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NO. 62507-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ROGER ALLEN SCHERNER,

Appellant.

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2009 JUN 18 PM 4:03

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD EADIE

**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**<sup>1</sup>

1. Whether the trial court properly admitted defendant Roger Scherner's taped telephone conversation with M.S.

2. Whether Scherner has failed to establish beyond a reasonable doubt that RCW 10.58.090 is unconstitutional.

a. Whether the application of RCW 10.58.090 to Scherner's case did not violate the ex post facto clause.

b. Whether the legislature's enactment of RCW 10.58.090 did not violate the separation of powers.

c. Whether Scherner has failed to establish that RCW 10.58.090 violates the equal protection clause.

d. Whether Scherner has failed to establish that RCW 10.58.090 violates the due process clause.

3. Whether the trial court acted within its discretion in admitting evidence of Scherner's previous acts of child molestation under RCW 10.58.090 and ER 403.

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<sup>1</sup> The State addresses the issues raised by Scherner in the order in which they arose at trial. The basis for the order in which Scherner discusses these issues in his opening brief is not readily apparent.

4. Whether the trial court acted within its discretion in finding that the evidence of Scherner's previous acts of child molestation was admissible under ER 404(b).

5. Whether the trial court properly allowed the State to call Scherner's wife to testify at trial.

6. Whether Scherner has failed to establish that juror misconduct justifies a new trial.

**B. STATEMENT OF THE CASE**

**1. SCHERNER'S MOLESTATION OF M.S.**

M.S. was born on June 3, 1994. RP 460.<sup>2</sup> She grew up in Napa, California with her parents and two siblings. RP 564-65.

Scherner is the paternal grandfather of M.S. RP 462.

During times relevant to the charges, he and his wife Joanne lived in Monterey, California, about two and a half hours away from M.S. RP 462-64, 564.

When M.S. was growing up, she frequently spent time with her grandparents and would occasionally spend the night at their house. RP 463, 565-68. Beginning when M.S. was five or six

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<sup>2</sup> The report of proceedings consists of 10 volumes. With the exception of two volumes, the pages are sequentially numbered throughout the transcripts and are referred to as "RP." The other two volumes, dated August 1, 2008 and August 12, 2008, are referred to as RP(8/1/08) and RP(8/12/08), respectively.

years old, Scherner began molesting her. When M.S. spent the night at Scherner's house, he would enter her bedroom late at night, lie in her bed and try to take her nightgown off. RP 466-67. He would play with the crotch of her underwear and rub her vagina. RP 467-72. In all, M.S. estimated that Scherner did this 20 times or more. RP 471. On a few occasions, Scherner also "French kissed" M.S. RP 498.

In the summer of 2001 or 2002, when M.S. was seven or eight years old, Scherner suggested that she join him and her grandmother on a trip to Seattle as a "birthday present." RP 570; Ex. 1 and 2. They drove a car up the coast, staying at hotels along the way, and then spent several nights at the house of Scherner's sister ("Aunt Sue") in Bellevue. RP 474, 571-72, 690-98. M.S. slept in a room with her grandmother, while Scherner slept on a pull-out coach in the living room. RP 479-81. Scherner suggested to M.S. that if her grandmother started to snore, she could sleep with him. RP 481.

One night, M.S. got out of bed and went downstairs to get a drink of water. RP 481. Scherner approached her and said, "You can just come and lay down with me for a little bit. It's not going to take long." RP 482. After M.S. lay down next to him, he pushed up

her nightgown. RP 482-84. Scherner put his hands on her stomach and moved his hand down to her crotch area, stroking in an up and down motion. RP 483. When he started to put his hands under her underpants, M.S. ran upstairs. RP 483-84.

A few nights later, M.S. was watching a movie, and everyone else but Scherner had gone to bed. RP 486. After the movie was over and M.S. got up to leave, Scherner asked her to lie down next to him. RP 486. After she did so, Scherner pulled up her nightgown, placed his fingers in her underwear, and moved his fingers along her vagina. RP 487-88.

On another night, when M.S. came out of the bathroom, Scherner was sitting on his bed and asked her to lie next to him. M.S. responded that she did not want to, but Scherner insisted, stating that "[i]t will help me sleep faster." RP 490. After M.S. complied, Scherner took her nightgown off and put his hand over her crotch. RP 491-93. He also took M.S.'s hand and moved it to his penis. RP 493-94. After about 10 minutes, he released M.S. and she went to her bedroom. RP 493-95.

## **2. THE DISCLOSURE OF THE ABUSE.**

M.S. told no one about the abuse; she was embarrassed and felt that it might be her fault. RP 485, 495. Finally, in May of

2003, M.S.'s friend, Emily Cagigas, asked her if anyone had ever kissed her, and M.S. responded that "Grandpa Roger" sometimes kissed her and stuck his tongue in her mouth. RP 496-98. After Emily's mother informed M.S.'s mother of this disclosure, M.S.'s mother confronted M.S. about what she had heard, and M.S. broke down and cried. RP 499-500, 538, 573-76. M.S. acknowledged that it was true, but did not tell her mother the full details because she was too embarrassed. RP 499-500, 508, 575-76.

On May 29, 2003, child interviewer Susan Gleason spoke with M.S. at the Child Advocacy Center in Salinas, California. RP 410-13, 509; Ex. 1, 2 and 3. M.S. reported that when she stayed at Scherner's house overnight, he came into her bedroom at night and tried to "French kiss" her. Ex. 1; Ex 2 at 23-30. She also reported that at Aunt Sue's house in Bellevue, Scherner "tried it again." Ex. 1; Ex 2 at 31-34. When pressed on the details, she responded, "I don't really know this. I forgot all about it." Ex. 1; Ex 2 at 35. M.S. ultimately disclosed that when she lay down next to Scherner, he touched her on her private parts. Ex. 1; Ex 2 at 36.

Afterwards, M.S. told her mother that she had not told Gleason everything, and another interview was arranged. RP 419-20, 510, 544-46, 579-80. During this interview, M.S. told Gleason

that on the trip to Seattle, Scherner touched and rubbed her right above where she peed. Ex. 4; Ex. 5 at 6-12. She further disclosed that he tried to make her touch him, but she pulled away. Ex. 4; Ex. 5 at 13.

### **3. SCHERNER'S OTHER VICTIMS.**

M.S. was not Scherner's only victim. Over the decades, he molested his nieces, granddaughters and the daughters of friends.

Jobbie Spillane is Scherner's niece. RP 904-05. When she was growing up in the 1970s, she frequently spent time at Scherner's house. RP 906-07. Beginning when she was five years old, Scherner began molesting her. RP 908. The first time, he sat Spillane down at the end of his bed, took off her panties, and used his fingers to masturbate her. He said, "look what you have done," and showed her that he had an erection. RP 908-09. That night, he also performed oral sex on her. RP 909.

Scherner would molest Spillane whenever she stayed overnight; even when she did not sleep over, he would molest her if he had the opportunity. RP 911. When he came into her room, he would give her chocolate to eat in order to keep her quiet. RP 912.

When Spillane was ten years old, she told her sister and they decided to tell her parents. RP 914. Her parents did not

contact the police; instead, they continued to visit Scherner and he continued to molest her. RP 914. Finally, when Spillane was 19 years old, she contacted the police, but charges were never filed. RP 915-16. In May of 2003, she learned from M.S.'s mother that Scherner had molested M.S., and Spillane then shared what Scherner had done to her. RP 928.

Shaun Oducado is Scherner's niece. RP 676-77. In the early 1970s when she was 13 years old, Oducado spent several nights at Scherner's house. RP 677-80. One night, Scherner entered her room, and began touching her nipples. RP 681. She asked him to stop, and he responded that she should be quiet because she was going to wake everyone up. RP 681. He proceeded to perform oral sex on Oducado. RP 681. The next day, her nipples were raw and bleeding. RP 682. She did not tell anyone for nearly a decade until she heard that Scherner had molested Spillane. RP 682-83.<sup>3</sup>

Suzanne Williamson's parents were friends with Scherner, and the two families went on ski trips to the Lake Tahoe area. RP 656-59. During one trip in the mid-1970s when Williamson was

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<sup>3</sup> At the time of trial in this case, Oducado had not spoken with Scherner's other victims about the abuse. RP 686-87.

13 years old, Scherner approached her at night after everyone had gone to bed. RP 659-63. He put his hands in her private area and rubbed for several minutes. RP 663-64. She did not tell her parents, explaining that she was scared and wanted to believe that it had not happened. RP 666.<sup>4</sup>

Naseema Kahn is Scherner's granddaughter and M.S.'s older cousin. RP 619. In the 1980s, when she was six or seven years old, she traveled with her grandparents from California to Washington. RP 622-23, 634. While staying in a motel room, Scherner told her to take her underwear off and then performed oral sex on her while she pretended to be asleep. RP 623-24. Approximately a year later, Kahn went to Disneyland with her grandparents. At night in the hotel room, Scherner performed oral sex on her. RP 627-28.

After M.S. disclosed that Scherner had molested her, there was a family meeting with M.S., M.S.'s mother, Naseema Kahn, Kahn's mother and Scherner's wife Joanne Scherner. RP 511, 539-40, 632. The purpose of the meeting was to provide support for M.S. RP 513, 616-17. At the meeting, M.S. learned that

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<sup>4</sup> Williamson did not know any of Scherner's other victims. RP 671.

Scherner had done something to Kahn, but the details were not discussed. RP 513, 632.

#### **4. THE POLICE INVESTIGATION.**

After M.S.'s initial disclosure, her mother contacted Child Protective Services, and the Monterey Sheriff's Department began investigating the case. RP 576-77. In light of the disclosures concerning the molestation at Aunt Sue's house, the Bellevue Police Department later became involved.

On January 29, 2007, M.S. called Scherner. RP 516. As described more fully below, the Bellevue Police arranged to record the call. RP 516, 585-86, 784-92. During their conversation, M.S. told Scherner that she was seeing a counselor and needed to face her fears.

M.S.: ...I just want you to tell me why you did this to me? Why did you touch me?

Scherner: Well, I'm afraid that there's two things that happened. Um, one I had too many drinks and I really didn't realize what was happening, and uh two, I just felt for very strongly for you[.]. I like you very much, love you and uh I guess I thought was doing the right thing instead of the wrong thing.

....

M.S. 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? I'm too young, I was too young for that.

Scherner: Well uh all I got to say, all we can do is, all I can do is say I am sorry I did it. I wish I hadn't and I thought I had explained to you why I probably did it. I really had way too much to drink and I wasn't myself.... I am sorry that it happened and I wish it didn't happen, but there is nothing that I can do to repair it, all I can do is say um understand that I made a mistake. And I am very very sorry that it happened....

Ex. 32; Ex. 33 at 2-3. When M.S. asked Scherner if Aunt Sue knew about it, Scherner responded that she did not and that "[t]his is not something that you don't [sic] go telling everyone about it. It is very embarrassing...." Ex. 32; Ex. 33 at 4. He told her that "we... would have to be as quiet about it as you can because it's just so embarrassing, so unnatural and so unreal." Ex. 32; Ex. 33 at 4. As the call was ending, Scherner acknowledged that "[i]t was a terrible thing for me to do." Ex. 32; Ex. 33 at 5.

On January 31, 2007, detectives from the Monterey County and the City of Bellevue contacted Scherner while he was playing golf. RP 637-39, 817-19. When they requested to speak with him in private, Scherner asked if it could wait and suggested making an appointment. RP 819-20. He ultimately agreed to talk with the police in the boardroom of the golf course clubhouse. RP 640-43, 821-22.

Scherner discussed his trip to Seattle with M.S. RP 823-28. Scherner claimed that M.S. had come downstairs and wanted to get in bed with him. RP 829. He stated that when she was in his bed, he may have pushed on her bottom. RP 829-30. When a detective confronted Scherner about M.S.'s account that he had touched her vagina and breast, he replied, "I don't recall touching her," but stated that "anything is possible but I don't believe I did." RP 835, 838. Scherner admitted to kissing M.S. because she had asked about "French kissing," though he denied using his tongue during the kiss. RP 834, 837. He recalled that M.S. wore tight underwear to bed. RP 841. When a detective told Scherner that they had recorded his telephone conversation with M.S., Scherner insisted that during the phone call he had not disputed that he had touched M.S. because he wanted to make her feel better. RP 844.

Scherner admitted that he had touched his granddaughter Naseema Kahn's breast and vagina. RP 843. He acknowledged that he had been accused before of touching girls and he went to Kaiser Hospital "for this type of activity." RP 832.

**5. THE CRIMINAL CHARGES, SCHERNER'S FLIGHT, AND THE TRIAL.**

On January 30, 2007, the State charged Scherner with two counts of first-degree rape of a child and one count of first-degree child molestation. CP 1-2. The charges were later amended to three counts of first-degree child molestation. CP 130-32. On the scheduled trial date, February 28, 2008, Scherner failed to appear and an arrest warrant was issued. RP 859; CP 246-47.

Law enforcement quickly determined that Scherner had fled to Panama City, Florida. RP 861-62. On March 6, 2008, a United States Marshal and the local police conducted a traffic stop of Scherner in Florida. RP 449-55, 777-79. During the stop, Scherner denied having any identification, lied about his age and insisted his name was "Roy Worth." RP 456. After determining his true identity the police arrested Scherner. RP 457-58. Inside Scherner's vehicle, the police found, among other things, over \$14,000 in cash and a wig. RP 864-69. Scherner had purchased his vehicle and rented an apartment using the name "Roy Worth." RP 888-90.

The matter went to trial in August of 2008. Scherner testified and denied molesting M.S. RP 947. He claimed that he had received treatment at Kaiser Hospital in the late 1980s because of

“problems with accusations” by granddaughter Naseema Kahn. RP 948, 970-71. He ultimately acknowledged that he had “a very intermittent problem with sexual abuse with children” and that he “occasionally” acted out on his sexual desires for children. RP 974-75. After cross-examination, he admitted that he had molested Kahn two or three times at his house. RP 977-78. However, he claimed that the treatment had cured him of his sexual desire for children. RP 979.

Scherner admitted fleeing to Florida, claiming that he was concerned that his 103-year-old mother would have a stroke if she heard about the trial. RP 954-55.

The jury found Scherner guilty as charged. CP 248-50. The court imposed standard range sentences. CP 236-45. This appeal follows.

**C. ARGUMENT**

**1. THE COURT PROPERLY ADMITTED THE RECORDING OF THE TELEPHONE CONVERSATION.**

Scherner contends that the trial court should have excluded his taped telephone conversation with M.S., claiming that the application for judicial authorization to record the conversation did not establish that normal investigative techniques had been tried

and failed. However, the police are not required to exhaust all alternatives to recording; instead, they must show that they seriously considered alternative techniques and explain why these techniques would likely be inadequate. The application did so in this case, and Scherner's claim should be rejected.

a. Relevant Facts

In January of 2007, Bellevue Detective Robertson submitted an application for a judicial order authorizing the interception and recording of an anticipated telephone conversation between M.S. and Scherner. CP 27-34. The application described the evidence that Scherner had molested M.S. and other family members and neighbors. CP 28-31.

The application also detailed past investigative efforts to speak with Scherner, including the fact that in November of 2005, a Bellevue detective left several messages on Scherner's telephone answering machine, but Scherner did not return her calls. CP 30.

The application further stated:

Normal investigative techniques have been tried and failed. These include interviews of MS, Jolene Scherner, Heidi Mayer, Jonathan Mayer, Jobie Spillane, Mary Olander and repeated attempts to interview Roger Scherner.<sup>[5]</sup> Previous investigations have ended inconclusively. I know of no other way to

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<sup>5</sup> The Mayers, Spillane, and Olander were other victims of child molestation.

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. Only a conversation between MS and Scherner can establish what occurred in 2001 and 2002. Because of the distance between Napa and Carmel (about 160 miles), it is not feasible to arrange a face-to-face conversation, and it would not be feasible to arrange for a detective to listen in, because any such conversation would likely be in a private place. Only a recorded conversation between MS and Scherner will provide definitive evidence showing what happened between MS and Scherner in 2001 and 2002. The actual content of the conversation, and the tone, inflection, and volume of Scherner's own voice, because they convey meaning outside that contained in the spoken words themselves, will be critical to a determination of Scherner's intended meaning as he discusses the above described crimes with MS.

CP 32-33.

On January 26, 2007, King County Superior Court Judge Dean Lum signed an order authorizing the interception and recording. CP 35-36. On January 29, 2007, M.S. called Scherner, and their conversation was recorded. Ex. 32 and 33.

Scherner moved to suppress the tape-recorded telephone conversation. CP 24-26. The court denied the motion, explaining:

[I]t seems to me, as I read the affidavit of the warrant, that it was well-grounded. I think you have to look at

and can look at the nature of the case and the kind of investigative techniques that can be used.... I think it was reasonable for the Bellevue Police Department to assume that Mr. Scherner would not cooperate in the investigation, would not give an interview, would not talk with them.... [Mr. Scherner] knew that the police were investigating, and if he would have talked to the police, he had an opportunity to do that, but did not. And the police determined that he would not, and I think that's a reasonable assumption by them.

There is no physical evidence to investigate, and given the nature of the case and the point at which this occurred. So, as I read the affidavit, it seemed to me that it was apparent from the application that any alternative means of investigation were unlikely to succeed.

RP 43.

- b. The Superior Court Properly Authorized The Intercept And Recording.

The Privacy Act generally prohibits the interception and recording of private communications. RCW 9.73.030. Under an exception to this general rule, a police officer may intercept and record a conversation to which one party has given consent, provided that the officer obtains a court order in advance. RCW 9.73.090(2). The application for a court order must contain 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 or to be too dangerous to employ." RCW 9.73.130(3)(f).

The judge issuing an intercept order has broad discretion to determine whether the statutory safeguards have been satisfied. State v. Johnson, 125 Wn. App. 443, 455, 105 P.3d 85 (2005). On appeal, the appellate court does not review the sufficiency of the application de novo. State v. Cisneros, 63 Wn. App. 724, 729, 821 P.2d 1262 (1992). Rather, the court will affirm if the facts set forth in the application are minimally adequate to support the court's determination. Id.

The particularized showing of need required under RCW 9.73.130(3)(f) is not one of absolute necessity. Id. Although the police are not required to exhaust all alternatives, they must seriously consider other techniques, and the court must be informed of the reasons that the alternative techniques have been or likely will be inadequate. Id. Mere boilerplate recitals are insufficient to establish the particularized showing of need. State v. Manning, 81 Wn. App. 714, 720-21, 915 P.2d 1162 (1996). In deciding whether to authorize recording, the trial judge may consider the difficulties of proof inherent in the crime alleged. State

v. Lopez, 70 Wn. App. 259, 267, 856 P.2d 390 (1993); State v. Knight, 54 Wn. App. 143, 150, 772 P.2d 1042 (1989).

In Johnson, the court rejected a challenge to an order authorizing the interception and recording of a conversation between Johnson and her brother about a murder. 125 Wn. App. at 455-56. The application explained that attempting to elicit information from Johnson would be futile because she previously had not been forthcoming with the police, and that normal investigative techniques to search for evidence would likely fail because Johnson had already destroyed evidence linking her to the murder. The Court of Appeals held that, "In light of the fact that we determine whether the facts supporting an application to record are *minimally adequate* to support the court's determination, the application was sufficient to support the order authorizing the interception and recording of Johnson's conversation." Id. at 456 (emphasis in original).

In this case, the application satisfied the requirements of RCW 9.73.130(3)(f). In the application, Detective Robertson explained that she had considered other methods of investigation and explained why they were inadequate. Due to the passage of time and the crime involved, sexual molestation of a young child,

there was no physical evidence. The evidence indicated that Scherner was a serial child molester, and it was reasonable to assume that he was highly unlikely to discuss his past acts of molestation with anyone other than M.S. In fact, the police had attempted to contact Scherner and he did not respond.

The application confirmed that the police had considered other methods of documenting a conversation between M.S. and Scherner other than an interception and recording. The police had considered setting up a face-to-face meeting between M.S. and Scherner, but concluded that due to the distance between M.S. and Scherner's residences, it was not feasible. The detective further noted that it was unlikely that Scherner would talk to M.S. in a place where a detective could listen in on the conversation.<sup>6</sup> These facts easily satisfied the "minimally adequate" standard applied to a challenge to a court order authorizing interception and recording.

In contrast, in State v. Porter, 98 Wn. App. 631, 990 P.2d 460 (1999), the police suspected a lawyer of using illegal drugs and obtained an intercept order to record conversations between a

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<sup>6</sup> See Lopez, 70 Wn. App. at 267 (rejecting challenge where application explained that the police had considered placing an officer in a position to overhear the conversation between the suspect and informant, but decided this technique would be unsuccessful given the probable location of conversation).

confidential informant, a third person and the suspect. The court noted that the typical method of investigation for this type of offense was through the use of a search warrant. The court found that the showing of need for the intercept was inadequate, because the "intercept affidavit does not allege that these methods, or, for that matter, any other methods, were tried or were unlikely to succeed. In fact, there is no indication that the Yakima police tried, or even considered, other investigative techniques." Id. at 636. The application in this case did not contain the flaws at issue in Porter.

Even if the trial court erred in admitting the tape-recorded conversation, Scherner's convictions should be reversed only if there is a reasonable probability that the outcome of the trial would have been different had the court excluded the evidence. State v. Courtney, 137 Wn. App. 376, 383-84, 153 P.3d 238 (2007), rev. denied, 163 Wn.2d 1010 (2008). Given the other overwhelming evidence of Scherner's guilt, any error does not merit reversal. The testimony of Scherner's other victims established his long history of molesting young female relatives. At trial, Scherner himself acknowledged he had "a very intermittent problem with sexual abuse with children" and that he "occasionally" acted out on his sexual desires for children. When the detective confronted

Scherner about M.S.'s report that she had been molested, he replied, "anything is possible but I don't believe I did." Finally, the inadvertent nature of M.S.'s disclosure of the abuse and her lack of any motive to fabricate strongly supported a finding that she was credible. It is not reasonably probable that the jury's verdict would have been different if the taped conversation had not been admitted.

**2. SCHERNER HAS FAILED TO ESTABLISH THAT RCW 10.58.090 IS UNCONSTITUTIONAL.**

Scherner raises a variety of constitutional challenges to RCW 10.58.090. He claims that it violates the ex post facto clause, the separation of powers, the equal protection clause and the due process clause.

As a general principle applicable to all of Scherner's constitutional claims, this Court must presume that RCW 10.58.090 is constitutional. State v. Lanciloti, 165 Wn.2d 661, 667, 201 P.3d 323 (2009). Scherner bears the burden of showing the statute is unconstitutional beyond a reasonable doubt. State v. Shafer, 156 Wn.2d 381, 387, 128 P.3d 87 (2006). He has failed to meet this burden.

a. Background

During the 2008 session, the Washington Legislature enacted RCW 10.58.090. The statute provides that in sex offense cases, evidence of the defendant's commission of another sex offense is admissible subject to the court's balancing of factors under ER 403. The statute provides in pertinent part:

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 Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403.

RCW 10.58.090(1).

This statute was based upon federal rules enacted in 1994. Federal Rules of Evidence 413, 414 and 415. At least nine other states have enacted similar statutes or rules.<sup>7</sup>

Prior to trial, the State gave notice that it would offer testimony from four witnesses under RCW 10.58.090 and ER 404(b), and provided summaries of their expected testimony. CP 187-206; Pretrial Ex. 5-8. The prosecutor noted that these four individuals were not Scherner's only previous victims; at least ten

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<sup>7</sup> See Arizona Evid. R. 404(c); Ark. Code § 16-42-103; Cal. Evid. Code § 1108; Fla. Stat. § 90.404(2)(b); 725 Ill. Comp. Stat. 5/115-7.3; Iowa Code § 701.11; La. Code Evid. art. 412.2; Mich. Comp. Laws § 768.27a; Okla. Stat. 12, § 2413.

individuals had reported that Scherner had molested them when they were children. CP 160-66.

Scherner challenged the constitutionality of RCW 10.58.090 and argued that the evidence was not admissible under the statute. The trial court rejected these arguments and admitted the testimony under RCW 10.58.090 and ER 404(b). RP 104-19, 220.

Prior to testimony of each witness and at the conclusion of trial, the court gave a limiting instruction:

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 the crime charged in the Information. Bear in mind as you consider this evidence at all times, the government has the burden of proving that the defendant committed each of the elements of the 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 Indictment.

CP 263; see also RP 617, 654, 673, 903.

b. The Admission Of Testimony Under RCW 10.58.090 Did Not Violate The Ex Post Facto Clause.

Scherner argues that the admission of evidence under RCW 10.58.090 violated the ex post facto clause because it "allow[ed] different evidence to be admitted at trial than would have been admitted when the offenses at issue are alleged to have been committed." Brief of Appellant at 32. This is not the standard for determining whether there is an ex post facto violation. If this were the standard, new evidence rules would apply only prospectively.

The United States and Washington Constitutions both contain ex post facto clauses. U.S. Const. art 1, § 10; Const. art. 1, § 23. "The ex post facto clauses prohibit states from enacting any law that (1) punishes an act that was not punishable at the time the act was committed, (2) aggravates a crime or makes the crime greater than it was when committed, (3) increases the punishment for an act after the act was committed, and (4) changes the rules of evidence to receive less or different testimony than required at the time the act was committed in order to convict the offender." State v. Angehrn, 90 Wn. App. 339, 342-43, 952 P.2d 195 (1998) (citing Collins v. Youngblood, 497 U.S. 37, 42, 110 S. Ct. 2715, 2719, 111 L. Ed. 2d 30 (1990)).

Scherner claims that the admission of evidence under RCW 10.58.090 in his trial violated this fourth category. However, few rules of evidence have been found to fall under this category. The Washington Supreme Court has held that a new rule of evidence that allows for the admission of previously prohibited witness testimony does not violate the ex post facto clause.

In State v. Clevenger, 69 Wn.2d 136, 141, 417 P.2d 626 (1966), Clevenger was charged with committing incest and indecent liberties on his three-year-old daughter. His wife was permitted to testify due to an amendment to the spousal privilege statute, passed after the commission of the crime, which created an exception for crimes committed against one's child. The Washington Supreme Court rejected Clevenger's ex post facto challenge to the amended statute, explaining:

[A]lterations which do not increase the punishment, nor change the ingredients of the offence [sic] 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 upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury, can be made applicable to prosecutions or

trials thereafter had, without reference to the date of the commission of the offence [sic] charged.

69 Wn.2d at 142 (quoting Hopt v. Utah, 110 U.S. 574, 590, 4 S. Ct. 202, 28 L. Ed. 262 (1884)).

Similarly, in State v. Slider, 38 Wn. App. 689, 688 P.2d 538 (1984), the Court of Appeals upheld the admission of child hearsay under the recently enacted child hearsay statute, RCW 9A.44.120. The court held that the application of the statute did not run afoul of the ex post facto clause because the statute "did not increase the punishment nor alter the degree of proof essential for a conviction[.]" Id. at 695; see also State v. Ryan, 103 Wn.2d 165, 179, 691 P.2d 197 (1984) (rejecting ex post facto challenge to child hearsay statute).

In contrast, in the case cited by Scherner, Ludvigsen v. City of Seattle, 162 Wn.2d 660, 174 P.3d 43 (2007), the Washington Supreme Court concluded that amendments to the Washington Administrative Code (WAC) effectively reduced the quantum of evidence necessary to convict a defendant of driving while intoxicated. Under the relevant municipal ordinance, the City was required to prove the defendant failed a valid breath test. A 2004 amendment to the Washington Administrative Code (WAC) relieved

the City of a previous requirement that, in order to establish a valid breath test, it prove that the breath test machine's thermometer had been properly certified. Addressing an ex post facto challenge to this amendment, the court framed the issue as "whether the WAC amendments changed ordinary rules of evidence or changed the evidence necessary to convict Ludvigsen of a DWI." Id. at 671-72.

The court concluded that the amendments had changed the evidence necessary for a conviction:

[U]nder the per se prong, the validity of the breath test is a part of the prima facie case the government must prove. The City redefined the meaning of a valid test and thereby changed the meaning of the crime itself.... The subsequent change reduced the quantum of evidence to establish a prima facie case and to overcome the presumption of innocence.

Id. at 672-73 (footnotes omitted).

RCW 10.58.090 did not reduce the quantum of evidence necessary to establish a prima facie case. The elements of the crime remain the same, and the quantum of proof required to satisfy those elements remains the same. It is similar to the statutory amendments at issue in Clevenger and Slider; it allows for

the testimony of witnesses who otherwise may not have been permitted to testify.<sup>8</sup>

Scherner complains that one of the legislature's motives in enacting the new statute was "to assist prosecutors in securing convictions at trial." Brief of Appellant at 31. Yet he cites no authority for the notion that the motives of legislators are relevant in determining an ex post facto violation. Presumably, similar motives were involved in passing the child hearsay statute at issue in Slider and Ryan and the amendments to the spousal privilege statute at issue in Clevenger. This Court should reject Scherner's ex post facto challenge to RCW 10.58.090.

c. The Legislature's Enactment Of RCW 10.58.090 Does Not Violate The Separation Of Powers.

Scherner argues that the legislature's enactment of RCW 10.58.090 violates the separation of powers. Because the courts and the legislature share the authority to enact rules of evidence

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<sup>8</sup> Courts in other jurisdictions have rejected ex post facto challenges to statutes similar to RCW 10.58.090. See State v. Willis, 915 So.2d 365, 383 (La. Ct. App. 2005) (rejecting ex post facto challenge and holding that Louisiana statute "did not alter the amount of proof required in the Defendant's case as it merely pertains to the *type of evidence* which may be introduced."); People v. Pattison, 276 Mich. App. 613, 619, 741 N.W.2d 558 (Mich. Ct. App. 2007) (rejecting ex post facto challenge to Michigan law).

and the legislature's enactment of RCW 10.58.090 does not threaten the independence or integrity of the courts, this claim fails.

The doctrine of separation of powers comes from the constitutional distribution of the government's authority into three branches. State v. Moreno, 147 Wn.2d 500, 505, 58 P.3d 265 (2002). The purpose of the doctrine is to prevent one branch of government from aggrandizing itself or encroaching upon the "fundamental functions" of another. Id. (citing Carrick v. Locke, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)). "Though the doctrine is designed to prevent one branch from usurping the power given to a different branch, the three branches are not hermetically sealed and some overlap must exist." City of Fircrest v. Jensen, 158 Wn.2d 384, 393-94, 143 P.3d 776 (2006). "The question to be asked 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." Carrick, 125 Wn.2d at 135.

The courts have long recognized the legislature's authority for enacting rules of evidence.<sup>9</sup> "[R]ules of evidence may be promulgated by both the legislative and judicial branches." Fircrest, 158 Wn.2d at 394. The Washington Supreme Court has acknowledged that its authority to enact rules of evidence derives, in part, from a statute, RCW 2.04.190, and has held that "[t]he adoption of the rules of evidence is a legislatively delegated power of the judiciary." Id.

As a historical matter in Washington, the legislature and the courts have shared the responsibility for enacting rules of evidence. Prior to the enactment of the Rules of Evidence in 1979, the trial courts applied rules of evidence based upon statutes and common law. See generally 5 R. Meisenholder, Washington Practice (1965). A Judicial Council Task Force, which included representatives of both the legislature and the judiciary, drafted the current rules of evidence. 5 K. Tegland, Washington Practice, Evidence Law and Practice, at V-IX (2nd ed. 1982). To this day, numerous statutes supplement the Rules of Evidence on various

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<sup>9</sup> See State v. Sears, 4 Wn.2d 200, 215, 103 P.2d 337 (1940) (the legislature has the power to enact laws which create rules of evidence); Slider, 38 Wn. App. at 695-96 ("Our Supreme Court has also recognized (implicitly) the Legislature's authority to enact evidentiary rules when it analyzed the rape shield statute.").

issues.<sup>10</sup> The legislature has enacted a number of statutes that relate particularly to evidence and testimony in sex offense cases.<sup>11</sup>

Since the enactment of the evidence rules, the courts have repeatedly rejected claims that the legislature's enactment of an evidentiary rule violated the separation of powers. In State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984), the Washington Supreme Court rejected the claim that the legislature's enactment of the child hearsay statute, RCW 9A.44.120, violated the separation of powers. In doing so, the court held that, "apparent conflicts between a court rule and a statutory provision should be harmonized, and both given effect if possible." Id. at 178.

More recently, in Fircrest, the defendant challenged a statute that provided that breath test results were admissible if the State satisfied a certain threshold burden. The statute was passed in response to a Washington Supreme Court decision holding breath tests were inadmissible if they failed to comply with certain

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<sup>10</sup> See, e.g., RCW 5.45.020 (business records); RCW 5.46.010 (copies of business and public records); RCW 5.60.060 (evidentiary privileges); RCW 5.66.010 (admissibility of expressions of apology, sympathy, fault).

<sup>11</sup> RCW 9A.44.020 (rape shield); RCW 9A.44.120 (child hearsay statute); RCW 9A.44.150 (child witness testimony concerning sexual or physical abuse).

procedures in the WAC. 158 Wn.2d at 396-97. The court held that the statute did not violate the separation of powers:

The legislature has made clear its 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 act does not state such tests must be admitted if a prima facie burden is met; it states that such tests are *admissible*. The statute is permissive, not mandatory, and can be harmonized with the rules of evidence. There is nothing in the bill, either implicit or explicit, indicating a trial court could not use its discretion to exclude the test results under the rules of evidence. The legislature is not invading the prerogative of the courts nor is it threatening judicial independence. SHB 3055 does not violate the separation of powers doctrine.

Id. at 399.

Here, the legislature, which retains authority to enact rules of evidence, did not invade the prerogative of the courts by enacting RCW 10.58.090. The statute carves out a narrow exception to ER 404(b), a rule that already contains numerous other exceptions.<sup>12</sup> The statute provides that the trial court has discretion to exclude the evidence after applying balancing factors

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<sup>12</sup> Scherner argues that the court cannot harmonize RCW 10.58.090 with ER 404(b), and cites RCW 2.04.200 for the proposition that the rule should prevail. However, that statute provides that a newly enacted court rule prevails over an existing statute. See LaHue v. Keystone Inv. Co., 6 Wn. App. 765, 776, 496 P.2d 343 (1972) (holding that under RCW 2.04.200, court rule superseded statute because statute was enacted before adoption of rule). Here, RCW 10.58.090 was passed after the enactment of ER 404(b). If there was a conflict that cannot be harmonized, the more specific and later in time statute should prevail. State v. Stark, 66 Wn. App. 423, 438, 832 P.2d 109 (1992).

under ER 403. The statute can be harmonized with the existing evidence rules, and the court can give effect to both. Other state courts, rejecting separation of powers challenges to similar statutes, have recognized that such evidentiary statutes do not infringe on the court's authority to establish rules of practice and procedure, but reflect policy concerns that are a legitimate subject of legislation.<sup>13</sup> This Court should hold that the legislature's enactment of RCW 10.58.090 did not violate the separation of powers.

d. RCW 10.58.090 Does Not Violate Equal Protection.

In a brief argument citing little authority, Scherner claims that RCW 10.58.090 violates the equal protection clauses because it treats individuals charged with sex offenses differently than individuals charged with non-sex offenses. This argument is utterly without merit.

The equal protection clauses of the federal and state constitutions require that persons similarly situated with respect to a

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<sup>13</sup> Pattison, 276 Mich. App. at 619-620; see also State v. McCoy, 682 N.W.2d 153, 159-61 (Minn. 2004).

legitimate purpose of the law receive like treatment. State v. Harner, 153 Wn.2d 228, 235, 103 P.3d 738 (2004). The court construes the federal and state equal protection clauses identically and considers claims arising under their scope as one issue. State v. King, 149 Wn. App. 96, 102, 202 P.3d 351 (2009) (citing State v. Manussier, 129 Wn.2d 652, 672, 921 P.2d 473 (1996)).

At the threshold of an equal protection determination, the court must first identify the standard of review. O'Hartigan v. Dep't of Pers., 118 Wn.2d 111, 122, 821 P.2d 44 (1991). The rational basis test applies when a statutory classification affects neither a fundamental right nor a suspect or semi-suspect class. King, 149 Wn. App. at 102. Scherner does not claim that a fundamental right or a suspect or semi-suspect class is involved.

Under the rational basis test, the challenged law must reflect a legitimate state objective, and the law must not be wholly irrelevant to achieving that objective. State v. Pedro, 148 Wn. App. 932, 944, 201 P.3d 398 (2009). The party challenging the classification must show that it is purely arbitrary. Id.

In rejecting a similar challenge to the federal rule upon which RCW 10.58.090 is based, the Seventh Circuit explained:

Rule 413 implicates neither a fundamental right nor a suspect class. Consequently, the more sweeping rule of admissibility that the rule creates for a defendant's prior acts in cases involving sexual assault does not violate equal protection principles so long as the rule has a rational basis. As the legislative history reveals, Congress enacted Rule 413 because sexual assault cases, especially cases involving victims who are juveniles, often raise unique questions regarding the credibility of the victims which render a defendant's prior conduct especially probative. Its reasoning in this regard cannot be described as irrational.

United States v. Julian, 427 F.3d 471, 487 (7<sup>th</sup> Cir. 2005) (internal citations omitted).

The Tenth Circuit articulated similar reasoning in rejecting an identical equal protection claim:

Under the rational basis test, if there is a "plausible reason [ ] for Congress' action, our inquiry is at an end." We need not find that the legislature ever articulated this reason, nor that it actually underlay the legislative decision, nor even that it was wise. There are plausible reasons for the enactment of Rule 414. "Congress' objective of enhancing effective prosecution of sexual assaults is a legitimate interest." The government has a particular need for corroborating evidence in cases of sexual abuse of a child because of the highly secretive nature of these sex crimes and because often the only available proof is the child's testimony. Rule 414 does not violate the Equal Protection Clause.

United States v. Castillo, 140 F.3d 874, 883 (10th Cir.1998)

(internal citations omitted).<sup>14</sup>

Here, RCW 10.58.090 has a clearly legitimate state objective: it allows the jury to hear and consider pertinent evidence of a defendant's history of sex offenses when considering a current sex offense charge. The law is not arbitrary; it limits consideration of such evidence to cases where the defendant is charged with a sex offense. Scherner has not met his burden of showing that RCW 10.58.090 violates equal protection.

e. RCW 10.58.090 Does Not Violate Due Process.

Scherner's due process claim also fails because the admission of his history of molesting children was not so unfair that it violated fundamental conceptions of justice. The federal and state appellate courts have rejected due process challenges to rules and statutes similar to RCW 10.58.090.

"The Constitution does not encompass all traditional legal rules and customs, no matter how longstanding and widespread

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<sup>14</sup> See also People v. Donoho, 204 Ill.2d 159, 176-78, 788 N.E.2d 707 (2003) (rejecting equal protection challenge to Illinois statute admitting evidence of defendant's other sex crimes); Horn v. State, 204 P.3d 777, 784-86 (Okla. Crim. App. 2009) (rejecting equal protection challenge to Oklahoma statute admitting evidence of defendant's other sex crimes).

such practices may be.” United States v. LeMay, 260 F.3d 1018, 1024 (9th Cir. 2001). An evidentiary rule fails the due process test of fundamental fairness only if “the introduction of this type of evidence is so extremely unfair that its admission violates fundamental conceptions of justice.” Dowling v. United States, 493 U.S. 342, 352, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990). Courts should construe the category of evidentiary rules that violate this rule “very narrowly.” Id. at 352.

In rejecting a due process challenge identical to Scherner’s, the Ninth Circuit questioned the notion that courts historically excluded evidence of a defendant’s prior sex offenses:

In many American jurisdictions, evidence of a defendant's prior acts of sexual misconduct is commonly admitted in prosecutions for offenses such as rape, incest, adultery, and child molestation. As early as 1858, the Michigan Supreme Court noted that “courts in several of the States have shown a disposition to relax the rule [against propensity evidence] in cases where the offense consists of illicit intercourse between the sexes.” Today, state courts that do not have evidentiary rules comparable to Federal Rules 414 through 415 allow this evidence either by stretching traditional 404(b) exceptions to the ban on character evidence or by resorting to the so-called “lustful disposition” exception, which, in its purest form, is a rule allowing for propensity inferences in sex crime cases. Thus, “the history of evidentiary rules regarding a criminal defendant's sexual propensities is ambiguous at best, particularly with regard to sexual abuse of children.”

LeMay, 260 F.3d at 1025-26 (internal citations omitted). The court concluded:

We conclude that there is nothing fundamentally unfair about the allowance of propensity evidence under Rule 414. As long as the protections of Rule 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.

Id. at 1026.

Similarly, in Castillo, the Tenth Circuit rejected a due process challenge, finding that "the history of evidentiary rules regarding a criminal defendant's sexual propensities is ambiguous at best, particularly with regard to sexual abuse of children." 140 F.3d at 881. The court held that "it is significant that other rules of evidence have been found constitutional even though they allow evidence presenting a risk of prejudice similar to that presented by Rule 414 evidence." Id. at 882. The final conclusive factor for the court was that the admission of the evidence was subject to the balancing of factors in Rule 403. Id. at 882-83.<sup>15</sup>

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<sup>15</sup> Numerous other courts have rejected similar due process challenges. See United States v. Mound, 149 F.3d 799, 801 (8th Cir. 1998); United States v. Enjady, 134 F.3d 1427, 1432 (10th Cir. 1998); People v. Falsetta, 21 Cal.4th 903, 912, 986 P.2d 182, 89 Cal.Rptr.2d 847 (1999); McLean v. State, 934 So.2d 1248 (Fla. 2006); People v. Beaty, 377 Ill.App.3d 861, 884, 880 N.E.2d 237, 255 (Ill. Ct. App. 2007); State v. Reyes, 744 N.W.2d 95, 101-03 (Iowa 2008); Horn, 204 P.3d at 784.

Scherner has not met his heavy burden of showing that evidence admitted under RCW 10.58.090 violates fundamental conceptions of justice. In Washington, courts have historically allowed similar testimony as evidence of a common scheme or plan under ER 404(b) or as evidence of the defendant's lustful disposition. State v. Ferguson, 100 Wn.2d 131, 133-34, 667 P.2d 68 (1983); State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995). Moreover, RCW 10.58.090 protects against undue prejudice by providing that the proffered testimony should be excluded under ER 403 if its probative value is outweighed by the danger of unfair prejudice. Scherner's due process claim should be rejected.

Scherner further claims that RCW 10.58.090 violates due process because it requires the trial court, when balancing various factors under ER 403, to consider the necessity of the evidence beyond that already offered at trial. Yet numerous rules of evidence require the trial court to consider and weigh the other evidence in determining whether to admit the evidence at issue. Before admitting evidence under ER 404(b), the court is required to weigh the probative value of the evidence against its prejudicial effect. State v. Tharp, 96 Wn.2d 591, 597, 637 P.2d 961 (1981) ("the trial court should weigh the necessity for its admission against

the prejudice that it may engender in the minds of the jury"). Under ER 403, the court must consider whether the proffered evidence is needlessly cumulative. ER 609(d) provides that the court should admit a witness's juvenile adjudication only if it is necessary for a fair determination of the issue of guilt or innocence. The balancing of factors in RCW 10.58.090 is consistent with these long-standing rules.<sup>16</sup>

Scherner also claims that RCW 10.58.090 violates due process because it is unconstitutionally vague. However, he cites no authority that a rule of evidence is subject to challenge on due process vagueness grounds. "Courts engage in constitutional due process vagueness analysis to ascertain the legitimacy of statutes and other official policies, which must be sufficiently clear for

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<sup>16</sup> In making this argument, Scherner discusses two United States Supreme Court cases; both are inapposite. At issue in Holmes v. South Carolina, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) was South Carolina's "other suspect" rule, which allowed for the *exclusion* of a defendant's "other suspect" evidence, regardless of its strength, if the State's case against the defendant was particularly strong. The Court concluded that the new rule was arbitrary and violated the defendant's right to present a complete defense. Giles v. California, \_\_\_ U.S. \_\_\_, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008) concerned the Sixth Amendment and the forfeiture by wrongdoing doctrine. The court examined the historical underpinnings of the doctrine when defining its scope. Neither case suggests that there is anything improper with an evidentiary rule that requires the trial court to consider the need for certain evidence before admitting it.

ordinary people to conform their behavior to the law.” State v. Releford, 148 Wn. App. 478, 493, 200 P.3d 729 (2009). Statutes and rules governing the admissibility of evidence are meant to be applied by lawyers and judges, not ordinary people. Given the absence of any authority supporting this due process vagueness claim, this Court should reject it.

**3. THE SUPERIOR COURT PROPERLY ADMITTED EVIDENCE THAT SCHERNER MOLESTED OTHER CHILDREN UNDER RCW 10.58.090 AND ER 403.**

Scherner argues that, even if RCW 10.58.090 is valid, the court should have excluded evidence of his previous acts of child molestation under ER 403.

Under ER 403, the trial court may exclude relevant evidence if the probative value is outweighed by the dangers of confusion of the issues or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. The trial court's ruling is afforded great deference and is reviewed under an abuse of discretion standard. State v. French, 157 Wn.2d 593, 605, 141 P.3d 54 (2006).

RCW 10.58.090 requires the court to consider the following non-exclusive factors when deciding whether to exclude evidence of the defendant's other sex offenses under ER 403:

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.

RCW 10.58.090(6).<sup>17</sup>

Here, the trial court considered each of these factors and concluded that the probative value of the evidence outweighed the

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<sup>17</sup> These factors were apparently modeled after factors applied by the federal courts applying the Rule 403 balancing test to evidence offered under Federal Rules of Evidence 413 and 414. LeMay, 260 F.3d at 1027-29.

prejudicial effect. RP 106-18. This conclusion was a reasoned decision and not an abuse of discretion.

The evidence revealed marked similarities between Scherner's prior acts of child molestation and the acts charged. All of the victims were young girls when Scherner molested them. They were either relatives or the daughters of close family friends, so Scherner had easy access to them. As he did with M.S., Scherner molested them when they stayed at his house and/or when they traveled with him. Scherner points to some slight differences in the nature of the abuse, noting he performed oral sex on some of his victims. But these slight differences do not change the basic similarities of Scherner's actions.<sup>18</sup> This factor supported admission of the testimony.

With respect to the closeness in time and frequency of the prior acts, the evidence established that Scherner was a prolific child molester. He molested two of the victims during the 1970s,

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<sup>18</sup> See United States v. Bentley, 561 F.3d 803, 815 (8th Cir. 2009) (rejecting claim that prior acts were too dissimilar when the testimony established that the defendant molested young girls who were actual or virtual members of his family or lived in his home); United States v. Horn, 523 F.3d 882, 888 (8th Cir. 2008) (finding no abuse of discretion despite differences in ages of victims where all of the offenses involved sexual assaults of defenseless victims); United States v. Hawpetoss, 478 F.3d 820, 825-27 (7th Cir. 2007) (finding no abuse of discretion when all of the acts involved children with whom the defendant had a familial or quasi-familial relationship).

another victim in the 1980s, and M.S. in 2001 and 2002. Contrary to Scherner's argument, the fact that some of the victims were molested decades ago does not weigh against admission.<sup>19</sup> RCW 10.58.090, like the corresponding federal rules, contains no time limit beyond which prior sex offenses by a defendant are inadmissible. See United States v. Benally, 500 F.3d 1085, 1091 (10<sup>th</sup> Cir. 2007). The lapse of time is simply one factor for the court to consider in weighing the probative value of the evidence against the risk of unfair prejudice. Julian, 427 F.3d at 486-87. Given the consistency of Scherner's behavior over the decades, the frequency of his acts favored admission of the evidence.

There were no intervening circumstances between the earlier acts of molestation and the molestation of M.S. that undermined the probative value of the evidence.

While none of the prior acts resulted in criminal conviction, the reason for this was not due to any issue about the veracity of

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<sup>19</sup> The federal courts have repeatedly held that prior sex offenses committed decades earlier were admissible. See United States v. Kelly, 510 F.3d 433, 437 (4<sup>th</sup> Cir. 2007) (rejecting argument that prior sex offense was inadmissible because it occurred more than 20 years ago); United States v. Benally, 500 F.3d 1085 (10<sup>th</sup> Cir. 2007) (affirming admission of testimony of two victims sexually assaulted 40 years earlier and a third victim sexually assaulted 21 years earlier), cert. denied, 128 S. Ct. 1917 (2008); United States v. Gabe, 237 F.3d 954, 959-60 (8<sup>th</sup> Cir. 2001) (upholding district court's admission of evidence of sexual molestation committed 20 years earlier).

the victims. Instead, the evidence indicated that, due to the delays in reporting the abuse, the statute of limitations had expired for each of these prior victims. CP 199-20. Scherner admitted to molesting one victim and acknowledged that he had a "problem" with committing child molestation during the time period that the other victims were molested.<sup>20</sup>

With respect to the necessity of the evidence, the Court of Appeals has observed, "[g]enerally, courts will find that probative value is substantial in cases where there is very little proof that sexual abuse has occurred, particularly where the only other evidence is the testimony of the child victim." State v. Sexsmith, 138 Wn. App. 497, 506, 157 P.3d 901 (2007). Here, the State's case rested on the testimony of M.S.; there was no scientific or medical evidence. Scherner attacked M.S.'s credibility and took advantage of the lack of eyewitnesses and M.S.'s reluctance to disclose the full details of the abuse. Given the central issue of credibility, the evidence of Scherner's other victims was highly probative.

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<sup>20</sup> See United States v. Guidry, 456 F.3d 493, 502-03 (5th Cir. 2006) (the fact that the defendant was never charged with the previous sexual assaults is not dispositive under Federal Rules of Evidence 413).

Scherner has not shown that the danger of unfair prejudice outweighed the probative value of this evidence. While his other victims' testimony was undoubtedly prejudicial as evidence admitted under the statute is very likely to be, RCW 10.58.090 and ER 403 are concerned only with *unfair* prejudice. This evidence was prejudicial to Scherner for the same reason it was probative - it tended to prove his propensity and his plan to molest vulnerable female children when presented with an opportunity to do so. Because this specific type of evidence is admissible under RCW 10.58.090, Scherner has not shown that its prejudice was *unfair*.

Scherner claims that the testimony of his other victims could have caused jury confusion, and he complains that the passage of time impacted his ability to investigate their allegations. Yet he fails to acknowledge that he admitted to molesting one of the victims and that he generally acknowledged that he had a problem in the past with molesting children. Scherner's complaints about the unfairness of admitting this evidence are not well taken.

**4. THE SUPERIOR COURT PROPERLY HELD THAT EVIDENCE THAT SCHERNER MOLESTED OTHER CHILDREN WAS ADMISSIBLE UNDER ER 404(b).**

Even if Scherner's challenges to RCW 10.58.090 had merit, he would not be entitled to relief in this case because the trial court

also found that the testimony of his four other victims was admissible under ER 404(b) as evidence of his common scheme or plan. This evidence established that Scherner employed a common scheme in satisfying his sexual desire for young children by molesting young girls staying at his house or traveling with him. Scherner has not shown that the court erred in finding that the evidence was admissible under ER 404(b).

a. The Evidence Established A Common Scheme Or Plan Under ER 404(b).

A trial court's decision to admit evidence under ER 404(b) is reviewed for abuse of discretion. Sexsmith, 138 Wn. App. at 504. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

ER 404(b) provides in pertinent part that "[e]vidence 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."

Evidence of a defendant's past acts of molestation may be admissible under ER 404(b) to show a common scheme or plan where the prior acts demonstrate a single plan used repeatedly to commit separate but very similar crimes. Sexsmith, 138 Wn. App. at 504. The prior acts must be "(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." Lough, 125 Wn.2d at 852.

"Where a defendant is charged with child rape or child molestation, the existence of 'a design to fulfill sexual compulsions evidenced by a pattern of past behavior' is probative of the defendant's guilt." Sexsmith, 138 Wn. App. at 504 (quoting State v. DeVincentis, 150 Wn.2d 11, 17-18, 74 P.3d 119 (2003)). The degree of similarity must be substantial, but the level of similarity does not require the evidence of common features to show a unique method of committing the crime. DeVincentis, 150 Wn.2d at 20-21. "[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." Id. at 13.

Here, there was a marked similarity between Scherner's molestation of M.S. and his sexual abuse of Spillane, Oducado, Williamson and Kahn. The victims were all young girls when Scherner molested them. The victims were either relatives or the daughters of close family friends, so Scherner had easy access to them. As he did with M.S., Scherner molested his victims when they stayed at his house and when they travelled with him.

In his brief, Scherner fails to discuss DeVincentis or other recent cases concerning the admissibility of this type of evidence under the common scheme or plan exception in ER 404(b). Instead, he argues that the passage of time weighed against admitting the evidence. Yet, as the Washington Supreme Court has observed, "when similar acts have been performed repeatedly over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan." Lough, 125 Wn.2d at 860. In DeVincentis, though approximately 15 years passed between the defendant's earlier conviction for sexual abuse and the new charge of rape, the court held that the evidence of the prior misconduct was relevant to show that he had previously victimized another girl in a markedly similar way under similar circumstances. 150 Wn.2d at 13. Here, the evidence showed that Scherner had victimized

young girls in a strikingly similar way over the last several decades. The court did not abuse its discretion in holding that this evidence was admissible under ER 404(b).

b. Scherner Has Waived His Claim That A Limiting Instruction Was Not Given Because He Never Requested A Proper Instruction.

Scherner complains that the trial court did not give an appropriate limiting instruction. However, because he never proposed a proper limiting instruction, this issue is waived.

The standard limiting instruction is set forth as follows:

Certain evidence has been admitted in this case for \_\_\_\_\_ only a limited purpose. This [*evidence consists of and*] may be considered by you only for the purpose of \_\_\_\_\_. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

11 Washington Pattern Jury Instructions-Criminal, 5.30 at 180 (3rd ed. 2008).

Scherner proposed a different instruction:

You are about to hear testimony regarding an allegation that between 20 and 40 years ago the defendant engaged in improper sexual contact with a minor other than the complainant in this case. The prosecution is presenting that evidence in effort to establish that the prior allegation and the acts alleged against the defendant in this case were part of a common scheme or plan. You are not to consider the prior allegation as evidence that the defendant's

conduct in this case conformed with the conduct alleged in the prior allegation.

Supp CP \_\_\_ (Sub. Nos. 88 and 90).<sup>21</sup>

The last sentence of this instruction is incorrect as a matter of law; it proposed to inform the jury that they could not consider the prior bad act evidence "as evidence that the defendant's conduct in this case conformed with the conduct alleged in the prior allegation." However, when prior bad acts evidence is admitted under the common scheme or plan exception in ER 404(b), it is entirely proper for the jury to consider whether the defendant's conduct in the current matter was consistent with his prior behavior. "[I]t is admitted to show that he committed the charged offense pursuant to the same design he used in committing the other four acts of misconduct." Lough, 125 Wn.2d at 861. Scherner's proposed limiting instruction was not a correct statement of the law.

"A party's failure to request a limiting instruction constitutes a waiver of that party's right to such an instruction and fails to preserve the claimed error for appeal." State v. Newbern, 95 Wn.

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<sup>21</sup> While Scherner has assigned error to the failure to give a limiting instruction, he did not make his proposed instruction part of the record on appeal. The instruction quoted above is the only defense proposed instruction in the record relating to ER 404(b).

App. 277, 295-96, 975 P.2d 1041 (1999). A party waives his right to object to the failure to give an instruction if he does not provide the trial court with an accurate instruction. Crossen v. Skagit County, 100 Wn.2d 355, 361 n.1, 669 P.2d 1244 (1983). Because Scherner never proposed a proper ER 404(b) limiting instruction, he has waived this issue.

**5. THE SUPERIOR COURT PROPERLY ADMITTED THE TESTIMONY OF JOANNE SCHERNER.**

Scherner, citing the spousal privilege statute, claims that the trial court erred in allowing the State to call his wife Joanne Scherner as a witness. However, that statute contains an exception when the defendant commits the crime against a child of whom the defendant is a guardian, and the courts broadly construe who qualifies as a guardian under this exception. Because Scherner was responsible for M.S.'s care during the trip to Seattle, the exception clearly applies. In any event, any error was harmless given the very limited nature of Joanne Scherner's testimony and the overwhelming evidence of Scherner's guilt.

The spousal privilege statute provides that a spouse may not testify against the other spouse without the non-testifying spouse's consent; it also protects confidential communications made during

the marriage. RCW 5.60.060(1). The court construes this privilege strictly because it interferes with the fact-finding process. State v. Waleczek, 90 Wn.2d 746, 749, 585 P.2d 797 (1978); State v. Bouchard, 31 Wn. App. 381, 387, 639 P.2d 761 (1982).

The privilege does not apply in "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[.]" RCW 5.60.060(1). The legislative intent for this exception was to "protect children from physical and sexual abuse." Waleczek, 90 Wn.2d at 751. The purpose of this exception is "to facilitate the disclosure of abuses of children, so that the offenders might be punished and the children protected from further mistreatment." State v. Lounsbery, 74 Wn.2d 659, 663, 445 P.2d 1017 (1968).

To effectuate this legislative purpose, the courts have construed "guardian" broadly to include anyone who acts *in loco parentis*. Waleczek, 90 Wn.2d at 752. For purposes of this statute, the Washington Supreme Court has defined *in loco parentis* as:

one who means to put himself in the situation of a lawful parent to the child with respect to the office and duty of making provision for it; one assuming the parental character and discharging parental duties; a person standing in loco parentis to a child is one who

has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation, without going through the formalities necessary to a legal adoption.

Id. at 752-53 (quoting 67 C.J.S. Parent and Child sec. 71 (1950)).

A person may assume the role of *in loco parentis* by accepting some parental responsibilities, even if only for a short time; in order to determine if this has occurred, the court examines the facts and circumstances of the particular case. State v. Modest, 88 Wn. App. 239, 247-48, 944 P.2d 417 (1997).

In Waleczek, the court held that a defendant who babysat the child of a social acquaintance for one night was a guardian for purposes of the exception. 90 Wn.2d at 747-53. The court noted that the defendant and his wife allowed the seven-year-old child to sleep at their house and agreed to wake her in the morning, feed her breakfast, and get her off to school. Id. at 753.

Similarly, in State v. McKinney, 50 Wn. App. 56, 747 P.2d 1113 (1987), the victim was left at her grandmother's house. When the defendant and his wife arrived at the house around midnight, the grandmother asked the defendant's wife to sleep with the victim to make sure she was not frightened. The court found that the defendant's wife was acting as the child's guardian because she

was responsible for responding to the child's needs while she slept with her. 50 Wn. App. at 65.<sup>22</sup>

In this case, the trial court properly denied Scherner's motion to prohibit Joanne Scherner's testimony, explaining that "Roger Scherner was the guardian of [M.S.] at the time the alleged acts occurred." RP 760.

The court's ruling was correct. Scherner acted as M.S.'s guardian for M.S. while on their trip to Seattle. M.S. was under his control and custody; he was required to provide shelter and food for her, and take care of her every need. The trial court did not err in permitting the State to call Joanne Scherner as a witness.

Scherner cites Zellmer v. Zellmer, 164 Wn.2d 147, 188 P.3d 497 (2008) for the proposition that temporary custody or control over a child does not establish an *in loco parentis* relationship. However, the court in Zellmer was not concerned with the spousal privilege statute; instead, at issue was whether the parental immunity doctrine shielded a stepparent from an action for

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<sup>22</sup> See also Bouchard, 31 Wn. App. at 387 (holding that grandparents who undertook parental duties were guardians of granddaughter who lived across the street and visited them at will, unescorted); State v. Wood, 52 Wn. App. 159, 758 P.2d 530 (1988) (holding that the defendant was acting as a guardian when he engaged in playing with the preschool child of a neighbor).

negligent parental supervision. Given that the court in Zellmer did not discuss any of the cases addressing the guardian exception to RCW 5.60.060(1), it cannot be read as overruling the repeated holdings that the guardian exception to the spousal privilege is construed broadly.

Even if the court erred in admitting Joanne Scherner's testimony, any 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. State v. Webb, 64 Wn. App. 480, 488, 824 P.2d 1257 (1992). Joanne Scherner's testimony was very brief, in part because the court prohibited areas of inquiry after she asserted her Fifth Amendment right against self-incrimination. RP 718-35. She testified as to basic background information about the family relationships. RP 763-65. She testified that in January 2007, after a detective contacted her, she talked with Scherner about M.S. and he said "I'm sorry." RP 766-67. However, she insisted that Scherner did not admit anything. RP 766. This testimony added little to the overwhelming evidence of Scherner's guilt. Scherner has not shown a reasonable probability, in light of

the entire record, that any error in admitting Joanne Scherner's testimony materially affected the outcome of the trial.

**6. SCHERNER HAS FAILED TO ESTABLISH THAT JUROR MISCONDUCT JUSTIFIES A NEW TRIAL.**

For the first time on appeal, Scherner claims that juror misconduct requires a new trial because a few jurors saw a newspaper headline and picture about the case. Because Scherner was aware of these facts at trial and never suggested that juror misconduct justified a new trial, he has waived this claim on appeal. In any event, given that neither the headline nor the picture communicated anything new about the case or charges, the claim of misconduct is without merit.

**a. Relevant Facts**

On August 19, 2008, near the end of the trial, the Seattle Times ran a front page article about the case with the headline "Rape trial lets family share decades of pain, secrets." Pretrial Ex. 28. That morning, at defense counsel's request, the court inquired whether any of the jurors had read the Seattle Times. RP 810. Several jurors responded affirmatively. RP 810. The court then asked whether any jurors had read the article about the case, and no juror responded affirmatively. RP 811.

Defense counsel later requested that the court ask the jurors whether they had seen the defendant's picture in the paper or on the internet. RP 856-57, 934. The picture showed the defendant in the courthouse hallway with his hands behind his back, and defense counsel acknowledged that handcuffs were not visible. RP 856-57. Two jurors (Nos. 4 and 8) responded that they had seen a picture in the newspaper that they thought was related to the case. RP 936. Three jurors (Nos. 3, 4 and 11) responded that they had read a headline that might be related to the case. RP 936.

Outside the presence of the other jurors, Juror No. 8 explained that he got the paper, was about to open it in the jury room, and someone saw it and "freaked out." RP 937-38. The juror saw the main headline, never read anything and put the paper away. RP 938. After the court dismissed Juror No. 8, the court asked each of the remaining three jurors whether they could base any decision solely on the evidence that had been admitted and be uninfluenced by any pictures or headlines they observed. Each of the jurors responded positively. RP 937-39.

After this inquiry, Scherner's defense attorneys did not ask that the court take any further action and did not claim that juror misconduct had occurred.

b. Scherner Has Failed To Establish That Juror Misconduct Occurred.

For the first time on appeal, Scherner claims that the jury was exposed to extraneous evidence and that the trial court failed to conduct an adequate investigation into the alleged juror misconduct. Scherner has waived this claim because he did not assert it below. In any event, he has not shown juror misconduct justifying a new trial.

When a defendant does not object or move for a mistrial based upon the alleged misconduct of the jury, he is deemed to have waived his right to claim error. State v. Valenzuela, 75 Wn.2d 876, 881, 454 P.2d 199 (1969). This rule is consistent with the general rule that issues cannot be raised for the first time on appeal. RAP 2.5(a); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). There is a limited exception where the issue being raised involves a "manifest error affecting a constitutional right." RAP 2.5(a)(3). The term "manifest" requires a showing of actual prejudice; the defendant must make a plausible showing that

the asserted error had practical and identifiable consequences in the trial of the case. State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007).

Here, after the trial court finished questioning the few jurors who saw the headline and/or picture, defense counsel did not argue that there was a problem with any of the jurors or move for a mistrial.<sup>23</sup> On appeal, Scherner makes no effort to show the practical and identifiable consequences at trial of the fact that a few jurors may have seen the headline or photo in the newspaper. Accordingly, this issue is waived.

Even if Scherner can raise this issue, his claim should be rejected. With respect to Scherner's claim that the trial court failed to do an adequate inquiry into the newspaper article, this Court reviews a trial court's investigation into alleged jury misconduct for abuse of discretion. State v. Earl, 142 Wn. App. 768, 774, 177 P.3d 132 (2008). Here, the court asked numerous questions of the jurors to determine what they saw. Given the jurors' responses and

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<sup>23</sup> At the point this issue arose the court had not yet selected and excused the alternate juror. RP 1051-52. Had Scherner timely claimed that one of the jurors committed misconduct, the court would have had the option of excusing that juror as the alternate, rather than grant a new trial.

the defense counsel's failure to suggest any further action, the court did not abuse its discretion in handling this issue as it did.

Moreover, Scherner has not met his burden of showing that a juror committed misconduct by considering extrinsic evidence. See State v. Hawkins, 72 Wn.2d 565, 568, 434 P.2d 584 (1967) (holding that the burden is upon the moving party to show any alleged misconduct of the jury). Extrinsic evidence is "information that is outside all the evidence admitted at trial, either orally or by document." Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 270, 796 P.2d 737 (1990). "Such evidence is improper because it is not subject to objection, cross examination, explanation or rebuttal." State v. Balisok, 123 Wn.2d 114, 118, 866 P.2d 631 (1994).

In this case, a few jurors saw a picture of the defendant and a headline stating "Rape trial lets family share decades of pain, secrets." The headline stated nothing that was not readily apparent from the testimony at trial; Scherner's victims all testified that they had only very recently shared with their relatives the fact that Scherner had also molested them. The picture in the paper also showed nothing incriminating; Scherner's counsel acknowledged

that any handcuffs that Scherner was wearing were not visible in the picture.

Even assuming Scherner established juror misconduct, not all instances of juror misconduct merit a new trial; there must be prejudice. State v. Barnes, 85 Wn. App. 638, 669, 932 P.2d 669 (1997) (citing State v. Tigano, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991)). The court determines prejudice by asking whether the withheld or extraneous information could have affected the jury's deliberations. Tigano, 63 Wn. App. at 341. The particular misconduct must be considered in light of all the facts and circumstances of the trial. Id. at 342.

In Tigano, several jurors read newspaper articles or listened to a radio report about the case, contrary to the court's specific instructions. 63 Wn. App. at 342-43. The trial court denied the motion for a new trial, finding that the additional information added nothing significant to what the jurors had been told in court. Id. at 340. The Court of Appeals upheld the trial court, finding no abuse of discretion. Id. at 343-34.

Similarly, in State v. Adamo, 128 Wash. 419, 421, 223 P. 9 (1924), a juror acknowledged that he had read the headline of a newspaper article indicating that the defendant had

been convicted at a former trial. The Washington Supreme Court rejected the argument that this justified a new trial, explaining:

[T]he headlines of the newspaper article only pretended to give the results of the former trial. Neither they nor the article itself pretended to give any opinion concerning the guilt or innocence of the appellant, nor did they in any way attack him. It was apparently a fair report of the result of the first trial.

Id. at 421.

In this case, as noted above, the headline and picture in the Seattle Times added nothing significant in light of the evidence introduced at trial. There was no prejudice, and the claim of juror misconduct should be denied:

The case primarily relied upon by Scherner, State v. Rinkes, 70 Wn.2d 854, 425 P.2d 658 (1967), concerned a newspaper editorial and cartoon, not about the case, that was mistakenly sent back to the jury for consideration as an exhibit. The editorial addressed the "purported leniency of area judges to alleged criminals," and the jury was able to consider it during its deliberations. Id. at 862-63. Under these circumstances, the Supreme Court concluded that "the material was very likely indeed to prejudice the cause of the defendants in this case." Id. at 863.

Rinkes is easily distinguishable. In Scherner's case, no jurors actually read the article in question, and the few jurors who saw the headline or picture acknowledged that they would base their verdict solely on the evidence introduced at trial. Under these facts, a new trial is not warranted.

**D. CONCLUSION**

For the reasons set forth above, the State respectfully requests that this Court affirm Scherner's convictions.

DATED this 17<sup>th</sup> day of June, 2009.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Eric Lindell, the attorney for the appellant, at 4409 California Avenue SW, Suite 100, Seattle, WA 98116, containing a copy of the Brief of Respondent, in STATE V. ROGER SCHERNER, Cause No. 62507-1-I, in the Court of Appeals, Division I, for the State of Washington.

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame  
Name  
Done in Seattle, Washington

6/18/09  
Date