant lapse of time, even as much as 36 years from the allegation at issue, this factor weighs heavily against admission of the uncharged wrongs.

(6)(c) The frequency of the prior acts - According to the propensity witnesses, the frequency of the alleged prior acts varied from once to numerous times over a period of several years, depending on which witness was making the accusation.

(6)(d) The presence or lack of intervening circumstances - Again, the trial court had difficulty understanding and, therefore, applying this

³³ “They may not have been one after the other, but there was a persistence. I am not exactly sure how the closeness of time of the prior acts to the act charged should be considered. I am more affected by the persistence of similar acts.” RP109-110.

factor³⁴. The court noted that this factor could include a lengthy time gap between the prior acts and the act at issue at trial. Then the court ignored the fact that there was a gap of 21 to 36 years between the allegation involving M.S. and the allegations by the propensity witnesses. Instead, the court reasoned, with no factual support whatsoever, that Mr. Scherner must not have had “access” to children during that 20 year period when there were no allegations against him, and that that lack of access explained the intervening gap. RP 115-17. In addition, the trial court ignored testimony that Mr. Scherner received some type of sexual deviancy counseling in the late 1980s, and that his counseling marked the start of the 20 year gap between the date of last allegation from the propensity witnesses and the allegation involving M.S. RP 773-774, RP 970.

The substantial length of time between allegations and the treatment both constitute intervening circumstances and weigh heavily against the admission of the uncharged misconduct evidence.

³⁴ “The presence or lack of intervening circumstances. You tell me exactly what that means. RP 110. I am not sure exactly what the legislature had in mind on that, but as I take it, I think they are talking about a big hole between one act and another, what was going on, in a very long period of time where nothing happens that was going on...RP110-111.

(6)(e) The necessity of the evidence beyond the testimonies already offered at trial³⁵ - In Mr. Scherner's case the trial court determined that the propensity witnesses were necessary before the trial court heard any of the "testimonies already offered at trial". Instead, the court determined *sua sponte* pre-trial that M.S.'s credibility was in question due to her delay in reporting, and that, therefore, the testimony from the propensity witnesses was necessary (for the prosecution) and admissible. See, RP 111.

Further, in light of the court's other pre-trial rulings including, but not limited to, admitting statements Mr. Scherner is alleged to have made to police following his arrest, admitting the fact that Mr. Scherner failed to appear for trial as evidence of knowledge of guilt, admitting otherwise privileged communications from Mr. Scherner's spouse, and admitting the tape recorded statement from Mr. Scherner that prosecutors characterized as a confession, there was actually no "necessity" to admit the decades old testimony from four propensity witnesses. This factor weighs against admitting the uncharged misconduct evidence.

(6)(f) Whether the prior act was a conviction - Mr. Scherner not only was not convicted of the alleged misconduct, he was never even

³⁵ The unconstitutional effect of this factor is discussed in greater detail in §V,4 a., c., & d above.

charged with any crime related to any of those allegations. This factor weighs strongly against not admitting the misconduct evidence.

(6)(g) The probative value of the misconduct evidence was substantially outweighed by the danger of unfair prejudice, undue delay, misleading the jury, and the needless presentation of cumulative evidence

- The trial court simply decided to admit the misconduct evidence despite the ER 403 factors, announcing instead its intent to “balance” out the effect of the highly prejudicial evidence by giving a limiting instruction, even though, as the prosecutor pointed out, RCW 10.58.090 does not provide for the court to give a limiting instruction. RP 117-118.

The prejudicial effect of the decades old unproven misconduct evidence far outweighed any probative value. See, *Old Chief v. United States*, 519 U.S. 172, 174, 117 S.Ct. 644, 650, (1997) (a court should, in each FRE 413 case, take into account the chance that "a jury will convict for crimes other than those charged - or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment").

Further, adding the testimony of four other witnesses who allege they were victimized decades ago resulted in confusion of the issues. See *Michelson v. United States*, 335 U.S. 469, 476, 69 S. Ct. 213 (1948) (“A court should also be aware that evidence of prior acts can have the effect of confusing the issues in a case”), likely misled the jury and caused undue

delay associated with adding several “mini trials” to the trial of M.S.’s case. In addition, because two to four decades had passed since the incidents alleged by the challenged misconduct witnesses, it was extremely difficult for the defense to investigate and rebut the decades old allegations. This factor weighed heavily against the introduction of such evidence.

(6)(h) Other facts and circumstances - That the trial court consider “other facts and circumstances” is required under RCW 10.58.090(6). The statute provides no limits or guidance as to what constitutes “other facts and circumstances” and it is unclear from the record how, if at all, the court weighed this factor. RP110-112 (reviewing the ER 403 factors and not mentioning the “other facts and circumstances” portion).

The testimony from the unproven misconduct witnesses should not have been admitted in the trial of Mr. Scherner and M.S. The probative value was substantially outweighed by the unfairly prejudice effect of the evidence. It was error for the trial court to admit the evidence.

5. Cumulative Error by the Trial Court Combined to Deprive the Appellant of his Right to a Fair Trial.

The Cumulative Error Doctrine applies to cases in which "there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial."

State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390, 399-400 (2000) (citing *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963); *State v. Alexander*, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992); *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970).

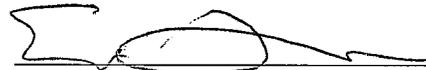
Here, as discussed above, the trial court committed several material errors, any one of which is sufficient to justify reversal. However, the court also committed several ER 403 errors of a lesser magnitude which, when confined to one trial, combined to deny Mr. Scherner a fair trial. Those errors include allowing the prosecutor to admit and repeatedly refer to photographs of four adult women as they appeared when they were children (RP 65, RP 627); allowing the prosecutor to elicit testimony that the defendant was mean to a witness's grandmother (RP 623); allowing various prior misconduct witnesses to describe to jurors the emotions and feelings associated with having to tell parents or significant others they had been molested (RP 667, RP 630); having prior misconduct witnesses explain they were in counseling due to the molestation that occurred decades earlier; allowing testimony of one misconduct witness that was apparently a recovered suppressed memory (RP 621, 625); and, allowing witnesses to testify regarding the defendant's general history of molesting persons other than M.S. or the misconduct witnesses who

testified at trial (RP 622, 769). While those errors standing alone might not merit reversal, when considered as a whole they combined to deprive Mr. Scherner of his right to a fair trial.

VI. CONCLUSION

By enacting RCW 10.58.090, the legislature amended ER 404(b) in order to increase the number of convictions had for persons accused of sex offenses. Section RCW 10.58.090 is unconstitutional for several reasons. Application of RCW 10.58.090 resulted in depriving the appellant in this case with a fair trial. That fact, and for the additional legal basis noted herein, requires that the appellant's convictions at trial be reversed.

DATED this 17 day of April, 2009.


ERIC W. LINDELL WSBA# 18972
Attorney for Appellant