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NO. 62507-1

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

STATE OF WASHINGTON

Respondent,

Vs.

ROGER ALLEN SCHERNER

Appellant.

APPEAL FROM KING COUNTY SUPERIOR COURT
Judge Richard D. Eadie

REPLY OF APPELLANT

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I. STATEMENT OF THE CASE

In January of 2007 the King County Prosecutor's Office charged Roger Scherner with having molested his granddaughter, M.S. CP 1-2.¹ In March of 2008 Washington's legislature enacted RCW 10.58.090. The new statute amended Evidence Rule 404(b). Rule 404(b) had been previously adopted by the judicial branch pursuant to the grant of authority provided the judiciary through Article IV, §1 of Washington's Constitution. The new statute was inconsistent with the centuries old prohibition against deciding the guilt or innocence of the accused based on a past propensity to engage in prior "bad acts."²

At trial the prosecution did not present any physical evidence consistent with guilt. Trial witnesses, including M.S.'s mother, testified that, during and after the period when M.S. alleged she was being molested, M.S. did not exhibit any unusual behaviors, and she did not change her outward attitude towards the Appellant. RP 589-90. Further, when M.S. testified, she stated that she lied to the police, lied to the

¹ The charges were subsequently amended to three counts of Child Molestation in the First Degree. CP 130-132.

² See e.g. *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).

prosecutor, and lied to defense counsel when she provided information surrounding her allegations against the Appellant. RP 554-556.

After M.S. testified the prosecution presented evidence from four adult women who claimed that, between 20 and 40 years ago, they had been molested by the Appellant. Mr. Scherner was then convicted at trial and this appeal followed.

II. ARGUMENT

A. **The Trial Court Erred By Admitting Evidence of A Private Phone Conversation in Violation of the State Privacy Act:**

In addressing the erroneous admission by the trial court of a recorded phone conversation made in violation of RCW 9.73 et seq., Washington's Privacy Act, the Respondent does not contest the following facts: that the recorded conversation was subject to Washington's Privacy Act; that the recording was a private conversation within the meaning of the Act; that the recording was made without consent of both parties; and, that such conversations are generally excluded as a violation of the Act. See RCW 9.73.050. The Respondent argues instead that the Application requesting the authorization to record in this case was "minimally adequate" to meet the requirements of the Act, and, that even if the Application was insufficient, the error in admitting the improper recording should be considered harmless. That simply is not the case here.

As the Respondent correctly notes, before seeking an Order authorizing the invasion of a private phone conversation police “must *either try or give serious consideration* to other methods and must explain to the issuing judge why those other methods are inadequate in the particular case.” *State v. Manning*, 81 Wn. App. 714, 720-721, 915 P.2d 1162 (1996) (emphasis added). By contrast, in the Appellant’s case, police failed to perform any investigation of any kind between November 2005 and January 2007, when police applied for the Order to record. RP 8-1-08 p.48; see also CP 113-114.

State v. Johnson. 125 Wn.2d 443, 105 P.3d 85 (2005), presented by the Respondent as an example of an instance where police established they had tried “other methods”, is distinguishable from the Appellant’s case in several material respects. First, before seeking authorization to record, police in *Johnson* had information proving that the defendant had destroyed physical evidence in an intentional effort to cover up her crime. *Johnson* at 449, 456. By contrast, in Mr. Scherner’s case, police failed to make any effort to secure any physical evidence even though it was still accessible at the time they applied for the recording.³

³ Jolene Scherner still had the clothing M.S. was wearing at the time of the alleged assault. RP 571. Although substantial time had passed between the date of the crime and the date police sought their Order, the delay was the result of failure by police to take any action on the case between 2005 to 2007.

Second, before seeking authorization to record, police in *Johnson* interviewed the available witnesses, including a witness who was present when the crime occurred. However, in Mr. Scherner's case, before seeking authorization to record, police never bothered to interview the only two witnesses staying in the house with M.S. and Mr. Scherner before, during, and after the crimes alleged were to have occurred.⁴ Finally, in *Johnson*, before police sought judicial permission to record, police had *recently* contacted the defendant who promptly provided them with false information. *Johnson* at 449, 456. As noted above, by contrast police Scherner's case simply did nothing between November 2005 and January 2007, when they applied for the Order to record.⁵ See CP 113-114, RP 8-1-08 p.48. Failure of the police to make any effort to investigate the case during that period should not substitute for the Privacy Act's requirement that police prove that they tried or seriously considered other investigative methods before seeking a wire tap order.

⁴ See, CP 110-117. Joanne Scherner and Sue Tillotson during the time period M.S. alleges she was molested. RP 689-704, RP 719-775. Both witnesses testified at trial after being called by the prosecution. *Id.*

⁵ Likely aware from the record that the "repeated attempts to interview Scherner" Detective Robertson included in her Application (CP110) actually consisted of an officer driving to Mr. Scherner's neighborhood once three years earlier, combined with two phone messages another officer apparently left for Mr. Scherner two years before seeking the Order, with no evidence that Mr. Scherner received the messages or that the purpose of the calls was mentioned in either message, RP 8-1-08 p. 34-35, 35-36, the Respondent's pleading does not discuss Robertson's "repeated attempts" claim.

Relying on *State v. Lopez*, 70 Wn. App. 259, 856 P.2d (1993), the Respondent asserts that Detective Robertson's assertion that she "considered" placing an officer in position to overhear conversations that might occur during an in-person meeting between M.S. and Mr. Scherner were sufficient to meet Privacy Act requirements. However, before police in *Lopez* applied for the order authorizing their informant to wear a body wire during a drug transaction, the police actually observed clandestine meetings with their suspect, enabling them to establish that logistically it would be impossible to place someone in position to eavesdrop. *Id.* at 267. By contrast, police in Mr. Scherner's case simply declared that, due to the distance between Mr. Scherner's home and M.S.'s home, an in-person meeting would not be feasible. Brief of Respondent, p. 15, CP 32-33. The facts in Mr. Scherner's case established that, not only was it feasible,⁶ but after M.S. made public her allegations, Mr. Scherner's wife traveled to M.S.'s home and met with M.S. and relatives. RP 598-601. Mr. Scherner's wife was blind at the time. RP 721. If such a meeting was feasible for Mrs. Scherner, the assertion that a meeting was not also feasible for Mr. Scherner is simply not credible.

⁶ Mr. Scherner and M.S. were relatives. Their families spent substantial periods of time together. RP 565-568. It would not have been unusual for M.S. and Mr. Scherner to meet in person. *Id.*

Finally, the *Lopez* court authorized recording based in part on the unique character of drug transactions and the high degree of danger to an eavesdropper if discovered. *Lopez*, 70 Wn. App. at 262, 266. By contrast, danger to an eavesdropper was not a concern in Mr. Scherner's situation.

Even if police in Mr. Scherner's case had been able to prove that they "tried or seriously considered" less intrusive methods, the application presented to the trial court in this case was deficient because it failed to include "particular facts" establishing that "normal investigative procedures... have been tried and failed." See RCW 9.73.130(3)(f). Boilerplate assertions and the fact that the prosecution would benefit from a recorded statement by the accused wherein he incriminates himself are insufficient to justify issuance of an order to record. See, *State v. Manning*, 81 Wn. App. 714, 720-721, 915 P.2d 1162 (1996) (citation omitted), *rev den*, 130 Wn.2d 1010 (1996); *State v. Porter*, 98 Wn. App. 631, 636, 990 P.2d 460 (1999).

As the Respondent notes, the "normal investigative procedures" Detective Robertson alleged had been "tried and failed" consisted of interviewing M.S., M.S.'s mother, and four other named witnesses. CP 115. Contrary to the boilerplate assertion in Detective Robertson's application, the interviews of M.S. and her mother cannot accurately be characterized as "failed." The information gained during those interviews

was invaluable and formed the basis for the case against Mr. Scherner. It was likewise inaccurate to characterize the interviews of the four other witnesses named in Robertson's application as "failed." None of the four witnesses was even asked about the crime M.S. claimed had been committed against her, and none of them had any personal knowledge about M.S.'s claim. RP 8-1-08 p. 38. Based on Detective Robertson's failure to disclose those facts, the reviewing judge could not help but erroneously conclude that "normal investigative procedures" had been tried but had failed, thereby providing justification for the court to issue the Order.

Neither the Privacy Act nor case law authorizes the tape recording of a private conversation simply because such a recording would make securing a conviction easier. Further, police should not be allowed to substitute their failure to perform any investigation in this case between late 2005 and early 2007 for the requirements of the Privacy Act.

1. Admission of the Recorded Statement was not Harmless Error:

As the Respondent notes, there was no physical evidence tying Mr. Scherner to the crime alleged and, other than the story of M.S., there were

no witnesses connecting Mr. Scherner to the crime charged.⁷ Brief of Respondent, p. 45. In addition, M.S.'s credibility was questionable.⁸ Under those circumstances there is little question that the recorded statement wherein the accused appeared to incriminate himself made a substantial and material difference in the outcome of this trial.

The error resulting from the admission of the recorded statement in Mr. Scherner's trial was extremely prejudicial and, because admission of the recording was not "trivial, or formal, or merely academic" the error was not harmless. See, *State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947).

B. RCW 10.58.090 Violated the Ex Post Facto Clause:

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 amendment to ER 404(b), codified as RCW 10.58 is an *ex post facto* law.

⁷ The Respondent relies on *State v. Courtney*, 137 Wn. App. 376, 153 P.3d 238 (2007), rev den 163 Wn.2d 1010 (2208) in support off his "harmless error" contention. The recorded conversation in *Courtney* involved a custodial interrogation, not a "private" conversation" under the Act, *Id* at 373. Nonetheless, the *Courtney* court concluded that, because derivative physical evidence from the recording was admissible and linked the defendant to the crime, the physical evidence combined with the two eyewitnesses that testified to seeing the defendant commit the crime, rendered any error harmless.

⁸ At trial M.S. admitted she lied to prosecutors, lied to police, and lied to the defense about Mr. Scherner. RP 554-556.

The Respondent does not contest that RCW 10.58.090 applied retroactively to the Appellant. Nor does the Respondent contest that RCW 10.58.090 “altered the legal rules of evidence to receive less or different testimony than the law required when the offense at issue is alleged to have occurred.” Instead, the Respondent asserts that, because the new law “did not actually increase punishment nor alter the degree of proof essential for a conviction,” no *ex post facto* violation occurred. Brief of Respondent p. 27. However, the Respondent’s proposed limitation would erode the foundation of Ex Post Facto law - the four category formulation⁹ enunciated more than two centuries ago in *Calder v. Bull*, 3 U.S. (3 Dall. 386) (1798) and followed ever since. See, *State v. Edwards*, 104 Wn.2d 63, 70-71, 701 P.2d 508 (1985).

The U.S. Supreme Court has declared that:

A law reducing the quantum of evidence required to convict an offender is as grossly unfair as, say, retrospectively eliminating an element of the offense, increasing the punishment for an existing offense, or lowering the burden of proof”... In each instance the government refuses, after the fact, to play by its own rules, altering them in a way that is an advantage only to the State, to facilitate an easier conviction.

⁹ Section RCW 10.58.090 violates the 4th *Calder* category of *ex post facto* law because it “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 v. Bull*, 3 U.S. (3 Dall.) 386, 390, 1 L. Ed. 648 (1798).

Carmell v. Texas, 529, 513, 120 S. Ct. 1620, 1632-33, 146, L. Ed. 2d 577 (2000).

At trial, a defendant cannot legally be convicted of a crime unless the prosecution presents that quantum of evidence necessary to prove guilt beyond a reasonable doubt. *Victor v. Nebraska*, 511 U.S. 1, 5, 114 S. Ct. 1239 (1994). The quantum of evidence necessary to meet the “beyond a reasonable doubt” threshold is not and has never been defined by law as a specific numerical assignment. Even so, research has long confirmed the common sense notion that the evidentiary threshold jurors deem necessary to convict a defendant is lessened when jurors learn of a defendant’s prior criminal activity.¹⁰

In Mr. Scherner’s trial, jurors were not simply informed that Mr. Scherner had engaged in prior criminal activity with minors, jurors were free to consider that information when determining whether the prosecutor’s evidence exceeded the “proof beyond a reasonable doubt”

¹⁰ 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): See also, Edward J. Imwinkelried, *The Use of Evidence of an Accused’s Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 Ohio St. L.J. 575, 581-82 (1990); Kalven Jr. and Hans Zeisel, *THE AMERICAN JURY* (Univ. Of Chicago Press, 1970 Ed.) at.396-397.

threshold. As noted above, research confirms that when presented with evidence of a defendant's prior criminal activity, jurors lessen or reduce the quantum of evidentiary necessary in order for them to convict. Because RCW 10.58.090 authorized jurors at Mr. Scherner's trial to consider propensity evidence when determining whether the evidentiary threshold necessary to convict had been met, a purpose prohibited at the time the crimes at issue occurred, RCW 10.58.090 violated the constitutional prohibition against *ex post facto* laws. Accordingly, Mr. Scherner's conviction should be reversed.

C. The Legislative Amendment of ER 404(b) Constitutes a Violation of the Separation of Powers Doctrine:¹¹

Article IV, §1 of Washington's Constitution grants the Supreme Court the inherent power to adopt rules that govern the "practice and procedure pertaining to the essential mechanical operation of the courts by which substantive law and rights are effectuated." *State v. Smith*, 84 Wn.2d 498, 501, 527 P.2d 627 (1974). By enacting RWC 2.04.190, the

¹¹ The Separation of Powers Doctrine is violated "when the activity of one branch of government threatens the independence or integrity or invades the prerogatives of another. See, *State v. Ramos*, 149 Wn. App 266, 271, 202 P.3d 383 (2009) (citations omitted).

legislature itself affirmed the constitutional grant of authority that allows the judicial branch to adopt rules of procedure governing the courts.¹²

Although there have been previous occasions where the judiciary has allowed legislation to supplement of the Rules of Evidence, none of those enactments have ever been upheld merely because they were enacted by the legislature. Instead, it is the judiciary, not the legislature, that remains the ultimate arbiter of whether or not a legislative offering to alter a court rule will be allowed to stand. *State v. Ryan*, 103 Wn.2d, 165, 178, 691 P.2d 197 (1984).¹³ *State v. Ryan*, relied on by the Respondent, illustrates that point.

In *Ryan*, the legislature enacted RCW 9A.44.120, amending Title VIII of the Evidence Code, the section of the Code regulating hearsay. In declining to strike the enactment, the *Ryan* court pointed out that the hearsay section of the Code specifically contemplated that amendment to

¹² ..."[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).

¹³ See also, *State v. Pollard*, 66 Wn. App.779, 784, 834 P.2d 91 (1992) (determining that ER 1101 prevails over conflicting statute); *State v. Templeton*, 148 Wn.2d 193, 217 (2002) (procedural rule of the court regarding right to counsel supersedes conflicting legislation); *State v. Long*, 113 Wn.2d 266, 272, 778 P.2d 1027 (1989) (court allowed legislative enactment affecting admissibility of DUI evidence because court found no reason to disagree and noted that it is the legislature that enacts those grants of authority regarding a citizens to refuse the breath test in DUI matters).

the hearsay rules may be made by “either statute or the court rule”. *State v. Ryan*, 103 Wn. 165, 178, 691 P.2d 197 (1984); see ER 802. By contrast, Title IV of the Evidence Code, the code section that encompasses relevance and which is at issue here, contains no such language.

Further, unlike the amendment in *Ryan*, Washington’s judiciary specifically opposed passing RCW 10.58.090 and declared that, if ER 404(b) was to be amended, it should be amended through the regular court rule making process. See, Senate Bill Report, SB 6933, p. 3.¹⁴

The Respondent alternatively argues that, even if RCW 10.58.090 infringed on the rule making authority of the judiciary, court rule and statutory provision should be harmonized when possible and both should be given meaning. Brief of Respondent, p. 31, citing to *State v. Ryan* 103 Wn.2d at 178. However, RCW 10.58.090, cannot be harmonized with the plain language of ER 404(b). Evidence Rule 404(b) provides “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” and reflects the justice systems historical prohibition against determining guilt or

¹⁴ ...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 SB 6933. P. 3.

innocence based upon the defendant's past history.¹⁵ By contrast, RCW 10.58.090 provides that such evidence "*is admissible*, notwithstanding Evidence Rule 404(b)."¹⁶

Because the legislative amendment to ER 404(b) violates separation of powers, Mr. Scherner's conviction should be reversed.¹⁷

D. RCW 10.58.090 Violates the Due Process Clause:

An individual's liberty interest and right to a fair and unbiased trial is a fundamental part of due process. *United States v. Salerno*, 481 U.S.

¹⁵ 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..)

¹⁶ 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.

¹⁷ Relying on *LaHue v. Keystone Inv. Co.*, 6 Wn. App. 765, 496 P.2d 343 (1972) and *State v. Stark*, 66 Wn. App. 423, 438, 832 P.2d 109 (1992), the Respondent also argues that whether a legislatively enacted court rule supersedes a court rule adopted by the judiciary depends on which of the two was enacted last. Brief of Respondent, fn 12. Neither case supports Respondent's proposition. In *LaHue*, both the rule and statute at issue had the same effective date. *Id.* at 776. Regardless, the *LaHue* court noted that the distinction was irrelevant and held the rule adopted by the judicially superior to the legislative enactment because RCW 2.04.200, plainly declared "that all laws in conflict with an authorized court rule shall have no effect". Further, the issue in the *Stark* case involved two statutes not a conflict between an authorized court rule and a statute. *Id.* at 437-438. Cases that actually have addressed the question have ruled that a more general court rule governing operation of the courts will supersede even a more specific statute on the same topic regardless of the date they were enacted. See *State v. Thomas*, 121 Wn.2d 504, 512 (1993) (declaring CrR 2.3, a general court rule regarding search warrants, as superior to RCW 69.50.509, the more specific legislative enactment on the subject).

739, 750, 95 L.Ed.2d 697, 107 S.Ct. 2095 (1987). U.S. Const. Amends¹⁸ 5, 14; Wash. Const. Art.1, §3. 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).

Arguing that case law from other jurisdictions establishes that RCW 10.58.090 does not violate due process, the Respondent cites to nine cases,¹⁹ relying primarily on *U.S. v. LeMay*, 260 F.3d 1018 (9th Cir. 2001) and *U.S. v. Castillo*, 140 F.3d 874 (10th Cir. 1998) to support his position. Brief of Respondent, pp. 36-38. However, *none* of the cases relied on by the Respondent involved a statutory scheme that matches RCW 10.58.090, a scheme that mandates that the trial judge consider the "necessity" to a party when deciding whether to admit propensity evidence. Compare FRE 414 with RCW 10.58.090(6)(e). In light of the legislature's stated

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.

¹⁹ *U.S. v. Lemay*, 260, F.3d 1018 (9th Cir. 2001); *U.S. v. Castillo*, 140 F.3d 874 (10th Cir. 1998); *U.S. v. Mound*, 149 F.3d 799 (8th Cir. 1998); *U.S. v. Enjady*, 134 F.3d 1427 (10th Cir. 1998); *People v. Falsetta*, 21 Cal. 4th 903, 986 P.2d 182 (1999); *McLean v. State*, 934 So.2d 1248 (Fla. 2006); *People v. Beatty*, 377 Ill. App. 3d 861, 880 N.E. 237 (Ill. Ct. App. 2007); *State v. Reyes*, 744 N.W.2d 95 (Iowa 2008); *Horn v. State*, 204 P.3d 27 (Okla. Crim. App. 2009).

purpose for enacting RCW 10.58.090²⁰, the “necessity” referenced in RCW 10.58.090 is unquestionably the “necessity” of the evidence to the prosecutor in order to convict the accused. The Respondent does not contest that fact.²¹

While, as the Respondent notes, there is nothing improper with a court considering the need for certain evidence before admitting it (Brief of Respondent, fn. 19), Due Process is violated when the court is required to consider, as part of determining whether certain evidence is admissible, whether the government needs that evidence in order to win.

Because the legislative amendment to ER 404(b), contained in RCW 10.58.090, violates the Due Process Clause of both State and Federal Constitutions, Mr. Scherner’s conviction in this case should be reversed.

²⁰ “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.

²¹ See Brief of Respondent, p.45, wherein the Respondent discusses the Scherner trial courts consideration of the necessity of the propensity evidence to the prosecution in order for the prosecution to secure a conviction.

E. The Uncharged Propensity Evidence Was Not Admissible as Part of a “Common Scheme or Plan” Under ER 404(b):

The trial court committed error by ruling that the propensity evidence the prosecutor offered against Mr. Scherner pursuant to RCW 10.58.090, was likewise admissible under the “common scheme or plan” exception to ER 404(b).

The trial court must always begin with the presumption that evidence of “prior bad acts” is inadmissible. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003); see also *State v. Fisher*, 165 Wn.2d 727, 744, 202 P.3d 937 (2009). In order to admit evidence of “common scheme or plan,” 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).

In an effort to demonstrate substantial similarity between the prior bad acts alleged against Mr. Scherner and the acts alleged by M.S., the Respondent relies on *DeVincentis* and *Lough*. However, the court in *DeVincentis* concluded “substantial similarity” existed in that case after noting that the defendant, an adult male, engaged in specific grooming behavior that included walking around his house in front of each of his victims while wearing only a G-string. *DeVincentis*, 150 Wn.2d at 16. In *Lough* the defendant surreptitiously put some type of drug in each of his victim’s drinks before sexually assaulting them when they were incapacitated. *State v. Lough*, 125 Wn.2d at 864-65. By contrast, when addressing whether the requisite substantial similarity exists between M.S. and the propensity witnesses who testified they were sexually assaulted 20 to 40 years ago, the Respondent notes only that all were young girls, some were relatives, some were not, that some were molested while staying at Mr. Scherner’s house while some were molested when traveling with their families and Mr. Scherner. Brief of Respondent, p. 49.

The degree of substantial similarity necessary to establish “common scheme or plan” is lacking in this case. Testimony from the four propensity witnesses offered against Mr. Scherner at trial was not admissible under ER 404(b).

1. The Trial Court Erred by Refusing to Give a 404(b) Limiting Instruction:

The introduction of evidence of “prior wrongs” requires that, if the trial court is asked to give an instruction informing the jury as to the limited purpose for which “prior wrongs” evidence may be considered, the instruction must be given. ER 105. *State v. Aaron*, 57 Wn. 277, 281, 787 P.2d 949 (1990) (once requested, limiting instruction is mandatory). Here, the defense did request that the trial court give jurors a limiting instruction regarding ER 404(b). RP 611-612. However, the trial court had already determined that it would give jurors the instruction proposed by the prosecutor derived from cases involving the admission of prior acts of sexual misconduct under FRE 414. That instruction, which addressed only issues that might arise under RCW 10.58.090 was insufficient under ER 404(b) to limit consideration of prior bad act evidence and, in fact, advised jurors that they could use evidence of Mr. Scherner’s uncharged prior wrongs for any purpose they saw fit. RP 612.²² Further, even after the court announced it would not present the defendant’s proposed ER 404(b) limiting instruction, reasoning jurors would become confused by the phrase “common scheme or plan,” the defense offered to modify their

²² “In a criminal case in which the defendant is accused of an offense of a 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 matters to which it is relevant... RP 617-618.

instruction to ensure jurors received an ER 404(b) limiting instruction. RP 614. Despite the defense's request, the trial court refused to present the jury with any instruction limiting the use for which jurors could consider the "prior wrongs" evidence. The court's failure to present any 404(b) limiting instruction was error²³. See ER 105.

F. Regardless of the Constitutional Flaws of RCW 10.58.090, The Trial Court Committed Error By Failing to Properly Weigh and Consider Standards Created to Prevent Unfairly Prejudicial Evidence From Being Admitted at Trial:

Section RCW 10.58.090(6),²⁴ a new version of ER 403 applicable only to cases involving allegations of prior sex abuse by the accused, requires the trial court consider and evaluate eight enumerated factors before admitting propensity evidence against a defendant charged with a sex crime. See, RCW 10.58.090(6). Contrary to the Respondent's assertions, the trial court in Mr. Scherner's case failed to properly weigh or consider each of those factors. The trial court's failure resulted in the improper admission of propensity evidence against Mr. Scherner at trial.

²³ Because defense counsel moved during pre-trial to exclude the prior misconduct evidence at issue, even a failure to request a limiting instruction would not waive any claimed error regarding subsequent admission of ER 404(b) evidence. See, *State v. Fisher*, 165 Wn.2d 727, fn 4, 202 P.3d 937 (2009).

²⁴ "When evaluating whether evidence of the defendant's commission of another sexual offense or offenses should be excluded pursuant to ER 403, the trial judge *shall* consider the following factors:" RCW 10.58.090(6) (emphasis added).

For example, RCW 10.58.090(6)(b) requires the trial court to consider “the closeness in time of the prior acts to the acts charged.” In Mr. Scherner’s case, the 20 to 40 year period between the prior acts and the act charged, while not alone dispositive, weighed against admission of the propensity evidence. However, rather than apply the statutorily mandated standard, the trial court substituted a standard of its own creation, “persistence by the accused”.²⁵ RCW 10.58.090(6)(b). The Respondent, likewise, asks this court to apply the trial court’s “persistence” standard as a substitute for both the “closeness in time” and “frequency of prior acts” statutory mandates. Brief of Respondent, p. 43-44. This court should decline to do so.

In addition, despite the requirement listed in RCW 10.58.090(6)(d), the trial court failed to consider and weigh the existence of “intervening circumstance.” After declaring it did not know exactly what the legislature meant by “intervening circumstance,”²⁶ the trial court failed to recognize unrefuted testimony that Mr. Scherner attended sexual

²⁵ “They may not have been one after the other, but there was a persistence. I am not exactly sure how the closeness of time of the prior acts to the act charged should be considered. I am more affected by the persistence of similar acts.” RP109-110.

²⁶ “The presence or lack of intervening circumstances. You tell me exactly what that means.” RP 110. “I am not sure exactly what the legislature had in mind on that, but as I take it, I think they are talking about a big hole between one act and another, what was going on, in a very long period of time where nothing happens that was going on.” RP110-111.

deviancy counseling in the late 1980s, and that following that counseling, there were no allegations of wrongdoing until M.S. alleges she was molested well more than a decade later. (RP 773-74, RP 968-70.) The Respondent, likewise, fails to address Mr. Scherner's treatment as an intervening circumstance.²⁷

The trial court in Mr. Scherner's case did not comply with the statutory mandate contained in RCW 10.58.090(6). The trial court failed to consider and weigh all of the enumerated factors in RCW 10.58.090. In addition, the trial court replaced statutorily mandated standards with standards of the court's own creation.

Failure by the trial court to consider and properly weigh all of the factors mandated by RCW 10.58.090(6) resulted in the admission of unfairly prejudicial propensity evidence against Mr. Scherner at trial. Accordingly, regardless of the constitutionality of RCW 10.58.090, the trial court committed error by admitting the propensity evidence proffered by the prosecution during Mr. Scherner's trial.

²⁷ Relying on *U.S. v. Guidry*, 456 F. 3d 493 (5th Cir. 2006), the Respondent asserts that the fact that the accused was not convicted of prior acts is not dispositive. The *Guidry* case analyzes FRE 414, a statute that, unlike RCW 10.58.090(6), does not mandate that the court consider whether any prior act resulted in conviction. While none of the eight statutory factors listed in RCW 10.58.090(6) is, standing alone, dispositive, the fact that Mr. Scherner was never convicted (or charged) weighs against admitting the propensity evidence.

G. Mr. Scherner's Right to a Fair Trial Was Violated By Juror Misconduct and the Trial Court's Failure to Investigate:

Due process has long required that every defendant receive a fair trial by a panel of impartial jurors who are free of improper extraneous evidence. See, *Remmer v. United States*, 347 U.S. 227, 74 S. Ct. 450, 98 L. Ed. 654 (1954); see also, *State v. Rinkes*, 70 Wn.2d 854, 425 P.2d 658 (1967) (jury misconduct where jurors were exposed to newspaper article during deliberations). In Mr. Scherner's case, jurors were exposed to improper extraneous evidence during trial when a juror brought a newspaper article about the case into the jury room, thereby causing another juror to "freak out".

The Respondent, relying on *State v. Valenzuela*, 75 Wn.2d 876, 454 P.2d 199 (1969), asserts that, because the defense did not move for a mistrial after the misconduct came to light, the issue is waived. However, *Valenzuela* declares that the issue is waived only if a party fails to move for mistrial or fails to otherwise preserve the objection. *Id.* at 881. In Mr. Scherner's case, the issue was preserved after the court refused defense counsel's request to further investigate the misconduct by asking jurors what impressions they formed from seeing the offending article. RP 935. At that point, requiring defense counsel to move for mistrial in order to preserve the issue was no more necessary than requiring defense counsel

to move for a mistrial after the court had denied any of the other requests for relief made by defense counsel before and during trial.

Arguing alternatively that, if error was preserved, the moving party is responsible to show misconduct occurred, the Respondent relies on *State v. Hawkins*, 72 Wn.2d 565, 434 P.2d 584 (1967). *Hawkins* involved a trial where no evidence any juror misconduct came to light until after the trial concluded. *Id.* at 565-566. However, in Mr. Scherner's case there was need to establish that jurors had been exposed to extraneous evidence, that information was brought to the court's attention by defense counsel during trial. RP 810, 935-938. Once jurors in Mr. Scherner's case confirmed that they had been exposed to extraneous evidence, and that a juror "freaked out" in the jury room after seeing the newspaper article brought into the jury room by another juror, a misconduct event had been established. At that point, prejudice is presumed and it is the prosecution that has the heavy burden of disproving prejudice beyond a reasonable doubt.²⁸ Further, any question must be resolved against the verdict. See, *State v. Cummings*, 31 Wn. App. 427, 430, 642 P.2d 415 (1982) (citations omitted).

²⁸ *State v. Murphy*, 44 Wn. App. 290, 296, 721 P.2d 30, review denied, 107 Wn.2d 1002 (1986); *Remmer v. United States*, 347 U.S. 227, 74 S. Ct. 450, 98 L. Ed. 654 (1954).

Mr. Scherner was denied the right to have a jury free of extraneous outside influence decide his case. Further, the trial court was obligated to investigate allegations of extraneous influence sufficiently to assure that the defendant's constitutional rights had not been violated. See, *U.S. v. Rigsby*, 45 F.3d. 120, 124-125 (6th Cir. 1995). That did not occur here. Accordingly, Mr. Scherner's conviction should be reversed.

III. CONCLUSION

For the reasons stated herein and in the Brief of Appellant, previously filed with this court, the Appellant requests the conviction previously entered in this case be reversed.

DATED this 17th day of July, 2009.



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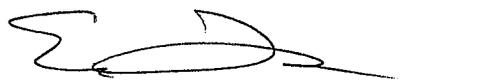
I, Eric W. Lindell, certify that on the 20th day of July, 2009, I caused to be delivered, via Sting Ray Legal Messenger, a copy of the Reply of Appellant in the above-referenced matter, upon the following persons and/or parties:

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And Further, that a copy of Reply of Appellant was sent via U.S. mail to:

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ERIC W. LINDELL

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