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SUPREME COURT NO._____
COURT OF APPEALS NO. 62507-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ROGER ALLEN SCHERNER

Petitioner/Appellant,

Vs.

STATE OF WASHINGTON,

Respondent.

FILED
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STATE OF WASHINGTON

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY
The Honorable Richard D. Eadie, Judge

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The petitioner is Roger Allen Scherner.

II. CITATION TO THE COURT OF APPEALS DECISION

The Petitioner seeks review of the published opinion of Division One of the Court of Appeals filed on December 21, 2009 in *State v. Scherner*, No. 62507-1-l, interpreting for the first time the constitutionality of RCW 10.58.090, a legislative amendment to Evidence Rule 404(b).

III. ISSUES PRESENTED FOR REVIEW

1. Whether RCW 10.58.090, an amendment to ER 404(b) created by the legislature, violates the Separation of Powers Doctrine, violates the constitutional prohibition against *ex post facto* laws, violates the Equal Protection Clause, and violates Due Process.

2. Whether RCW 10.58.090(6) allows evidence of a defendant's prior misconduct to be admitted without the longstanding requirement that the trial court actually weigh the probative value of such evidence against the danger of unfair prejudice.

3. Whether, contrary to Washington case law, the restrictions on the admission of evidence under the "common scheme or plan" exception to ER 404(b) should be lessened and whether such evidence should be allowed without a limiting instruction.

IV. STATEMENT OF THE CASE

In 2007 in King County Washington, Roger 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. The complaining witness in the case was Mr. Scherner's 13-year-old granddaughter, M.S. RP 130-131. Although Mr. Scherner and M.S. lived in California, prosecutors alleged that the charged crimes occurred when Mr. Scherner, his wife, and M.S. traveled to Bellevue, Washington to visit Mr. Scherner's sister. RP 130-131, RP 690-91.

In March of 2008, 14 months after Mr. Scherner had been charged; Washington legislators enacted RCW 10.58.090.[1] The new statute amended ER 404(b) so that in trials wherein the defendant was accused of a sex offense, evidence of the defendant's prior sexual misconduct was admissible. Furthermore, contrary to decades of precedent, once such evidence was admitted, the new statute contained no limitation as to how a jury might use that evidence, thereby freeing prosecutors to argue and jurors to reason that the defendant was likely guilty of the charged crime based on his propensity to commit such crimes.

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[1] 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. Mr. Scherner was charged in February 2007 and his trial began on July 2008.

When Mr. Scherner's trial began in July 2008, the trial court, relying on RCW 10.58.090, allowed the prosecutor to present testimony from four adult women who claimed that they had been molested by Mr. Scherner 20 to 40 years earlier when they were children. RP 105-132. Mr. Scherner had not been charged or convicted in connection with any of those prior allegations. At trial, consistent with RCW 10.58.090, the prosecutor argued to Mr. Scherner's jury that evidence he had molested other children could be used to demonstrate a pattern and that "he is a child molester" and was, therefore, likely guilty of having molested M.S. See, RP 1021-1022, RP 1011.

Mr. Scherner appealed his convictions. The Court of Appeals concluded that the new statute did not violate the constitution. The Court of Appeals sustained Mr. Scherner's convictions.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED[2]

By enacting RCW 10.58.090 as a means of amending ER 404(b), the legislature significantly changed the law governing the admissibility of prior misconduct evidence in sex offense trials. That change is an issue of substantial public interest. Further, the legislative amendment to ER 404(b) resulted in several significant questions of constitutional law. The

[2] In addressing RCW 10.58.090 for the first time, Division One issued opinions on two different cases on the same day authored by two different judges. See, *State v. Scherner*, No. 62507-1-l (Div. I, 12-21-09) and *State v. Gresham*, No. 62862-3-I (Div. I, 12-21-09).

Appellant respectfully requests that the Supreme Court accept review of this case in order to decide those issues.

A. RCW 10.58.090 Violates the Separation of Powers Doctrine:

The Separation of Powers Doctrine is violated when the activity of one branch of government "encroaches" upon the powers of another branch. See, *State v. Moreno*, 147 Wn.2d 500, 505, 58 P.3d 265 (2002); Article IV, WASH CONST.

By enacting RCW 10.58.090, the legislature encroached upon the authority granted the judicial branch by Article IV, §1 of Washington's Constitution[3]. Article IV grants the judicial branch the authority to create and adopt those rules of procedure necessary to govern the essential mechanical operation of the courts. See, *State v. Smith*, 84 Wn.2d 498, 501, 527 P.2d 627 (1974). Furthermore, 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.

[3] The legislature affirmed that constitutional grant of judicial authority in RCW 2.04.190, which provides..."[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).

Despite the Separation of Powers, the three branches of government are not "hermetically sealed" and some overlap must occasionally exist.[4] For example, in Title VIII of Evidence Code, ER 802 plainly provides that amendments to the hearsay rules may be made by "either statute or court rule." However, unlike Title VIII, Title IV, the code section governing relevance and which is at issue here, contains no grant of authority to the legislature. Furthermore, none of the previous legislative enactments affecting the admissibility of evidence have ever been upheld merely because they were enacted by the legislature.[5] Instead, it is the judiciary, not the legislature, that ultimately determines whether or not a legislative amendment altering a court rule will be allowed to stand.

Washington's judiciary specifically opposed the legislative effort to amend ER 404(b)[6]. The legislature amended the rule despite the

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[4] *City of Fircrest v. Jensen*, 158 Wn. 2d 384, 393-94, 143 P. 2d 776 (2006).

[5] See, e.g. *State v. Long*, 113 Wn 2d 266, 272, 788 P. 2d 1027 (1989). In *Long*, the Supreme Court allowed a legislative enactment affecting the admissibility of breath test refusal evidence in DUI cases. However, the court specifically announced, "...we retain our power to determine the relevancy and thus the admissibility of certain types of evidence...[but] we perceive no reason not to accept the legislature's recognition in this instance." The court went on to note that, in cases involving driving and DUI, the desires of the legislature should be recognized 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).

[6] ...the judiciary is opposed to the Legislature making this change to ER 404(b) and feels that the proper forum and procedure for consideration of such an important and consequential change in the evidence rules is the court rule making process. There is not enough time at the end of this short legislative session for adequate discussion and debate about such an important change in our criminal justice system. Senate Bill SB6933. P. 3.

objection announced by the judiciary. The reason was clear. Members of the legislature believed that sex offense trials would more often end in conviction if prosecutors were not hampered when trial judges applied ER 404(b) limitations to the admissibility of prior misconduct evidence.[7]

In addressing the Separation of Powers violation, the Court of Appeals below reasoned that, so long as ER 403 allowed a trial court to weigh the admissibility of evidence before admitting it, there could not be a Separation of Powers violation. See, *State v. Scherner*, No. 62507-1-I. p.19-20 (Div. I, 12-21-09). Further, Division One analogized the new statute to the "lustful disposition" exception to ER 404(b), even though that exception had previously been strictly limited to prior acts occurring between the defendant and victim at issue. *State v. Scherner*, at p. 14-15, 21. Division One then concluded that any apparent conflict between RCW 10.58.090 and ER 404(b) could be harmonized and, therefore, no Separation of Powers violation existed. *State v. Scherner*, at p.18 (citing to *State v. Ryan*, 103 Wn.2d, 165, 178, 691 P.2d 197 (1984)[8].

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[7] "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.

[8] Unlike the case before the court, *Ryan* addresses an amendment enacted pursuant to Title VIII, which expressly gives the legislature authority to amend hearsay rules. See ER 802.

The legislative amendment to ER 404(b) contained in RCW 10.58.090 violates the Separation of Powers Doctrine. By announcing in essence that a legislative enactment amending the rules of evidence will not violate the Separation of Powers so long as the proposed rule is subject to an ER 403 balancing test by the trial court, Division One improperly erodes the Separation of Powers Doctrine. Furthermore, RCW 10.58.090, cannot be harmonized with the plain language of ER 404(b). Evidence Rule 404(b) provides that "evidence of other crimes, wrongs, or acts is *not admissible* to prove the character of a person in order to show action in conformity therewith." The rule reflects the justice systems longstanding prohibition against determining guilt or innocence based upon the defendant's past history.[9] By contrast, RCW 10.58.090 provides that such evidence "*is admissible*, notwithstanding Evidence Rule 404(b)."[10]

The Supreme Court should accept review in order to resolve this significant question of Constitutional law.

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[9] E.g. *State v. Smith*, 103 Wash. 267, 268, 174 P.9 (1918) ("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...")

[10] Although both ER 404(b) and RCW 10.58.090 require the court to consider relevancy pursuant to ER 403 before such evidence can be admitted, RCW 10.58.090 contains no limit as to the purpose for which such misconduct evidence can be used once it has been admitted.

B. RCW 10.58.090 Violates the Prohibition against *Ex Post Facto* Laws:

The Washington State Constitution declares that "[n]o. . . *ex post facto* law. . .shall ever be passed." CONST. Art. I, §23. See also U.S. CONST. Art. I, §10. The seminal *ex post facto* case in the U.S. and the case relied on below by Division One is *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 1 L. Ed. 648 (1798). The *Calder* court identified four categories of laws that constitute an *ex post facto* violation.[11] RCW 10.58.090 violates the 4th *Calder* category 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.[12]

Section RCW 10.58.090 alters ER 404(b) to allow different testimony than was allowed when the crimes at issue were alleged to have

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[11] 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 crime, 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 (emphasis added).

[12] In addition to violating one of the *Calder* factors, "[t}o 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). Neither the Appellate Court nor the prosecutor dispute the fact that RCW 10.58.090 applied retroactively to Mr. Scherner.

occurred, thereby reducing the quantum of evidence needed to convict. Addressing the *ex post facto* issue, the Court of Appeals below relied on *Carmell v. Texas*, 529 U.S. 513, 525, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000), for the proposition that, no *ex post facto* violation existed because the enactment of "ordinary" rules of evidence does not constitute a violation of the 4th *Calder* category. Specifically, Division One declared that:

> ...ordinary rules of evidence, for example, do not violate the [*ex post facto*]Clause. Rules of that nature are ordinarily evenhanded, in the sense that they may benefit either the State or the defendant in any given case.

State v. Scherner, at p. 10. (Citing to *Carmell v. Texas*, 529 U.S. at 533, n.23.)

However, RCW 10.58.090 cannot accurately be described as an "ordinary" rule of evidence. RCW 10.58.090 is not "evenhanded" and will not benefit "either the State or the defendant in any given case". The Court of Appeals below characterized the appellant's position and RCW 10.58.090 as a rule that will benefit the State "more often than the accused." *Scherner* at p. 29. But that characterization does not accurately describe either the appellant's position below or RCW 10.58.090. The stated purpose behind RCW 10.58.090 is to increase the likelihood that prosecutors will win convictions in sex offense trials where evidence of

prior sexual misconduct by the accused exists.[13] The statute is designed to do away with the historical limitations ER 404(b) placed on the uses to which jurors can put prior misconduct evidence in sex cases. Consistent with that purpose, prior misconduct evidence admitted under RCW 10.58.090 always benefit the State and will never benefit the defendant.[14] RCW 10.58.090 is not an "ordinary" rule of evidence.

Because RCW 10.58.090 violates the prohibition against *ex post facto* laws, the Supreme Court should accept review in order to resolve this significant question of Constitutional law.

C. RCW 10.58.090 Violates the Equal Protection Clause:

The legislative amendment to ER 404(b) violates the Equal Protection Clause of both the State[15] and Federal[16] Constitutions.

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[13] "We need to allow for the admission of evidence that did not result in conviction..." House Bill Report re: RCW 10.58.090. See p. 6, fn.8 *supra*.

[14] See e.g. Eisenberg, Theodore and Hans, Valarie, "The Effect of a Prior Criminal Record on the Decision to Testify and On Trial Outcomes, Cornell Legal Studies Research Paper No. 07-012 (August 8, 2007), http://ssrn.com (after studying data from over 300 criminal trials, researchers determined that the evidentiary threshold necessary for jurors to convict is lessened in cases where defendants have criminal history. *Id.* p. 30-31); Green and Dodge, *The Influence of Prior Record Evidence on Juror Decision Making,* 19 Law & Hum Behav. 67, (1995) (mock jury study demonstrating that jurors are more likely to convict when they learned defendant had prior criminal history).

[15] 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.

[16] 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 it's 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).

Under RCW 10.58.090, "class members" like Mr. Scherner, charged with committing a sex crime under RCW 9A.44 of Washington's criminal code are treated differently than persons charged with violating any other section of the criminal code. Persons charged under RCW 9A.44 are treated differently because RCW 10.58.090 allows the prosecutor to introduce evidence in such cases of a defendant's prior misconduct in order to demonstrate guilt based on propensity. Guilt based on propensity cannot lawfully be argued against persons who have been charged with violating any other chapter of the criminal code.

Furthermore, RCW 10.58.090 was not passed for a constitutionally legitimate purpose. The legislative history behind the law reveals an absence of concern that, by admitting evidence of a defendant's prior misconduct, a defendant who is innocent of the particular crime for which he being tried might be wrongly convicted. Instead, the rule is designed to increase the chance that a person charged with a sex crime will be convicted not based on the evidence as it applies to the crime for which they are charged, but based instead on whether or not they have a history of prior

sexual misconduct.[17] Accordingly, it would be inaccurate to reason that the "legitimate purpose" behind RCW 10.58.090 is to ensure that juries receive evidence necessary to reach a "just and fair" verdict. The purpose is to increase convictions of persons accused of RCW 9A.44 crimes if they have been previously accused of sexual misconduct.

RCW 10.58.090 violates the Equal Protection Clause. Accordingly, the Supreme Court should decide this significant question of constitutional law.

D. RCW 10.58.090 Violates the Due Process Clause:

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. Amends[18] 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, constitutes a violation of due process under the State and Federal Constitutions.

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[17] See p. 6, fn 8, *supra.*

[18] ...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.

At the outset, RCW 10.98.050 violates due process because it 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)[19]. The use of pure propensity evidence to determine guilt, allowed under RCW 10.58.090, undermines the jury's conceptual ability to meaningfully presume the accused innocent, thereby threatening the very foundation of due process. See, *Estelle v. Williams*, 425 U.S. 501, 503 (1976); see also, *Coffin v. United States*, 156 U.S. 432, 453 (1895).

The new law also violates due process because it requires the trial court to relinquish its role of impartiality. Section RCW 10.58.090(6)(e) mandates that the trial court consider "The necessity of the [prior misconduct] evidence beyond the testimonies already offered at trial" when deciding whether such evidence should be admitted. The net result of requiring the trial court to evaluate the "necessity" of such evidence in order to determine its admissibility places the traditionally neutral trial judge in a position where he/she must push down on one side of the scales of justice in order to tip things towards one party - here, the prosecution - if it appears

[19] Also citing to *Spencer v. Texas*, 385 U.S. 554, 574, 87 S.Ct. 648 (1967) (introduction of prior offenses for "no purpose other than to show criminal disposition would violate the Due Process Clause").

that that party's evidence may be insufficient for it to win unless the prior misconduct evidence is admitted. That type of judicial scale tipping violates the constitutional right to a fair trial and due process. To the contrary, due process has always required that trial judges remain neutral and unbiased.[20] Consistent with that requirement, our legal system prohibits judges from entering the "fray of combat" or "assuming the role of counsel". *State v. Ryan Ra*, 142 Wn. App. 868, 884-885, 175. P.3d 609 (2008) (Appearance of Fairness Doctrine). By requiring the trial court to abandon its role of impartiality and to make decisions based on what's best for one party to a litigation, RCW 10.58.090 violates due process.

Similarly, evidentiary schemes, like RCW 10.58.090, that require the trial court to admit or exclude evidence depending on a judicial predetermination of the strength or weakness of one party's case, violate due process and are unconstitutional. *Giles v. California*, __ U.S. __, 128 S. Ct. 2678, 171 L.Ed 2d 488 (2008). In the *Giles* case, the Supreme Court struck down a California rule that infringed upon a defendant's right of confrontation by expanding the doctrine of "forfeiture by wrongdoing" as it applied to domestic violence cases. Application of the California rule required the trial judge to measure whether the defendant was likely guilty

[20] "...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).

before determining whether or not to apply the rule. The *Giles* 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. Like the rule criticized in *Giles*, under RCW 10.58.090(6)(e), in order to reach the point where the trial judge determines that it is "necessary" to admit evidence of prior misconduct against the defendant, the court first must predetermine that the defendant is likely guilty. Mindful that the legislative purpose behind RCW 10.58.090 is to increase the likelihood that prosecutors will secure more convictions of defendants with histories of sexual misconduct, without a judicial predetermination of likely guilt by the trial court, there would be no "necessity" that the prior misconduct evidence be admitted.[21]

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, Washington's Rules of Evidence should not

[21] The Court of Appeals below also addressed the RCW 10.58.090 due process violation by relying on the fact that FRE 414, a federal statute similar to RCW 10.58.090, has withstood constitutional challenge. However, the Federal Rule relied on by the Court of Appeals does not contain language requiring the trial judge to measure the necessity of the misconduct evidence as part of the process of determining its admissibility.

have one rule of relevance for sex offense cases 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)(h) mandates that the trial court consider, "other facts and circumstances" in making its determination of admissibility. Although mandatory, the new law provides no definition or limit as to what "other facts and circumstances" might be. Furthermore, as noted above, 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 exactly what the necessity is and when the decision of "necessity" ought to be made.[22] In other words, because the new law

[22] For example, 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 complainant's accusation might be called into question due to her significant delay in reporting the alleged offense. RP 111.

does not provide "explicit standards to prevent arbitrary enforcement," it is unconstitutionally vague.

By enacting RCW 10.58.090, the legislature codified a statute that violates Due Process. The Due Process violation is a significant issue of constitutional law which should be decided by the Supreme Court.

E. RCW 10.58.090(6) Improperly Allows for the Admission of Evidence of a Defendant's Prior Misconduct Without the Longstanding Requirement that the Trial Court Actually Perform an Analysis of the Probative Value Compared to the Danger of Unfair Prejudice:

RCW 10.58.090(6) includes a modification to ER 403 so that before evidence of a defendant's prior sexual misconduct can be admitted, the trial judge must first consider eight factors enumerated in the statute. In addressing the statutory mandate and the failure by the appellants trial judge apply the eight factors[23], the Court of Appeals below reasoned that because "RCW 10.58.090(6) does not instruct the court on how to weigh

[23] Mr. Scherner's trial judge failed to properly consider and apply the eight factors listed in RCW 10.58.090(6). For example, when considering RCW 10.58.090(6)(d) - the presence or lack of intervening circumstances - the trial court stated, "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. Instead of weighing intervening circumstances, the trial court announced, with no factual basis, that the 20 year gap in allegations against Mr. Scherner must have meant he didn't have "access" to children during that two decade period. RP 115-17. When considering RCW 10.58.090(6)(b) - closeness in time of the prior acts to the acts charged - (in Mr. Scherner's case there was a 20 year gap) the trial court stated, "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.

the articulated factors" the statutory requirement that the court consider eight factors listed can be satisfied without the trial court actually performing any detailed analysis of the factors, so long as the trial court acknowledges the existence of each factor. *Scherner*, at p. 36-37. However, notwithstanding the other constitutional violations related to RCW 10.58.090, RCW 10.58.090 is unconstitutional if the statute can be read to excuse the trial court from performing a detailed ER 403 analysis when determining whether prior misconduct evidence can be admitted. See, *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"). The Court of Appeals' interpretation of RCW 10.58.090(6) raises an issue of significant constitutional law which should be decided by the Supreme Court.

F. The Restrictions on the Admission of Evidence Under the "Common Scheme or Plan" Exception to ER 404(B) Should Not Be Lessened and Such Evidence Should Not Be Properly Admitted Without a Limiting Instruction:

When determining the admissibility of "prior bad acts" evidence, the trial court must always begin with the presumption that such evidence is inadmissible. See, *State v. Fisher*, 165 Wn.2d 727, 744, 202 P.3d 937 (2009). In order to admit prior misconduct evidence of under the "common

scheme or plan," exception of ER 404(b) the proponent must present "substantial proof" either that the defendant devised a single plan and repeatedly used it to perpetuate separate but very similar acts, or, that the defendant's prior acts constitute parts of a larger, overarching criminal plan in which the prior acts are causally related to the crime charged. *State v. DeVincentis*, 150 Wn.2d 11, 19, 74 P.3d 119 (2003). Random similarities are not enough. *Id.* at 18. Further, the degree of similarity between the prior acts and the crime at issue must be substantial. *Id.* The mere fact that a defendant engaged in prior sex crimes is insufficient to prove a "common scheme or plan." See *State v. Lough* 125 Wn.2d 847, 862-863, 889 P.2d 847 (1995). Nonetheless, the Court of Appeals below sustained the use of such evidence in the appellant's case even though the prior misconduct consisted of nothing more than those acts that generally exist in the vast majority of child molestation incidents. *Scherner*, at p. 35.

In addition, RCW 10.58.090, as drafted, contains no limitation on the use to which the jury can put prior misconduct evidence once such evidence is deemed admissible. However, admission of prior misconduct evidence under ER 404(b) requires that the trial court give the jury an instruction limiting the purpose for which the evidence can be considered. 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). The Court of Appeals

sustained the trial court's admission of prior misconduct evidence even though the trial court failed to instruct the jury that the misconduct evidence could only be used to determine "common scheme or plan."

Allowing evidence under the common scheme or plan exception to ER 404(b) is not admissible without a proper limiting instruction.

VI. CONCLUSION

For the reasons noted above herein, the Petitioner respectfully requests that the Supreme Court accept review of the significant issues raised by the enactment of RCW 10. 58.090.

RESPECTFULLY SUBMITTED this 19th day of January 2010.

ERIC W. LINDELL WSBA# 18972
Attorney for Petitioner

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ROGER ALAN SCHERNER, Appellant.	)	No. 62507-1-I DIVISION ONE PUBLISHED IN PART FILED: December 21, 2009

Cox, J. — Roger Scherner appeals his convictions of three counts of first degree child molestation. He fails in his burden to prove beyond a reasonable doubt that RCW 10.58.090, legislation that permits but does not require admission of evidence of prior "sexual offenses"[1] in sex offense prosecutions, is unconstitutional. That statute is not an ex post facto law and does not violate the separation of powers between the legislative and judicial branches. Moreover, it does not violate either the equal protection or the due process clauses of the state or federal constitutions. Alternatively, the evidence of his prior "sexual offenses" that the trial court admitted under the statute was also admissible as a common scheme or plan under ER 404(b). In sum, the trial court did not abuse its discretion in admitting the evidence of prior sexual offenses in this case. Because there are no other meritorious challenges to his convictions, we affirm.

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[1] RCW 10.58.090(4) and (5).

Roger Scherner is the grandfather of M.S. Both Scherner and M.S. reside in California. During the summer of 2001 or 2002, when M.S. was seven or eight years old, she joined her grandparents on a car trip to visit relatives in Bellevue, Washington. During the trip M.S. stayed in hotels with her grandparents and at the house of Scherner's sister in Bellevue.

In May 2003, M.S. revealed that she had been molested by Scherner during the trip to Washington. Both the Monterey County Sheriff's Department and the Bellevue Police Department were involved in investigating the case over the course of the next three years. During this time, M.S. revealed that she had been molested by Scherner prior to the trip to Washington. Beginning at a time when M.S. was five or six years old, Scherner molested her when she spent the night at his house. M.S. described the molestation primarily as genital stroking, both over and under her underwear.

Prior Sexual Misconduct

The investigation also revealed that Scherner had previously molested other women when they were children. Scherner's previous victims included J.S., S.O., S.W., and N.K. Scherner and J.S. are relatives. Scherner molested J.S. from the time she was five years old until she was a teenager. The molestation involved genital touching, digital penetration, and oral sex. The misconduct usually took place at Scherner's house.

Scherner and S.O. are also relatives. Scherner molested S.O. when she was thirteen years old. Scherner rubbed her nipples and performed oral sex on her when she spent the night at his house.

Scherner's family befriended S.W.'s family when S.W. was growing up. S.W. was thirteen when Scherner molested her during a family ski trip. He rubbed her genitals while she was in bed in the condominium where both families were staying.

Scherner and N.K. are relatives. N.K. took two car trips with Scherner and his wife when she was between six and eight years old. During the first trip, to Washington, Scherner molested N.K. while they were staying in a hotel room. On the second trip, to Disneyland, Scherner again molested N.K. while they were staying in a hotel room. Both times Scherner performed oral sex on N.K.

At trial, the court admitted testimony of the above described sexual offenses from J.S., S.O., S.W., and N.K. under RCW 10.58.090. The court also admitted the same evidence as a common scheme or plan under ER 404(b). The jury convicted Scherner as charged. The court sentenced him to 135 months in confinement for each count, to be served concurrently.

CONSTITUTIONAL CHALLENGES

Scherner primarily argues that RCW 10.58.090 is unconstitutional under the state and federal constitutions. Specifically, he argues that it violates the prohibition against ex post facto laws, the separation of powers doctrine, due process, and equal protection. We disagree.

A statute is presumed constitutional and the party challenging it has the burden to prove beyond a reasonable doubt that it is unconstitutional.[2] "When a

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[2] State v. Ward, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994).

party claims both state and federal constitutional violations, we turn first to our state constitution."[3]

"The primary goal of statutory interpretation is to ascertain and give effect to the legislature's intent and purpose .... If, among alternative constructions, one or more would involve serious constitutional difficulties, the court will reject those interpretations in favor of a construction that will sustain the constitutionality of the statute."[4]

This court reviews de novo challenges to the constitutionality of legislation.[5]

RCW 10.58.090 provides in part:

> (1) In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding ER 404(b), if the evidence is not inadmissible pursuant to ER 403.
>
> (2) In a case in which the state intends to offer evidence under this rule, the attorney for the state shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
>
> . . .
>
> (4) For purposes of this section, "sex offense" means:
>
> (a) Any offense defined as a sex offense by RCW 9.94A.030;

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[3] State v. Patton, No. 80518-1, 2009 WL 3384578, at *2 (Oct. 22, 2009) (citing State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996)).

[4] In re Parentage of J.M.K., 155 Wn.2d 374, 387, 119 P.3d 840 (2005) (internal citations omitted).

[5] City of Fircrest v. Jensen, 158 Wn.2d 384, 389, 143 P.3d 776 (2006).

(b) Any violation under RCW 9A.44.096 (sexual misconduct with a minor in the second degree); and

(c) Any violation under RCW 9.68A.090 (communication with a minor for immoral purposes).

(5) For purposes of this section, uncharged conduct is included in the definition of "sex offense."

(6) When evaluating whether evidence of the defendant's commission of another sexual offense or offenses should be excluded pursuant to Evidence Rule 403, the trial judge shall consider the following factors:

(a) The similarity of the prior acts to the acts charged;

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

(c) The frequency of the prior acts;

(d) The presence or lack of intervening circumstances;

(e) The necessity of the evidence beyond the testimonies already offered at trial;

(f) Whether the prior act was a criminal conviction;

(g) Whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; and

(h) Other facts and circumstances.

We begin our analysis by making some preliminary observations. First, contrary to Scherner's characterization, nothing in the text of RCW 10.58.090 permits admission of "***unproven*** misconduct evidence."[6] The language of the statute does not indicate that the proponent of admission of sexual offense

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[6] Brief of Appellant at 27, 30-32 (emphasis added).

evidence is relieved of the common law burden of proving by a preponderance of the evidence that the misconduct occurred.[7] To the contrary, the legislative history states: in a criminal action charging a sex offense, evidence of the defendant's ***commission*** of other sex offenses is admissible, notwithstanding Washington's ER 404(b), ***if relevant to any fact in issue***.[8]

Second, this same legislative history states that relevancy of the evidence remains a requirement for admission.[9] This is consistent with the existing admissibility requirements of the common law.[10]

Third, the statute expressly requires courts to consider an expanded nonexclusive list of balancing factors in conducting an ER 403 balancing test.[11] We note that the statute expressly retains in subsection (6)(g) the traditional ER 403 test that courts have applied.[12]

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[7] 5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 404.33 (5th ed. 2007) (under ER 404(b), the proponent of prior misconduct evidence must show that such conduct occurred by a preponderance of the evidence as a precondition to admissibility); State v. Baker, 89 Wn. App. 726, 731-32, 950 P.2d 486 (1997) (before admitting evidence of other wrongs under ER 404(b), the trial court must find that a preponderance of the evidence shows that the misconduct occurred).

[8] S.B. REP. on Substitute S.B. 6933, 60th Leg., Reg. Sess. (Wash. 2008) (emphasis added).

[9] Id.

[10] Baker, 89 Wn. App. at 731-32 ("Before admitting evidence of other wrongs under ER 404(b), a trial court must . . . identify the purpose for which the evidence is being introduced").

[11] RCW 10.58.090(1) and (6).

[12] Blythe Chandler, Comment, Balancing Interests Under Washington's Statute Governing the Admissibility of Extraneous Sex-Offense Evidence, 84

Lastly, the primary issue before us is whether the challenged statute is unconstitutional, not whether the statute should have been subject to the supreme court's rule making process.[13]

Ex Post Facto

Scherner argues that RCW 10.58.090 violates the prohibition against ex post facto laws. We disagree.

The United States Constitution declares that "[n]o state shall . . . pass any . . . ex post facto law."[14] The Washington Constitution includes a virtually identical prohibition: "No . . . ex post facto law . . . shall ever be passed."[15]

Both the United States Supreme Court and the Washington Supreme Court have repeatedly endorsed the analytical framework articulated in Calder v.

WASH. L. REV. 259, 270-77 (2009) (discussing legislative emphasis on ER 403 balancing test).

[13] The Board of Judicial Administration opposed S.B. 6933, arguing that the proper forum and procedure for making this type of change in the Evidence Rules is the court rule-making process. S.B. REP. on Substitute S.B. 6933, 60th Leg., Reg. Sess., at 3 (Wash. 2008). There was similar opposition from the federal judiciary to the legislative introduction of Federal Evidence Rules (FER) 413-415. The Judicial Conference of the United States unequivocally recommended that Congress reconsider its decision to adopt FER 413-415. FEDERAL JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE JUDICIAL CONFERENCE ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES, 159 F.R.D. 51, 52-54 (1995). Yet, the federal courts have not overturned FER 413-415 on constitutional grounds despite previously expressing opposition.

[14] U.S. CONST. art. I, § 10.

[15] Wash. CONST. art. I, § 23.

Bull[16] for analyzing ex post facto violations.[17] This framework identifies four categories of ex post facto laws:

> 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. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a 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 offence, in order to convict the offender.***[18]

The fourth category is at issue here. That same category was also at issue in the state supreme court's decision in Ludvigsen v. City of Seattle.[19]

In Ludvigsen, the defendant was charged with driving while intoxicated (DWI) in 2002 after submitting to a breath test.[20] He was not tried and convicted until 2005.[21] Ludvigsen appealed his DWI conviction, arguing that a 2004 legislative amendment, which removed the requirement that the breath test

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[16] 3 U.S. (3 Dall.) 386, 1 L. Ed. 648 (1798).

[17] See State v Edwards, 104 Wn.2d 63, 70-71, 701 P.2d 508 (1985); State v. Handran, 113 Wn.2d 11, 14, 775 P.2d 453 (1989); Ludvigsen v. City of Seattle, 162 Wn.2d 660, 668-69, 174 P.3d 43 (2007); Carmell v. Texas, 529 U.S. 513, 525, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000).

[18] Calder, 3 U.S. at 390 (emphasis added).

[19] 162 Wn.2d 660, 668, 174 P.3d 43 (2007).

[20] Id. at 664.

[21] Id.

machine's thermometer be certified by a thermometer traceable to National Institute of Standards and Testing standards, was an ex post facto law.[22]

Discussing the ex post facto prohibition, the court stated that "[t]he difference between 'ordinary' rules of evidence and the alterations in the rules of evidence that Justice Chase [the author of Calder] spoke of in his '4th category' is their impact on the sufficiency of evidence necessary to convict . . . . '[O]rdinary' rules of evidence do not implicate ex post facto concerns because 'they do not concern whether the admissible evidence is sufficient to overcome the presumption [of innocence].' Thus, the issue is whether the . . . amendments changed the ordinary rules of evidence or changed the evidence necessary to convict."[23]

The court concluded that because the validity of the breath test was part of the prima facie case required to convict, the government redefined the crime itself by redefining the meaning of a valid test.[24] The amendment reduced the quantum of evidence required to overcome the presumption of innocence.[25]

The Ludvigsen analysis adopts the United States Supreme Court's most recent analysis of the fourth Calder category from Carmell v. Texas.[26] There, the

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[22] Id. at 668.

[23] Id. at 671-72 (fifth alteration in original) (quoting Carmell, 529 U.S. at 533 n.23).

[24] Id. at 672.

[25] Id. at 673.

[26] 529 U.S. 513,120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000).

defendant was charged with sexually abusing his stepdaughter for many years.[27] Under the law in existence at the time of the challenged conduct, the defendant could not be convicted solely on the basis of the complaining victim's testimony, unless the victim reported the crime within six months.[28] After the charged criminal conduct occurred, but before trial, the legislature amended the law to allow conviction on the basis of the complaining victim's testimony alone, regardless of when the abuse was reported.[29] The defendant was convicted based only on his stepdaughter's testimony under the revised law.[30]

The Court stated that "[a] law reducing the quantum of evidence required to convict an offender is as grossly unfair as . . . retrospectively eliminating an element of the offense, increasing the punishment for an existing offense, or lowering the burden of proof."[31] In a footnote, the Court went on to define more precisely its understanding of what kinds of evidence rules violate the ex post facto prohibition:

> We do not mean to say that every rule that has an effect on whether a defendant can be convicted implicates the *Ex Post Facto* Clause. Ordinary rules of evidence, for example, do not violate the Clause. Rules of that nature are ordinarily evenhanded, in the sense that they may benefit either the State or the defendant in any given case. More crucially, such rules, by simply permitting evidence to be admitted at trial, do not at all subvert the

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[27] Id. at 516.

[28] Id. at 517.

[29] Id. at 518.

[30] Id. at 519.

[31] Id. at 532.

> presumption of innocence, because they do not concern whether the admissible evidence is sufficient to overcome the presumption. Therefore, to the extent one may consider changes to such laws as "unfair" or "unjust," they do not implicate the same *kind* of unfairness implicated by changes in rules setting forth a sufficiency of the evidence standard.[32]

In concluding that the Texas statute did violate the ex post facto clause, the court noted that the statute was a sufficiency of the evidence rule.[33] "As such, it does not merely 'regulat[e] . . . the mode in which the facts constituting guilt may be placed before the jury,' but governs the sufficiency of those facts for meeting the burden of proof."[34]

Scherner essentially argues that RCW 10.58.090 is a sufficiency of the evidence rule that reduces the quantum of evidence required to prove guilt beyond a reasonable doubt. Neither a close reading of the statute nor the case law supports this argument.

In State v. Clevenger,[35] our supreme court noted that, "alterations which do not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt, but - leaving untouched the nature of the crime and the amount or degree of proof essential to conviction - only remove existing restrictions" on the admission of evidence "can be made applicable to prosecutions or trials thereafter had, without reference to the date of the

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[32] Id. at 533 n.23 (internal citation omitted).

[33] Id. at 544.

[34] Id. at 545.

[35] 69 Wn.2d 136, 417 P.2d 626 (1966).

commission of the offense charged."[36] Thus, as the U.S. Supreme Court noted in Carmell, a mere change in the evidence rules does not trigger constitutional concerns.

Scherner argues, incorrectly, that RCW 10.58.090 permits admission of unproven sexual offenses. As we have already observed, nothing in the statute relieves the proponent of such evidence of the existing requirement of proving by a preponderance of the evidence that the sexual offense occurred.

He also argues that the statute permits admission of evidence without specification of its purpose. Again, nothing in the statute relieves the proponent of the evidence or the court from the common law requirement of ensuring that the evidence is not used for an improper purpose.

For example, the court here gave an instruction to the jury that provided:

> In a criminal case in which the defendant is accused of an offense of sexual assault or child molestation, evidence of the defendant's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered for its bearing on any matter to which it is relevant. However, evidence of a prior offense on its own is not sufficient to prove the defendant guilty of any crime charged in the Information. Bear in mind as you consider this evidence that at all times the State has the burden of proving that the defendant committed each of the elements of each offense charged in the Information. I remind you that the defendant is not on trial for any act, conduct, or offense not charged in the Information.[37]

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[36] Id. at 142.

[37] Clerk's Papers at 263.

Scherner neither assigns error to, nor explains why, this type of instruction fails to adequately protect against the improper use of sexual offense evidence.[38]

Scherner does not and could not persuasively argue that RCW 10.58.090 changes the State's burden of proof. Prior to passage of the statute, the State had to prove beyond a reasonable doubt that Scherner (1) had sexual contact with M.S, (2) who was under twelve years old and unmarried to Scherner at the time, and (3) that Scherner was more than thirty-six months older than M.S.[39] Those requirements remained after enactment of RCW 10.58.090.

Scherner's more troubling argument is that sex offense evidence is propensity evidence that reduces the quantum of evidence the State must produce in order to convict. We conclude that it is not.

In Schroeder v. Tilton,[40] the Ninth Circuit Court of Appeals considered whether California Evidence Code § 1108, which makes evidence of prior sexual misconduct admissible in sex offense prosecutions, violated the ex post facto clause of the United States Constitution.[41] The narrow question presented to the court on appeal was whether, under Carmell, the California Court of Appeals

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[38] While this instruction appears to have been adopted from a federal case, we do not suggest that it is the only type of instruction that may be given in similar cases. See United States v. Benally, 500 F.3d 1085, 1089 (10th Cir. 2007).

[39] RCW 9A.44.083.

[40] 493 F.3d 1083 (9th Cir. 2007).

[41] Id. at 1085.

incorrectly held that § 1108 did not "eliminate or lower the quantum of proof required or in any way reduce the prosecutor's burden of proof."[42]

The Ninth Circuit concluded that the California court correctly held that § 1108 relates to admissibility of evidence and not sufficiency. "Nothing in the text of § 1108 suggests that the admissible propensity evidence would be sufficient, by itself, to convict a person of any crime."[43] The court further noted that while § 1108 technically allows conviction on "different" evidence than before its adoption, the argument that this violates the ex post facto clause "would be persuasive if the jury could rely ***solely*** on the uncharged acts to convict."[44] Similarly, here there is no suggestion that evidence admitted pursuant to RCW 10.58.090 would be sufficient, by itself, to result in a sex offense conviction.

We also note that RCW 10.58.090 permits but does not require admission of sexual offense evidence. Likewise, ER 404(b) permits admission of evidence for "other purposes" than to show propensity:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for ***other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.***[45]

Moreover, the accused's "lustful disposition" toward the victim, though not expressly listed in the rule is, nevertheless, another exception to the rule against

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[42] Id. at 1088.

[43] Id.

[44] Id.

[45] (Emphasis added.)

certain types of propensity evidence.[46] Evidence of an accused's sexual offenses against the ***victim*** in a prosecution for sexual misconduct has been consistently recognized as admissible.[47]

This statute does not limit evidence of sexual offenses to acts against the victim. Rather, it permits admission of evidence of sexual misconduct by the accused against persons other than the victim. Viewing this statutory change as an extension of the principles underlying the lustful disposition exception to propensity evidence that Washington courts already recognize, it is difficult to see why admission of lustful disposition evidence is not unconstitutional but admission of sexual offense evidence under RCW 10.58.090 is unconstitutional. There is no reduction in the quantum of evidence required to convict when comparing the two.

In any event, the statute expressly retains the function of the trial courts to balance probative value against prejudicial effect under the modified ER 403 test. Moreover, trial courts retain the ultimate power to decide whether to admit or exclude any proffered evidence. These safeguards should protect against admission of any evidence that could unconstitutionally affect the sufficiency of evidence to convict.

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[46] 5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 404.26 (5th ed. 2007).

[47] Id. ("By long-standing tradition, the defendant's previous sexual contacts with the victim are admissible in prosecutions for rape, statutory rape, incest, seduction, sodomy, and indecent liberties." (internal citations omitted)).

Unlike the statute at issue in Carmell, RCW 10.58.090 does not subvert the presumption of innocence because it does not concern whether the admitted evidence is sufficient to overcome the presumption of innocence.[48] Here, as the Carmell court stated "to the extent one may consider changes to such laws as 'unfair' or 'unjust,' they do not implicate the same *kind* of unfairness implicated by changes in rules setting forth a sufficiency of the evidence standard."[49] There is no constitutional violation.

Finally, Scherner argues that the statute violates the ex post facto clause because it changes the definition of what constitutes a sex offense. However, the focus of the ex post facto inquiry is on whether a legislative change alters the definition of criminal conduct or increase the punishment for criminal acts.[50] RCW 10.58.090 does not alter the definition of any crime or relate to punishment for any criminal act. The definition of "sex offense" at RCW 10.58.090(4) simply creates a category of potentially admissible evidence. Scherner's argument fails.

This is not an ex post facto law.

Separation of Powers

Scherner next argues that RCW 10.58.090 violates the separation of powers doctrine. He argues that RCW 10.58.090 invades the judicial branch's inherent power to promulgate rules of evidence, infringing on the court's

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[48] See Carmell, 529 U.S. at 533 n.23.

[49] Id.

[50] Collins v. Youngblood, 497 U.S. 37, 38, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990).

independence and integrity. In the alternative, he argues that the statute cannot be harmonized with ER 404(b). We again disagree.

The doctrine of separation of powers is implicit in our constitution, derived from the distribution of power into three coequal branches of government.[51] However, "the three branches are not hermetically sealed and some overlap must exist."[52] The inquiry we must make is "not 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."[53]

The authority to enact evidence rules is shared by the supreme court and the legislature.[54] The supreme court is vested with judicial power from article IV of our constitution and from the legislature under RCW 2.04.190.[55] The court's authority to govern court procedure flows from these dual sources of authority.[56]

The legislature's authority to enact rules of evidence has long been recognized by the supreme court.[57] "The adoption of the rules of evidence is a

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[51] Fircrest, 158 Wn.2d at 393.

[52] Id. at 393-94.

[53] Id. at 394 (internal citations omitted).

[54] Id.

[55] Id.

[56] Id. (citing State v. Fields, 85 Wn.2d 126, 128-29, 530 P.2d 284 (1975)).

[57] See State v. Pavelich, 153 Wash. 379, 279 P. 1102 (1929); State v. Sears, 4 Wn.2d 200, 103 P.2d 337 (1940); Fields, 85 Wn.2d at 128-29; Fircrest, 158 Wn.2d at 394.

legislatively delegated power of the judiciary. Therefore, rules of evidence may be promulgated by both the legislative and judicial branches."[58]

The question Scherner poses concerns the effect of RCW 10.58.090 on the court-promulgated ER 404(b), which deals with the same subject matter. Specifically, we must address the effect of the statutory language that states: "In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding ER 404(b), if the evidence is not inadmissible pursuant to ER 403."[59]

For at least 25 years, where an apparent conflict between a court rule and a statutory provision can be harmonized, both are given effect if possible.[60] If, on the other hand, there is "an irreconcilable conflict between a court rule and a statute concerning a matter related to the court's inherent power, the court rule will prevail."[61] The "inability to harmonize a court rule with a statute occurs only when the statute directly and unavoidably conflicts with the court rule."[62]

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[58] Fircrest, 158 Wn.2d at 394.

[59] RCW 10.58.090(1).

[60] See State v. Ryan, 103 Wn.2d 165, 178, 691 P.2d 197 (1984); Emwright v. King County, 96 Wn.2d 538, 543, 637 P.2d 656 (1981).

[61] Fircrest, 158 Wn.2d at 394.

[62] Washington State Council of County and City Employees v. Hahn, 151 Wn.2d 163, 169, 86 P.3d 774 (2004).

Here, Scherner appears to argue that the subject matter of ER 404(b) may not be modified by RCW 10.58.090 and, thus, we need not attempt to harmonize the two. However, the case law is to the contrary.

Scherner next argues that RCW 10.58.090 cannot be harmonized with ER 404(b) because it poses a direct conflict with the ban on propensity evidence. We also reject this argument.

ER 404(b) bans the admission of propensity evidence if offered to prove action in conformity therewith, but permits admission of other crimes, wrongs, and acts for other purposes.[63] Case authority requires courts to balance the admission of such evidence against the possibility of unfair prejudice under ER 403.[64] RCW 10.58.090 expands the nonexclusive list of "other purposes" for which evidence of "other crimes, wrongs, or acts" may be admitted to include other sex offenses in sex offense prosecutions. The admission of other sex offenses under RCW 10.58.090 is still subject to the court's ER 403 balancing test, expanded to include a list of eight nonexclusive balancing factors.[65]

Although the evidence rules relating to relevance do not specifically contemplate legislative amendment, RCW 10.58.090 is not inconsistent with the legislature's prior policy-driven amendments to the rules of evidence. It is not at all unusual for the legislature to act with regard to the admissibility of specific

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[63] ER 404(b).

[64] Baker, 89 Wn. App. at 732.

[65] RCW 10.58.090(2).

classes of evidence based on overarching policy concerns.[66] So long as the statute enacted by the legislature is merely permissive, leaving the court to function as the final gate-keeper determining the ultimate admission of evidence, our supreme court has consistently upheld these public policy driven amendments.

In City of Fircrest v. Jensen,[67] the legislature amended RCW 46.61.506, which codifies the requirements for admission of Blood Alcohol Content (BAC) tests in any civil or criminal action.[68] Jensen claimed that by mandating the admission of BAC tests, the amendment conflicted directly with the court's authority to exclude evidence based on relevance or prejudice. The City argued that the amendment simply codified the admissibility rules from case law prior to a 2004 court opinion that deviated from previous precedent.[69] The court concluded that the amendment did not violate the separation of powers doctrine.[70] The court determined that "[t]he legislature has made clear its

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[66] See, e.g., RCW 5.64.010 (evidence of furnishing or offering to pay medical expenses and expressions of apology, sympathy, etc., not admissible in negligence action against health care provider); RCW 5.66.010 (evidence of expressions of sympathy inadmissible against party in a civil action seeking damages for death or personal injury); RCW 5.60.060 (witnesses disqualified due to rules of privilege); RCW 5.60.050 (making persons of unsound mind, persons intoxicated at the time of their examination, and children who are incapable of receiving just impressions of the facts incompetent to testify).

[67] 158 Wn.2d 384, 143 P.3d 776 (2006).

[68] Id. at 388.

[69] Id. at 396.

[70] Id. at 399.

intention to make BAC test results fully admissible once the State has met its prima facie burden. No reason exists to not follow this intent . . . . The statute is permissive, not mandatory, and can be harmonized with the rules of evidence."[71]

RCW 10.58.090 modifies the subject matter addressed by ER 404(b) by expanding the nonexclusive[72] list of permissible purposes for which evidence of prior "crimes, wrongs, or acts" may be relevant to include prior sex offenses by the defendant in sex offense cases. The exception that the legislature carved out closely tracks developments in Washington case law that have allowed the admission of prior sexual misconduct evidence in sex offense cases for a number of limited purposes. As previously noted, Washington courts have long admitted evidence of a defendant's "lustful disposition" toward the victim under the common law.[73] In addition, our supreme court has recently upheld the admission of sexual misconduct evidence involving other victims under a less stringent

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[71] Id.

[72] ER 404(b) has been interpreted as providing a nonexclusive list of other purposes for which prior bad acts evidence may be admissible. See S.B. REP. on Substitute S.B. 6933, 60th Leg., Reg. Sess. (Wash. 2008). This interpretation of ER 404(b) is consistent with a majority of federal and state courts. EDWARD J. IMWINKELRIED, 2 UNCHARGED MISCONDUCT EVIDENCE §§ 29-31(1998).

[73] State v. Ferguson, 100 Wn.2d 131, 133-34, 667 P.2d 68 (1983) ("This court has often invoked an exception in similar cases to permit evidence of collateral sexual misconduct when it shows a lustful disposition directed toward the offended female. Such evidence is admitted for the purpose of showing the lustful inclination of the defendant toward the offended female, which in turn makes it more probable that the defendant committed the offense charged.").

version of the "common scheme or plan" exception to ER 404(b).[74] Evidence of prior sexual misconduct involving other victims has also been allowed as evidence of identity,[75] a unique modus operandi,[76] and to rebut the defendant's claim that the charged sexual offense was accidental.[77]

RCW 10.58.090 also is consistent with developments in the federal rules of evidence.[78]

Scherner argues that RCW 10.58.090 cannot be harmonized with ER 404(b) because it overrules the court's unequivocal ban on all propensity evidence. He reads too broadly the scope of ER 404(b)'s exclusion of propensity evidence in Washington.

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[74] State v. DeVincentis, 150 Wn.2d 11, 21, 74 P.3d 119 (2003) (holding that the high level of similarity between the charged crime and prior bad acts necessary to prove common scheme or plan does not require evidence of common features to show a unique method of committing the crime).

[75] See, e.g., State v. Herzog, 73 Wn. App. 34, 43-44, 867 P.2d 648 (1994); State v. Bowen, 48 Wn. App. 187, 193, 738 P.2d 316 (1987).

[76] See Herzog, 73 Wn. App. at 44 ("Evidence that the accused committed an uncharged crime *of the same type as the crime charged* tends to prove that the accused has a propensity to commit that specific type of crime. Evidence that the accused has a propensity to commit that specific type of crime increases, more strongly than before, the probability that the accused committed the particular crime charged.").

[77] See, e.g., Baker, 89 Wn. App. at 734-35.

[78] FER 413 and 414 permit trial judges to admit evidence of prior sex offenses committed by the defendant in sex offense cases and evidence of prior child molestation committed by the defendant in child molestation cases, if the judge finds that such evidence is relevant to any fact in issue. Unlike RCW 10.58.090, the federal rules do not explicitly require the trial court to conduct an ER 403 balancing test. REPORT TO THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES at 1 (February 1995).

RCW 10.58.090 is consistent with the direction of case law allowing prior sexual misconduct evidence in sex offense cases. More significantly, the legislative amendment permits but does not ever ***require*** a court to admit evidence of prior sexual misconduct. Rather, admission is subject to the court establishing that the evidence is relevant and that the probative value outweighs the risk of unfair prejudice under the modified ER 403 balancing test.

In sum, RCW 10.58.090 evidences the legislature's intent that evidence of sexual offenses may be admissible, subject to the modified ER 403 balancing test. But the legislation also leaves the ultimate decision on admissibility to the trial courts based on the facts of the cases before them. This is consistent with past legislative amendments to the rules of evidence and does not infringe on a core function of the judiciary.

There is no violation of the separation of powers between the legislative and judicial branches of government.

Equal Protection

Scherner claims that RCW 10.58.090 violates his right to equal protection under the law. This argument is unconvincing.

The law must provide similarly situated people with like treatment.[79] Our courts construe the federal and state equal protection clauses identically.[80]

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[79] State v. Jagger, 149 Wn. App. 525, 531-32, 204 P.3d 267 (citing State v. Coria, 120 Wn.2d 156, 169, 839 P.2d 890 (1992)), review denied, 166 Wn.2d 1023 (2009).

[80] Id. (citing State v. Manussier, 129 Wn.2d 652, 672, 921 P.2d 473 (1996)).

The rational basis test applies to equal protection claims when a classification does not involve a suspect class and does not threaten a fundamental right.[81] Under the rational basis test, a law will be upheld if it rests upon a legitimate state objective and is not wholly irrelevant to achieving that objective.[82] The person challenging the classification must show that it is "purely arbitrary."[83]

Here, there is no suspect classification. Thus, the rational basis test controls. Under that test, RCW 10.58.090 is not unconstitutional as long as there is a legitimate objective and the statute is reasonably designed to achieve that objective. Washington courts apply the following three-part test to determine whether a statute survives rational basis scrutiny: (1) does the classification apply equally to all class members, (2) does a rational basis exist for distinguishing class members from non-members, and (3) does the classification bear a rational relationship to the legislative purpose.[84]

Scherner argues that persons charged with sex offenses are treated differently than those charged with other criminal offenses and that admission of evidence of other sexual offenses violates the equal protection clause for this

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[81] Manussier, 129 Wn.2d at 673.

[82] Id.

[83] Omega Nat'l Ins. Co. v. Marquardt, 115 Wn.2d 416, 431, 799 P.2d 235 (1990).

[84] Jagger, 149 Wn. App. at 532 (citing Morris v. Blaker, 118 Wn.2d 133, 149, 821 P.2d 482 (1992) and In re Pers. Restraint of Silas, 135 Wn. App. 564, 570, 145 P.3d 1219 (2006)).

reason. We reject this argument for the same reasons that Washington courts have previously rejected similar equal protection claims.

Here, the statute passes the first prong of the rational basis test because it applies equally to all defendants who have committed a sex offense as defined by RCW 10.58.090(4).[85] The statute also passes the second prong of the test. Our supreme court has previously held that a rational basis exists for distinguishing sex offenders from other criminal offenders.[86] Finally, under the third prong of the test, we must determine whether this classification bears a rational relationship to the legislative purpose behind RCW 10.58.090. We recognize that the legislature has broad discretion to determine the public interest and what measures are necessary to secure that interest.[87] Here, the legislature's legitimate objective was to ensure that juries receive the necessary evidence to reach a just and fair verdict in sex offense prosecutions.[88] Making evidence of prior sex offenses admissible where relevant and probative in sex offense prosecutions is rationally related to the legitimate objective of protecting victims and the public from sex offenders. RCW 10.58.090 passes the rational basis test.

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[85] RCW 10.58.090(4) (including all sex offenses defined by the RCW 9.94A.030, sexual misconduct with a minor, and communication with a minor for immoral purposes).

[86] See State v. Ward, 123 Wn.2d 488, 516-17, 869 P.2d 1062 (1994) (classifications in RCW 9A.44.130(3) for sex offender registration do not violate equal protection guaranties).

[87] Id. at 516.

[88] Laws of 2008, ch. 90, § 1.

Scherner also cites Bush v. Gore[89] to support his claim that RCW 10.58.090 violates equal protection. There, the United States Supreme Court held that the equal protection clause requires uniform and specific standards for vote counting.[90] However, the holding in Bush v. Gore was limited to "the present circumstances."[91] The facts at issue here do not remotely resemble those facts. Consistent with the self-limiting language of the opinion, the Supreme Court has declined to cite Bush v. Gore since the decision was published. Except in the rare circumstances where the facts at issue show some resemblance to the contested 2000 presidential election,[92] the precedential value of Bush v. Gore is ambiguous at best and the opinion should not be cited to support other equal protection claims.

Due Process

Scherner contends that permitting admission of evidence of sexual offenses against persons other than the current alleged victim under RCW 10.58.090 violates the constitutional right to due process by denying defendants a fair trial. Specifically, he argues that admission of propensity evidence

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[89] 531 U.S. 98, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000).

[90] Id. at 106.

[91] Id. at 109.

[92] League of Women Voters v. Brunner, 548 F.3d 463, 477 (6th Cir. 2008) (finding Bush v. Gore applicable to challenge to Ohio's voting system); Common Cause S. Christian Leadership Conference of Greater L.A. v. Jones, 213 F.Supp. 2d 1106, 1108 (C.D. Cal. 2001) (finding Bush v. Gore applicable to challenge to California's voting system); Big Spring v. Jore, 326 Mont. 256, 109 P.3d 219 (2005) (finding Bush v. Gore applicable to challenge to Montana's recount procedures and standards for determining voter intent).

undermines the presumption of innocence and permits convictions on less than proof beyond a reasonable doubt. He also argues that the statute violates due process because it requires the trial court to consider the "necessity" of the evidence before deciding whether or not to admit the evidence of prior sexual assaults. Finally, he claims the statute is vague. We disagree with all of these contentions.

The due process clauses of both the state and federal constitutions declare that no person shall be deprived of life, liberty, or property without due process of law.[93] Due process includes the guarantee of a fair trial, including conviction on nothing less than proof beyond a reasonable doubt in a criminal case.[94] The United States Supreme Court has held that the test for whether an evidentiary rule violates due process is if "the introduction of this type of evidence is so extremely unfair that its admission violates 'fundamental conceptions of justice.'"[95] The court has also stated that the category of rules that violate fundamental conceptions of justice should be construed "very narrowly."[96]

We first address Scherner's "necessity" argument. Scherner argues that RCW 10.58.090(6)(e) violates due process by requiring the trial court to weigh the "necessity" of the sexual offense evidence. According to him, to do so

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[93] U.S. CONST, amend. 14; WASH. CONST., art. I, § 3.

[94] In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995).

[95] Dowling v. U.S., 493 U.S. 342, 352, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990).

[96] Id.

requires the trial court to abandon its neutrality and prejudge the strength of the prosecution's case and the likelihood of the defendant's guilt. He misreads the statute.

In fact, the provision on which he bases his argument is one of eight nonexclusive factors a court should consider when deciding whether sexual offense evidence should be "excluded pursuant to ER 403." RCW 10.58.090(6)(e) states the factor as, "The necessity of the evidence beyond the testimonies already offered at trial."

As the State correctly argues, other evidentiary rules require the trial court to consider the necessity of the proffered evidence. ER 403 itself requires the trial court to weigh the necessity of the evidence to determine whether it will be needlessly cumulative or duplicative. Likewise, ER 609(d) provides that the trial court may admit a witness's juvenile adjudication only if it is necessary for a fair determination of the issue of guilt or innocence.

Neither Holmes v. South Carolina[97] nor Giles v. California[98] support Scherner's assertion that a rule requiring the trial court to consider the necessity of additional evidence violates due process. In Holmes, the court concluded that a South Carolina common law rule that allowed the trial court to exclude ***defense*** testimony based on the strength of the prosecution's case denied the defendant

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[97] 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006).

[98] __ U.S. __, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008).

his right to "present a complete defense."[99] In Giles, the court concluded that a California rule allowing testimonial statements under an exception for "forfeiture by wrongdoing" stripped the defendant of his Sixth Amendment guarantee of confrontation.[100] Neither case is persuasive here.

Scherner's more compelling argument is that the statute will benefit the State more often than an accused. However, none of the cases cited by Scherner suggest that an evidentiary rule violates due process simply because it benefits one party over another. Scherner couches his argument in general terms: the trial judge must remain neutral and unbiased. While this general statement of law is true, Scherner does not cite any case law to support the proposition that a party cannot receive a "fair, impartial, and neutral hearing" because a rule of evidence is not neutral.[101]

Scherner next argues that admission of propensity evidence undermines the presumption of innocence and permits convictions on less than proof beyond a reasonable doubt.

The test for admissibility of evidence is relevance. One limitation on relevant evidence is ER 404(b).[102] ER 404(b) codified the historical prohibition on prior misconduct as character evidence, where such evidence is offered for

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[99] Holmes, 547 U.S. at 331.

[100] Giles, 128 S. Ct. at 2692-693.

[101] See Brief of Appellant at 41 (citing State v. Perala, 132 Wn. App. 98, 112-113, 130 P.3d 852 (2006)).

[102] ER 404(b).

the sole purpose of proving the defendant's action in conformity with the character trait, unless admitted for another purpose.[103]

ER 404(b) does not, however, prohibit the admission of all prior misconduct evidence. The rule provides a list of "other purposes" for which prior misconduct evidence may be admitted.[104] As discussed above, Washington courts have historically allowed evidence of a defendant's prior sex offenses in certain sex offense prosecutions under a number of these exceptions. Prior sex offenses involving other victims have been allowed under ER 404(b) as evidence of identity,[105] a unique modus operandi,[106] to prove a common scheme or plan,[107] and to rebut the defendant's claim that the charged sexual offense was accidental.[108] In addition, courts have allowed evidence of prior sexual offenses

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[103] EDWARD J. IMWINKELRIED, 2 UNCHARGED MISCONDUCT EVIDENCE §§ 24-31 (1998).

[104] ER 404(b).

[105] Herzog, 73 Wn. App. 43-44; Bowen, 48 Wn. App. at 193.

[106] Herzog, 73 Wn. App. 43-44; Bowen, 48 Wn. App. at 193.

[107] State v. Lough, 125 Wn.2d 847, 853-56, 889 P.2d 487 (1995) (prior acts admitted to show scheme or plan to drug and rape women); Baker, 89 Wn. App. at 732-35 (prior acts admitted to show common scheme or plan to sexually assault sleeping children); State v. Krause, 82 Wn. App. 688, 693-98, 919 P.2d 123 (1996), review denied, 131 Wn.2d 1007 (1997) (prior acts admitted to show scheme or plan of molesting young boys by befriending the parents and working to gain the boys affections); DeVincentis, 150 Wn.2d at 16-21 (prior acts admitted to show common plan to get to know prepubescent girls, create a trusting relationship, and desensitize them to nudity by wearing almost no clothing); State v. Kennealy, 151 Wn. App. 861, 887-89, 214 P.3d 200 (2009) (prior acts admitted to show a common scheme or plan even though defendant argued that the prior incidents differed from the charged incidents).

[108] Baker, 89 Wn. App. at 734-35.

under a common law exception to show the defendant's "lustful disposition" toward the victim.[109]

The Ninth Circuit rejected a due process challenge to a similar rule of evidence,[110] Federal Evidence Rule (FER) 414, noting that many jurisdictions allow evidence of a defendant's prior acts of sexual misconduct in prosecutions for offenses such as rape, incest, and child molestation under similar exceptions to those utilized by Washington courts.[111] The court concluded that "there is nothing fundamentally unfair about the allowance of propensity evidence under FER 414. As long as the protections of ER 403 remain in place to ensure that potentially devastating evidence of little probative value will not reach the jury, the right to a fair trial remains adequately safeguarded."[112] Other federal

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[109] State v. Ray, 116 Wn.2d 531, 546-48, 806 P.2d 1220 (1991); State v. Camarillo, 115 Wn.2d 60, 70, 794 P.2d 850 (1990); State v. Ferguson, 100 Wn.2d 131, 133-34, 667 P.2d 68 (1983); State v. Medcalf, 58 Wn. App. 817, 822-23, 795 P.2d 158 (1990).

[110] FER 414(a) ("In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant."); see also, FER 413(a) ("In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.").

[111] United States v. LeMay, 260 F.3d 1018, 1025-26 (9th Cir. 2001).

[112] Id. at 1026.

appellate courts that have considered the same question have reached a similar conclusion.[113]

RCW 10.58.090 explicitly requires the trial court to conduct a modified ER 403 balancing test and prohibits admission of evidence of prior sex offenses where the risk of unfair prejudice is greater than the probative value of the evidence. Application of ER 403 in determining admissibility ensures that RCW 10.58.090 does not open the door to any and all propensity evidence in sex offense cases.

Relying on State v. Rhodes[114] and City of Spokane v. Fischer,[115] Scherner argues that RCW 10.58.090 violates due process because it is unconstitutionally vague. He argues that the enumerated factors courts must consider when determining whether other sexual offenses are admissible are not adequately defined. Neither case supports his argument.

Rhodes was overruled by State v. Baldwin.[116] In Fischer, the court concluded that a municipal ordinance making it a nuisance for any dog to disturb or annoy any person by habitual howling, yelping, or barking was void for vagueness.[117]

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[113] See, e.g., U.S. v. Mound, 149 F.3d 799 (8th Cir. 1998); U.S. v. Castillo, 140 F.3d 874, 883 (10th Cir. 1998); U.S. v. Enjady, 134 F.3d 1427, 1429 (10th Cir. 1998).

[114] 92 Wn.2d 755, 600 P.2d 1264 (1979).

[115] 110 Wn.2d 541, 754 P.2d 1241 (1988).

[116] 150 Wn.2d 448, 78 P.3d 1005 (2003).

[117] Fischer, 110 Wn.2d at 542.

Neither Rhodes nor Fischer supports the conclusion that RCW 10.58.090 does not provide adequate standards to prevent arbitrary enforcement. As the State points out, rules governing the admissibility of evidence are meant to be applied by lawyers and judges and do not apply directly to ordinary citizens. Courts regularly weigh numerous factors when ruling on the admissibility of evidence and RCW 10.58.090 is no different.

In sum, given the governing test, we conclude that this statute does not violate due process.

ADMISSIBILITY UNDER ER 404(b) and 403

Scherner next argues that the trial court abused its discretion in alternatively admitting the sexual offense evidence under the common scheme or plan exception to ER 404(b). He also claims the court failed to conduct an adequate ER 403 balancing test. We reject these claims.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion.[118] A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds.[119]

The trial court must always begin with the presumption that evidence of prior bad acts is inadmissible under ER 404(b).[120] The analysis for admitting

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[118] DeVincentis, 150 Wn.2d at 17.

[119] In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

[120] State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

prior bad acts to prove a common scheme or plan is set forth in State v. Lough.[121]

> Proof of such a plan is admissible if the prior acts are (1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial.[122]

Scherner argues that the State did not meet its burden under the second element of the Lough test because it did not 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."[123] Scherner is incorrect.

In DeVincentis, our supreme court addressed whether, under Lough, prior acts may be admitted which are similar to the charged crime but not unique or uncommon.[124] The court held that the degree of similarity between the charged crime and the prior bad acts must be substantial, but did not require that the evidence of a common feature be a unique method of committing the crime.[125] "[T]he trial court need only find that the prior bad acts show a pattern or plan with marked similarities to the facts in the case before it."[126]

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[121] 125 Wn.2d 847, 889 P.2d 487 (1995) (upheld by DeVincentis, 150 Wn.2d at 17).

[122] Id. at 852.

[123] Brief of Appellant at 47 (citing State v. Bacotgarcia, 59 Wn. App. 815, 820, 801 P.2d 993 (1990) (additional citations omitted)).

[124] DeVincentis, 150 Wn.2d at 18.

[125] Id. at 20-21.

[126] Id. at 13.

Here, there was a marked similarity between Scherner's molestation of M.S. and his prior sexual abuse of J.S., S.O., S.W., and N.K. All of the girls were of similar prepubescent age and size when Scherner began molesting them. In each instance, Scherner was a trusted relative or friend of the girl. In each case, he molested the girl in bed, sometimes after she had gone to sleep. In each case, the abuse involved rubbing the girl's genital area or performing oral sex. Admission of this evidence as a common scheme or plan was a proper exercise of discretion.

Scherner next argues that even if the prior sex offenses were properly admitted under either RCW 10.58.090 or the common scheme or plan exception to ER 404(b), the trial court failed to properly weigh the probative value of the evidence against the danger of unfair prejudice.

Scherner argues that the trial court abused its discretion under RCW 10.58.090 because (1) the specifics of the prior molestation differed from the charged crimes, (2) the prior molestation took place decades ago, (3) the frequency of the prior molestation varied by victim, (4) he received some kind of sexual deviancy counseling since the last incident of molestation, (5) the evidence was not necessary, (6) none of the prior molestation resulted in a criminal conviction, and (7) the potential for unfair prejudice outweighed the probative value. He argues based on these factors that the danger of unfair prejudice substantially outweighed any probative value of the prior misconduct evidence.

Here, the trial court considered each of the articulated factors under RCW 10.58.090(6) and determined that the probative value of the testimony from Scherner's four prior victims outweighed the danger of unfair prejudice. Prior to admitting the evidence, the trial court determined based on a preponderance of the evidence that the prior sexual misconduct had occurred. The court then concluded that "this evidence addresses the credibility of the complaining witness. The only direct evidence against the defendant[.] [A]nd her credibility is a critical element in the case."

Although the defendant argued for a different result under the ER 403 balancing test and RCW 10.58.090(6) in his motion in limine, the trial court's ruling was not an abuse of discretion. As the trial court pointed out, RCW 10.58.090 does not instruct the court on how to weigh the articulated factors. It only states the trial court must consider all of the factors when conducting its ER 403 balancing test. The ultimate decision on admissibility or exclusion remains with the court.

In addition to conducting a proper ER 403 balancing test, the court also gave the jury a limiting instruction:

> [E]vidence of a prior offense on its own is not sufficient to prove the defendant guilty of any crime charged in the Information. Bear in mind as you consider this evidence that at all times the State has the burden of proving that the defendant committed each of the elements of each offense charged in the Information. ***I remind you that the defendant is not on trial for any act, conduct, or offense not charged in the Information.***[127]

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[127] Clerk's Papers at 263 (emphasis added).

Here, the trial court complied with both RCW 10.58.060 and ER 403. Moreover, the court gave the jury the above limiting instruction. There was no abuse of discretion in also admitting the evidence under the common scheme or plan exception to ER 404(b).

We affirm the judgment and sentence.

The balance of this opinion has no precedential value. Accordingly, pursuant to RCW 2.06.040, it shall not be published.

Scherner also claims that the trial court abused its discretion by admitting into evidence a recorded conversation between Scherner and the complaining witness. He claims the authorization for the recording violated the Washington Privacy Act. He also argues that the trial court's admission of testimony from his wife violated the spousal privilege and that the trial court failed to properly investigate allegations of jury misconduct. Finally, Scherner argues that cumulative errors deprived him of a fair trial. None of these claims is persuasive.

STATE PRIVACY ACT

We first consider Scherner's claim that the State's application for judicial authorization to intercept the call was inadequate because it did not show that normal investigative techniques had been tried and failed. We disagree.

The Washington Privacy Act prohibits interception and recording of private communications and conversations.[128] Such recordings are generally

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[128] RCW 9.73.030(1).

inadmissible.[129]

The act provides an exception for law enforcement where one of the parties has given prior consent and the officer first obtains judicial authorization.[130] In that case, the officer's application must satisfy several statutory conditions, including a particular statement of facts showing that "other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried."[131]

The showing required is not one of absolute necessity.[132] But the application must contain more than mere "boilerplate assertions."[133] 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."[134]

On appeal, this court will affirm the trial court's order authorizing the interception and recording of a private phone call if the facts set forth in the application are minimally adequate to support the order.[135]

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[129] RCW 9.73.050.

[130] RCW 9.73.090(2).

[131] RCW 9.73.130(3)(f).

[132] State v. Johnson, 125 Wn. App. 443, 445, 105 P.3d 85 (2005); State v. Cisneros, 63 Wn. App. 724, 729, 821 P.2d 1262 (1992).

[133] State v. Manning, 81 Wn. App. 714, 720, 915 P.2d 1162, review denied, 130 Wn.2d 1010 (1996).

[134] Id.

[135] Johnson, 125 Wn. App. at 445; Cisneros, 63 Wn. App. at 729.

Here, Bellevue Detective Jennifer Robertson submitted an application for a judicial order authorizing interception and recording of an anticipated telephone conversation between M.S. and Scherner in January 2007. The trial court issued an order authorizing interception and recording.

M.S. called Scherner and their conversation was recorded by Detective Robertson pursuant to the order. During the conversation M.S. asked Scherner, "why did you touch me in my vagina[,] why did you squeeze me and touch me in places that I don't want to be touched?"[136] Scherner replied, "all I can do is say I am sorry I did it. I wish I hadn't and I though[t] I had explained to you why I probably did it."[137]

Detective Robertson's application was filed approximately three and a half years after the initial report to the Monterey, California, Sherriff's Department that Scherner had molested M.S. Between the time the molestation was reported and the date of the application, the investigation was handled by both the Monterey County Sheriff's Department and the Bellevue Police Department. Detective Robertson outlined the course of the investigation in her application.

During the spring and summer of 2003, M.S. disclosed the extent of Scherner's molestation to the Monterey County Sheriff's Department. In May 2004, a Monterey County detective was asked to contact and interview Scherner at his residence. The detective did not speak to Scherner. In November 2005, a

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[136] Clerk's Papers at 123.

[137] Id.

Bellevue detective interviewed Scherner's sister-in-law, who disclosed that Scherner had molested her when she was eleven years old. Later in November, the same detective left several messages on Scherner's phone, including a request that he return the call. Other prior victims were also disclosed and interviewed during the course of the investigation.

Detective Robertson's statement that other investigative techniques had been tried and failed referred to the above investigation. More importantly, it discussed ***why*** the above techniques (and other possible techniques) were inadequate in the particular case.

> I know of no other way to resolve the truth or falsity of MS's allegations. Scherner's refusal to talk with detectives indicates he is well aware his conduct is criminal and that he is unlikely to make any admissions or to confess. If there was any physical evidence, it disappeared long ago. Scherner is highly unlikely to discuss these issues with anyone other than MS, or with anyone else present. . . . The nature of cases involving sexual molestation of minors often makes these cases peculiarly difficult for the factfinder to resolve. The victims are, of course, vulnerable and less articulate and sophisticated by virtue of their age. Frequently factfinders are predisposed . . . to believe either that minors are likely to 'make things up' or alternatively 'would never lie'. In cases like the one outlined above, where there is no physical or medical evidence to corroborate the victim's statements, the factfinder must decide solely on the basis of the victim/witness's testimony.[138]

Scherner argues that Detective Robertson's application was insufficient for a number of reasons, some of which are more credible than others. First, Scherner argues that the police and, as a result the trial court, were incorrect to assume that Scherner would not speak with the police if asked. While it appears

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[138] Clerk's Papers at 32-33.

that Scherner may have received as few as one or two messages on his home answering machine prior to the court issuing the order to intercept, he provides no credible explanation for why he did not return the police detective's calls in 2005. Nor does Scherner allege that he was unaware of being under investigation.

Next, Scherner argues that additional investigative techniques should have been tried before Detective Robertson applied for authority to intercept. But RCW 9.73.130(3)(f) does not require police to exhaust all possible investigative techniques. It only requires the officer to show that "other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried."[139]

We conclude that the facts presented in Detective Robertson's application are adequate to support the superior court's determination. There was no abuse of discretion in authorizing the recording.

SPOUSAL PRIVILEGE

Scherner argues that the trial court erred by admitting testimony from his wife in violation of the spousal privilege. We disagree.

RCW 5.60.060(1) contains Washington's spousal privilege rule and provides:

> A spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner; nor can either during marriage or during the domestic partnership or afterward, be without the

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[139] RCW 9.73.130(3)(f).

> consent of the other, examined as to any communication made by one to the other during the marriage or the domestic partnership. But this exception shall not apply . . . to a criminal action or proceeding for a crime committed by said spouse or domestic partner against any child of whom said spouse or domestic partner is the parent or guardian.

In this context, Washington courts have construed the term "guardian" broadly in order to effectuate the intent of the legislature to "protect children from physical and sexual abuse."[140] "A 'parent' or 'guardian' is anyone who 'stand[s] in the relationship of parent' or who 'assume[s] duties normally characterized as parental even for a short time.'"[141]

ER 104(a) provides that preliminary questions regarding the "qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence" are to be determined by the trial court.[142] This court construes the spousal privilege strictly.[143]

In State v. Waleczek,[144] our supreme court concluded that the defendant was a guardian for the purposes of RCW 5.60.060(1). There, the complaining witness (a seven-year-old girl) spent the night with the defendant and his girlfriend for one night and was sent to school by the defendant the next

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[140] State v. Waleczek, 90 Wn.2d 746, 751, 585 P.2d 797 (1978).

[141] State v. McKinney, 50 Wn. App. 56, 65, 747 P.2d 1113 (1987) (citing State v. Bouchard, 31 Wn. App. 381, 387, 639 P.2d 761, review denied, 97 Wn.2d 1021 (1982)).

[142] ER 104(a).

[143] Waleczek, 90 Wn.2d at 749; Bouchard, 31 Wn. App. at 387.

[144] 90 Wn.2d 746, 585 P.2d 797 (1978).

morning.[145] The girl's mother had known the defendant and his girlfriend for three weeks before the incident.[146] The court concluded that the defendant "undertook duties that are normally characterized as parental" by agreeing to let the child sleep at his house, wake her up in the morning, provide her with breakfast, and send her to school.[147]

Here, the trial court allowed Mrs. Scherner to testify despite the fact that the defendant had invoked the spousal privileges contained in RCW 5.60.060(1).

Similar to the situation in Waleczek, here, when Scherner and his wife agreed to take M.S. on vacation with them, they assumed duties normally characterized as parental. During the trip they were responsible for all of M.S.'s needs. A person may assume the role of *in loco parentis* by accepting some parental responsibilities, even if only for a short time.[148] Under Waleczek, Scherner and his wife were the guardians of M.S. for the purposes of RCW 5.60.060(1) when the charged crime occurred.

Scherner's reliance on Zellmer v. Zellmer[149] is not persuasive. RCW 5.60.060(1) was not at issue in that case. Rather, the court in Zellmer was

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[145] Id. at 748.

[146] Id.

[147] Id. at 753.

[148] State v. Modest, 88 Wn. App. 239, 247-48, 944 P.2d 417 (1997).

[149] 164 Wn.2d 147, 188 P.3d 497 (2008).

considering whether the parental immunity doctrine shielded a stepparent from an action for negligent parental supervision.[150]

The court did not abuse its discretion by concluding that the spousal privilege did not apply to Scherner or his wife.

In any event, any claimed error was harmless. Error admitting privileged marital communications is harmless unless there is a reasonable probability, in light of the entire record, that the error materially affected the outcome of the trial.[151]

Here, the testimony provided by Scherner's wife was brief. She testified about basic background information regarding family relationships. She also testified that she had a conversation with Scherner about M.S. in January 2007 during which he said he was sorry. But she insisted that he did not admit to anything during this conversation. In light of the extensive record, this testimony added little to the overwhelming evidence of Scherner's guilt.

JURY MISCONDUCT

Scherner argues that the trial court's investigation of alleged jury misconduct was inadequate. The argument he now makes on appeal was not preserved below and we do not reach it.

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[150] Id. at 167.

[151] State v. Webb, 64 Wn. App. 480, 488, 824 P.2d 1257 (1992).

The party alleging jury misconduct has the burden to show that misconduct occurred.[152] In a case where the alleged jury misconduct is the interjection of new or novel evidence, the court must first determine if the information meets the definition of extrinsic evidence.[153] "Novel or extrinsic evidence is defined as information that is outside all the evidence admitted at trial, either orally or by document."[154]

Second, the court must determine if the misconduct affected the verdict.[155] This court will grant a new trial only where jury misconduct has prejudiced the defendant.[156]

However, "[w]here defendant made no motion for mistrial and in no way preserved an objection, he is deemed to have waived his right to claim error for the alleged misconduct of the jury."[157]

Here, close to the end of the trial, the Seattle Times carried a front page story about the trial.[158] The headline read, "Rape trial lets family share decades of pain, secrets" and was accompanied by a photograph of Scherner being led by

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[152] State v. Hawkins, 72 Wn.2d 565, 566, 434 P.2d 584 (1967).

[153] Richards v. Overlake Hosp. Medical Center, 59 Wn. App. 266, 270, 796 P.2d 737 (1990).

[154] Id.

[155] Id.

[156] State v. Boling, 131 Wn. App. 329, 332, 127 P.3d 740, review denied, 158 Wn.2d 1011 (2006).

[157] State v. Valenzuela, 75 Wn.2d 876, 881, 454 P.2d 199 (1969).

[158] Exhibit 28.

uniformed security officers. The text of the article was divided between page A1 and page A8. The text on page A1 does not reference any evidence that was not properly admitted at trial. The text on page A8 does include references to evidence that was not admitted at trial.

Scherner asked the court to inquire whether any of the jurors had seen or read the article. The court questioned the jury and determined that four jurors had read the Seattle Times on the morning the article was published. The court asked specifically whether any juror had read an article about the case and noted on the record that "there is no response." The court ended its inquiry by reminding the jury not to read any news media related to the case.

At the end of the same day, the court asked the jury some additional questions about the Seattle Times article. The court asked specifically whether any juror had seen the photo of Scherner that accompanied the article, and whether any juror had read the headline. One juror had observed both the photo and the headline, one had only observed the photo, and two had only observed the headline.

One juror stated the following: "I get the paper, I didn't open it. I took it to the jury room. I just about opened it in the jury room and somebody saw it, and kind of freaked out, and I put it down. So, I saw the main headline. I never read anything. So, I don't know what it's about."[159]

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[159] Report of Proceedings (August 19, 2008) at 937-38.

The court then called each of the four jurors who had observed the photo or headline, one at a time, and asked whether they could reach a decision in the case based only on the evidence and exhibits admitted at trial and uninfluenced by anything they had observed in the newspaper. All four jurors answered yes.

After the court conducted its inquiry into the Seattle Times article, Scherner did not ask the court to take any further action or claim that jury misconduct had occurred. For the first time on appeal, Scherner claims that the jury was exposed to extraneous evidence and that the trial court failed to adequately investigate the alleged jury misconduct. Scherner did not preserve his claim below and we will not address this claim on appeal.

CUMULATIVE ERROR

Scherner argues that the trial court committed cumulative errors depriving him of the right to a fair trial. We disagree.

Where several errors standing alone do not warrant reversal, the cumulative error doctrine requires reversal when the combined effects of the errors denied the defendant a fair trial.[160]

The cumulative error doctrine does not apply because the trial court did not commit any errors. We have already addressed certain alleged errors above, but Scherner adds others.

Scherner argues that the trial court abused its discretion by admitting photographs of J.S., S.O., S.W., and N.K. as they appeared when they were

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[160] State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

children and by allowing these witnesses to describe the emotional impact of the abuse and their consequential need for counseling.

The court addressed Scherner's objections to the victim impact testimony prior to trial and ruled that it was admissible. The court's ruling was informed by its careful balancing of the probative value of these witnesses' testimony against the danger of unfair prejudice under the modified ER 403 balancing test required by RCW 10.58.090. The court's decision to allow some victim impact testimony was not an abuse of discretion.

Scherner also argues that the trial court abused its discretion by allowing these witnesses to testify that Scherner had a history of abusing other children. The record does not support this claim. The testimony Scherner points to as objectionable simply indicates that Scherner had a longstanding history of abusing children—it does not indicate that Scherner abused anyone other than the testifying witnesses.

Finally, Scherner argues that the trial court abused its discretion by allowing N.K. to testify that Scherner was mean to his wife, and to testify about an allegedly suppressed memory. The record does not support these claims of error.

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

Leach, J.

Schindler, C.J.