

WASHINGTON STATE COURT OF APPEALS

DIVISION II

NO. 39750-1-II

STATE OF WASHINGTON,

RESPONDENT,

Vs.

William Kipp,

APPELLANT

BRIEF OF APPELLANT

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STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II

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Brief of Appellant Kipp

ORIGINAL

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B. ASSIGNMENTS OF ERROR

1. The court erred in not holding the full evidentiary hearing including testimony of Mr. William Kipp (hereinafter Kipp) and Mr. Joseph Tan (hereinafter Tan) as requested by the defense regarding the Privacy Act Suppression motion. Clerks Papers item hereinafter (CP) at 38-39; Verbatim Report of Proceedings (Hereinafter RP) at 57, 61-62.
2. The court erred in finding that the kitchen where the recorded conversation of Mr. Kipp and Mr. Tan took place was a room lacking in privacy and this finding was without substantial evidence to support it. RP at 63.
3. The court erred in finding the recorded conversation between Mr. Kipp and Mr. Tan was not a private conversation. RP at 62-64; 202-03.
4. The court erred in its finding that Mr. Kipp and Mr. Tan weren't talking as family members and they weren't talking as brothers-in-law; but, that they were talking as father of a daughter and the accused molester as the nature of the relationship. RP at 64.
5. The court erred in finding that the "nature" of the recorded conversation was between the father of a daughter (Mr. Tan) and the accused molester (Mr. Kipp), because the finding is without substantial evidence since the court did not allow Mr. Kipp to present his evidence

that he was under duress in making the statements in the recorded conversation at issue. RP at 57, 61-2, 64, 313-33; CP at 39.

6. The court erred in finding that the Privacy Act did not require the suppression of the secretly recorded conversation between Mr. Tan and Mr. Kipp. RP at 62-64; 202-03.

7. The court erred when it found that the nature and duration of the conversation between Mr. Kipp and Mr. Tan was a confrontation that is not the sort of thing that remains private, whether this was a finding of fact or a conclusion of law. RP at 64.

8. The court erred in allowing the previous alleged bad acts in under an ER 404b and/ or an ER 403 analysis. RP at 64; RP at 106.

9. The court erred in allowing the previous alleged bad acts in under RCW 10.58.090 and an ER 403 analysis. RP at 64; RP at 106.

10. The court erred in finding that RCW 10.58.090 is constitutional. RP at 98-106.

11. The court erred in suppressing the testimony of Alan Tan because of his late disclosure as a witness and/or because his testimony would be similar in nature to Ms. Tan's and Tan-Kipp's. RP at 127 and 22 July 09 RP at 5-6 (A supplemental verbatim report of proceedings from 22 July 2009 containing only the portion of the record where the issue of Alan Tan as a witness was raised; hereinafter 22 July RP).

C. QUESTIONS PRESENTED

1. Whether the court should have held a factual hearing to allow Mr. Kipp to present his evidence in support the Privacy Act motion to suppress?
2. Whether since Mr. Kipp was not allowed to testify in support the Privacy Act motion to suppress and Mr. Tan's testimony was at trial and limited to voir dire regarding authentication of the tape the trial court's findings of fact, lack substantial evidence in the record?
3. Whether the court erred in finding that the secret recording of Mr. Kipp , which lasted over ten minutes by Mr. Tan, in Tan's residence, while they were alone in the kitchen did not violate the statutory protections of the Privacy Act, RCW 9.73.030 based upon the facts and undisputed proffers before the court?
4. Whether when the trial court in applying RCW 10.58.090 and ER404b did so correctly when assessing the ancient allegations raised by JMC, which unfairly prejudice Mr. Kipp both to disproving the ancient allegations and/or the lack of a need for them in this case?
5. Whether under CrR 4.7 and/or ER 403 should Alan Tan's testimony been excluded, as he was one of the few witnesses to events around the alleged assaults to both JMC or DGT?

6. Whether RCW 10.58.090 is an unconstitutional violation of the Separation of Powers?
7. Whether the evidence for a common plan or scheme should be excluded in this case?

D. STATEMENT OF THE CASE

Mr. William Kipp's jury trial for two counts of Rape of child in the second degree and one count of child molestation in the second degree was called on 21 July 2009, the court heard motions including the Privacy Act suppression motion and the motions in limine, including those regarding RCW 10.58.090 on that date. RP at 3-116; CP at 8-10. This was followed with jury selection starting on 22 July 2009 . See RP at 116 and the 22 July Report of Proceedings hereinafter (22 July RP) at 2. The defense attempted to add Mr. Alan Tan as a witness on 22 July 2009, which was objected to by the State and the court gave an interim ruling suppressing his testimony. 22 July RP at 2-6. The State started presenting its witnesses on 28 July 2009. The State rested that same day. RP at 136-230. The defense started and rested its case on 29 July 2009. RP at 241-349. Mr. Kipp was found guilty of the offenses charged and subsequently sentenced. See CP 73-84 the judgment and sentence.

The defense moved to suppress the recording of the tape of the conversation between Mr. Kipp and Mr. Joseph Tan (Mr. Kipp's brother-

in-law. CP 38-44. The Defense included within the motion an offer of proof that this was a “private conversation”¹ recorded without the knowledge of Mr. Kipp. CP at 38-39. That Mr. Kipp believed Mr. Tan was armed and knew Mr. Tan had been found not guilty by reason of insanity for the murder his wife. CP at 38. That Mr. Kipp was in fear of Mr. Tan during this conversation. CP at 38. That Mr. Tan had admitted this was a conversation he had secretly recorded. CP 38. Counsel for defense stated in the motion to suppress, “I believe that there is a factual basis for the motions herein, that they are made in good faith, and that an evidentiary hearing regarding the motions is merited.” CP at 39.

The Defense offered again to present testimony regarding the Privacy Act suppression motion. RP at 57. The defense indicated it would explain why the defendant responded the way he did². RP at 57 (See also RP at 313-333 Kipp’s testimony at trial regarding his fear that both he and his two young children were at risk from Mr. Tan who had previously been

¹ The court did not grant a full evidentiary hearing and so the basis for characterization that this was a “private conversation” is somewhat flushed out when this motion to suppress was re-visited by the court during trial; when the defense pointed out that Mr. Kipp believed that he had asked during the recorded conversation (in a portion of the recording that was unintelligible to counsel and apparently the court reporter, but apparently not to Mr. Kipp or Judge Laurie) “Are we alone”. See RP at 56, and 202-03 .

² Mr. Tan testified he found out about Mr. Kipp abusing his daughters in May 2008. RP AT 214. Mr. Tan testified that he did not report this matter to the police until after the Mr. Horatio Tan the patriarch of the family was removed from Mr. Joseph Tan’s care and was placed with the Kipps, in October of 2008, and after the secret recording was made. RP at 215-216. Mr. Horatio Tan died in November 2008. RP at 215.

found not guilty by reason of insanity to the bludgeoning death of his wife. See also the testimony of Ms. Kipp regarding the family dispute between her and her brother Joseph Tan RP at 255-274). Counsel made another offer to have his Mr. Kipp establish the facts by testimony. RP at 61-62.

The State noted that there were factual disputes regarding the circumstances of the conversation at issue. State's Response to Defendant's Motion to Suppress Hereinafter CP at 66. The state's response challenged there was any evidence of a weapon. CP at 64. The State proffered that the conversation, at issue, was roughly 10 minutes in length. CP at 64. That Mr. Kipp admitted during this 10 minute conversation that he had molested Mr. Tan's daughters. CP at 64. The State also proffered that the conversation did not explicitly contain any reference to keeping the conversation between the two private. CP at 64.

The offers of proof were further fleshed out in open court. RP at 56-57, 59-60. Counsel for the defendant stated he could establish through testimony of Mr. Kipp, that the conversation at issue: (1) took place in a house, a private residence, (2) as Mr. Kipp entered the room³ a family member (the son of Mr. Tan) left the kitchen⁴ for Mr. Kipp and Mr. Tan to

³ Subsequent testimony by Mr. Kipp corrected an error by counsel, Mr. Kipp specified that it was not the kitchen, but when he was entering the residence. RP at 323.

⁴ The kitchen was the room in the residence where the recorded conversation took place.

be alone, (3) why Mr. Kipp believed that the room would be private⁵, (4) the intimate subject matter of the conversation, (5) there was no presence of a third party, (6) that the recording was done secretly, and (7) that the conversation was between Mr. Kipp and Mr. Tan alone. RP at 56-57.

The state noted additionally that Mr. Kipp and Mr. Tan were family members and that Mr. Tan was confronting Mr. Kipp as the father of the two young women alleged to have been molested. RP at 60, and 65.

Judge Laurie listened to the approximately 10 minute recording, without objection. RP at 57-58. The recorded tape⁶ was transcribed to the best of the court reporters ability. RP at 207-213. The court revisited the suppression motion after the state substituted the original recording during the jury trial, because the original recording was more intelligible. RP at 191-192, 199-200, 202-203. This occurred when Mr. Tan was on the stand to authenticate the tape at issue. RP -187-91; 199-201.

The Defense raised that Mr. Kipp could hear himself on the tape saying, "Are we alone." RP at 202 line 25. The Defense then requested the court to revisit the motion to suppress the tape. RP at 202-03. The court

⁵ The court ruled that the kitchen would not be a private area, thus rejecting Mr. Kipp's offer of proof on this issue and not allowing him to present evidence to establish his basis for this claimed fact. Yet trial testimony seems to indicate that this room was upstairs with everyone else downstairs arguably providing notice of anyone coming up the stairs. RP at 206.

⁶ This transcription was off a subsequent tape, of better quality than what the state provided Judge Laurie or the defense before trial. See RP at 191-192, 199-200.

stated, “I did not hear it as clear as Mr. Kipp did, but what I heard even clearer was his closing remarks, which confirm in my mind the earlier ruling that he suggested that he and Mr. Tan go somewhere alone to further discuss it, to further explain it. Consequently my ruling stands.” RP at 203.

Mr. Kipp subsequently testified during trial to his seeing Mr. Tan’s wife being wheeled out of the residence in a gurney, bleeding from her head. RP at 311-12. He testified that on the day the tape at issue was made he had went over to the Tan residence. RP at 313. That he had with him his two small children. RP at 313. That Vlace Tan (Mr. Joseph Tan’s son) was leaving the kitchen as Mr. Kipp went up. RP at 313. That Vlace told him as he entered the house “that his dad wanted to talk to me, and that he had told his dad to leave my family alone and not to hurt me.” RP at 323.

The court gave two rulings on the motion to suppress the recording at issue, both finding that the conversation at issue was not a private conversation and allowing the jury to hear the recording. RP at 62-64⁷; 203.

⁷ The court ruling was as follows:

THE COURT: I did listen to the tape: 10 minutes and 16 seconds. It was very difficult to understand a great deal of it, but parts of it were more clear. The question before me is whether it is a private

The trial court gave a detailed recitation applying its analysis to ER 404b, RCW 10.58.090, including the courts ER 403 analysis and finding that the alleged prior bad act(s) regarding JMC should come into evidence and were proven by a preponderance of the evidence. RP at 102-107

conversation. And both parties have given me the factors outlined in the case law to review when determining whether this was a private conversation or not. The first factor is the nature and duration of the conversation. And on this factor I think it splits equally between the parties in terms of their position. It is a confrontation by a father to someone he believes has molested his daughters. Whether that belief is true or not, it is his belief. And that sort of confrontation is not the kind of thing that remains private. However, it was also long and isn't these offhand remarks to a stranger that we see. So I think that factor, balancing, we've got almost identical considerations to both sides. The second factor is where it took place. And again, we've got a bit of a split. Mr. McFadden is correct, it took place in a private residence, but it did take place in a common area, the kitchen. It didn't take place in a bedroom or in a basement, anything. And I will accept Mr. McFadden's description of the events as would have been testified to by Mr. Kipp. I'll accept the offer of proof that it did take place in this kitchen and that Mr. Tan's son has left. But the issue is the potential for a third person to come in. And I think that potential is much higher in this situation in a kitchen than it would be in a different place.

The third factor that is outlined by the courts is the role of the nonconsenting party and his or her relationship to the consenting party. And again, we've got a couple of things going on; they are family members, and typically that would be private. But they weren't talking as family members; they weren't talking as brothers-in-law. They were talking as father of a daughter and the accused molester. And I think that's really the nature of the relationship. what tips me though on this analysis is something that was on the tape that isn't covered by one of the factors, but is certainly the expectation and intent of the parties through the language of the parties. At the very end of the tape, as they are kind of winding down the conversation, Mr. Kipp says to Mr. Tan - - and I might not have it exactly correct because of the quality of the tape, but he says: Let's go somewhere and talk about this, just the two of us. That tells me that he's looking for a private conversation and that what was going on ahead of time wasn't. I am going to allow the jury to hear the tape
RP at 63-64.

The court found that RCW 10.58.090 is constitutional and explained the reasoning. RP at 100-101.

The court suppressed the testimony of Alan Tan because of his late disclosure as a witness and/or because his testimony would be similar in nature to Ms. Tan's and Tan-Kipp's. RP at 127 and 22 July 09 RP at 5-6. This issue of Alan Tan as a witness was initially raised in the supplemental verbatim report of proceedings from 22 July 2009 containing only the portion of the record that day (the rest was jury selection), 22 July RP at 2-6. Counsel made an offer of proof on 28 July 2009 to the court as to what Alan Tan could testify to at trial. RP at 123-4.

E. ARGUMENT

I & II. The court should have held a factual hearing to allow Mr. Kipp to present his evidence within the Privacy act motion; and in the alternative since Mr. Kipp was not allowed to testify in support of the motion and Mr. Tan's testimony was at trial and limited to voir dire regarding authentication of the tape, and so the trial court's findings of fact, lacked substantial evidence.

a. Standard of Review:

The appeals court reviews issues of law de novo. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293, 300 (1996). The trial court in the face of disputed facts chose to rule on the proffers of evidence and by

listening to the tape at issue. However, “**Whether a conversation is private is a question of fact, unless the facts are undisputed and reasonable minds could not differ, in which case it is a question of law.**”

[citations omitted] *Lewis v. State, Dept. of Licensing*, 157 Wn.2d 446, 458-459, 139 P.3d 1078 (2006) (emphasis added).

If the case involves mixed questions of law and fact such issues are reviewed under the error of law standard. *Korte v. Employment Sec. Dept.* 47 Wn.App. 296, 300, 734 P.2d 939, 942 - 943 (1987). A mixed question of law and fact exists when there is a dispute both as to the inferences drawn from the raw facts and the meaning of a statutory term. *Korte*, at 300.

Mr. Kipp argues that these are pure question of law. But, he could see an argument that because some of the evidence at issue, the recording and ultimately some testimony from Mr. Tan became available for this issue that it could be argued to be a mixed question, with the trial court relying upon those facts in the record. In either case the standard of review is still de novo, even for the review of a mixed question. *Korte*, at 300.

Findings of fact are viewed as verities, provided however, there is substantial evidence to support the findings. *State v. Hill*, 123 Wn.2d 641, 644-47, 870 P.2d 313, (1994). Substantial evidence exists where there is a

sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *Hill*, at 644-47.

b. Argument

Mr. Kipp argues that in this case there were disputed facts on the issues the court ruled upon and as noted in *Lewis* 157 Wn.2d at 458-459 that a court can only make its ruling as a matter of law if the facts are not in dispute as they were in this case. Ultimately the trial court resolved some of these issues, without allowing Mr. Kipp to present his side of the matter in an evidentiary hearing as he requested and repeatedly offered to do for court, in violation of the standard set out in *Lewis supra*.

First, a key factual issue was the privacy, or lack thereof for the recorded conversation at issue that took place in the kitchen. Mr. Kipp offered to explain why he believed it was a room with privacy⁸. RP at 56-57. Mr. Tan's trial testimony states that this room was upstairs with everyone else downstairs⁹. RP at 206. Mr Kipp argues that he also could have provided this testimony at a suppression hearing and then argued that

⁸ Mr. Kipp ultimately did testify at trial regarding the recorded conversation. RP at 312-316.

⁹ Assuming that the court had allowed an evidentiary hearing on the privacy act motion to suppress Mr. Tan would have been called by the Defense. See CP at 38 ("Joseph G. Tan, will be called and is expected to testify . . .").

anyone coming up the stairs, would have provided them with notice of another person approaching increasing the level of privacy.

The State explicitly argued that this was not a private room stating, “[I]t apparently took place in a residence, but in a kitchen. Anyone could have walked in.” RP at 59-60. The court explicitly accepted the State’s offer and argument on this issue stating, “But the issue is the potential for a third person to come in. And I think that potential is much higher in this situation in a kitchen than it would be in a different place.” RP at 63. The court did this without allowing Mr. Kipp the opportunity to present his evidence from the proffers made to the court on this issue.

The second factual dispute was whether the tape was obtained by duress applied against Mr. Kipp by Mr. Tan’s actions in the room and the evidence about his son telling Mr. Kipp, I told my dad not to hurt you. CP at 38-39; *see also* trial testimony at RP at 323. Mr. Kipp alleged that he believed Mr. Tan was armed. CP at 38. That Mr. Kipp viewed this as confrontation. CP at 38. Mr. Kipp proffered that he was in fear of Mr. Tan when he was speaking to him in the kitchen. CP at 38. His subsequent trial testimony also noted that he was fearful of injury being done to his children by Mr. Tan and this in part arose from Mr. Tan’s bludgeoning his wife to death and then being found insane. RP at 314-16, 323. The State had argued that there was no evidence of a threat. CP at 64.

Again, there was a factual dispute regarding the nature of the conversation. The reason this becomes important is that the court also found for the State on this point and stated: “But they weren't talking as family members; they weren't talking as brothers-in-law. They were talking as father of a daughter and the accused molester. And I think that's really the nature of the relationship.” RP at 64. Again, at this point if the court is finding the nature of the relationship was father of a daughter and accused molester, it finds against Mr. Kipp’s version of what was occurring, that it was a confrontation with a potentially armed madman, who got away with murder before. CP 38-39; RP at 57, 61-64, & (See Mr. Kipp’s trial testimony on this issue RP at 313-333). But the court made this finding without allowing Mr. Kipp to present testimony, limiting to his proffers and the tape. See RP 63-64. While this is not one of the factors in *Lewis supra*; however, the court did use this issue as part of its analysis to come to the conclusion that it was not a private conversation. RP at 64.

The non-constitutional error analysis is done at the end of issue III directly below because the exclusion of tape is addressed by the first three issues.

III. The court erred in law, in finding that the secret recording of Mr. Kipp , which lasted over ten minutes by Mr. Tan, in Tan’s residence, while they were alone in the kitchen did not violate

the statutory protections of the Privacy Act, RCW 9.73.030 based upon the facts in the record and the undisputed facts in the proffers before the court.

a. Standard of Review:

Although findings of fact in a suppression hearing are entitled to great deference on appeal, if the trial court did not hear oral testimony for such a finding, but made the finding based solely on stipulated facts, there is no reason to defer to the judgment of the trial court, and the finding should be reviewed de novo. *State v. Rowe*, 93 Wn.2d 277, 280, 609 P.2d 1348 (1980). Additionally, there must be substantial evidence to support the findings of facts in the record. *See Hill*, at 644-47. Errors of law are reviewed de novo. *Johnson*, at 443.

b. Argument

Mr. Kipp argues that on the undisputed facts within the proffers and those evidentiary facts available to the court, including those when it revisited the motion to suppress during the trial that it was an error of law for the court to find that the recorded conversation at issue was not a private communication covered by the privacy act. The only issue before the trial court on the Privacy Act motion was whether the conversation was private within the meaning of the act. See CP 38-44; 63-68.

Mr. Kipp argues the undisputed facts proffered to the court or the court found from the recording or established by Mr. Tan's trial testimony can be summarized as follows: a) the recorded conversation took place in a private residence's kitchen (See RP at 63-64); b) the recorded conversation was about ten minutes in length (See RP at 58, CP at 64); c) before Mr. Kipp entered the kitchen for the conversation a family member (the son of Mr. Tan) left the kitchen for Mr. Kipp and Mr. Tan to be alone (See RP at 63-64); d) Mr. Kipp and Mr. Tan are family members brothers in law (See RP at 63-64); e) Mr. Kipp says that he could hear himself on the tape saying, "Are we alone?" RP at 202; f)The court found, "I did not hear it as clear as Mr. Kipp did, but what I heard even clearer was his closing remarks, which confirm in my mind the earlier ruling that he suggested that he and Mr. Tan go somewhere alone to further discuss it, to further explain it. Consequently my ruling stands." RP at 203.¹⁰ The issue is ,on the above facts found from the actual evidence presented, and undisputed facts from the parties proffers, was the conversation, at issue,

¹⁰ The actual transcribed portion of the recorded conversation the court is referring to is as follows: "MR. KIPP: No, no. No, like I say, when we get a chance, just you and I, we will go somewhere and we'll talk, try to -- MR. TAN: Okay. MR. KIPP: -- understand everything. MR. TAN: Okay. (End of tape.)" RP at 213.

private within the meaning of the privacy act. The relevant portion of RCW 9.73.030, the Privacy Act states:

(1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:

...

(b) **Private conversation**, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated **without first obtaining the consent of all the persons engaged in the conversation.**

RCW 9.73.030 (emphasis added).

“[Washington's privacy act, chapter 9.73 RCW] is one of the most restrictive electronic surveillance laws ever promulgated.” *State v. O'Neill*, 103 Wn.2d 853, 878, 700 P.2d 711 (1985). While there is no statutory definition of private, the case law used the dictionary definition and provided three factors for the trial court to consider in determining if the communication is private as seen below:

In *Kadoranian*, this court adopted the *Webster's Third New International Dictionary* (1969) definition of “private” as “ ‘belonging to one's self ... secret ... intended only for the persons involved (a conversation) ... holding a confidential relationship to something ... a secret message: a private communication ... secretly: not open or in public.’ ” 119 Wash.2d at 190, 829 P.2d 1061 (quoting *State v. Forrester*, 21 Wash.App. 855, 861, 587 P.2d 179 (1978)). When determining whether a particular conversation is private, we look to the subjective intentions of the parties to the conversation. *Clark*, 129 Wash.2d at 225, 916 P.2d 384. However, because most defendants would contend that

their conversations are private, we also look to factors bearing on the reasonable expectations and intent of *459 the parties. *Id.* In *Clark*, we identified three factors bearing on the reasonable expectations and intent of the parties (1) **duration and subject matter of the conversation**, (2) **location of conversation and presence or potential presence of a third party**, and (3) **role of the nonconsenting party and his or her relationship to the consenting party**. *Id.* at 225-27, 916 P.2d 384. *Lewis*, 157 Wn.2d at 458-459.

Duration and Subject Matter: The duration of the tape is slightly over 10 minutes in length and can be characterized as Mr. Kipp confessing to having molested Mr. Tan's two daughters¹¹; however compare this long conversation with intimate and incriminating subject matter to the short and inconsequential conversations the appeals courts analyzed in the *D.J.W.* and *Kadoranian* cases. *State v. D.J.W.*, 76 Wn.App. 135, 140-142, 882 P.2d 1199 (1994) stated:

Under the foregoing analysis, the conversations between the appellants and the cooperating witness were not private. **The appellants were vendors of merchandise selling their wares on a public street to anyone who wished to be a customer. Just as a clerk in a store would be willing to engage in a conversation about a product with any customer who happened by, so did the appellants manifest a willingness to engage in a conversation with any prospective buyer.** It is reasonable to conclude that **their conversations with Glass were practically identical in substance to those between them and any other purchaser with whom they transacted business.** The conversations, then, could not have been

¹¹ See the transcription of the recording at RP 207-213. See also RP at 214, Mr. Tan's testimony that it was a confession.

“secret” or intended only for the ears of the individual appellants and Glass, because the identity of the person with whom the appellants were conversing during any given conversation was not significant.^{FN1}

FN1. Obviously, Glass's identity as a cooperating witness eventually became quite significant to the appellants, but in a different context than relevant here.

While Glass's identity remained unknown to the appellants, the appellants treated him no differently than they would have treated any other potential buyer.

We find the situation here similar to that in *Kadoranian*, where the police intercepted a brief telephone conversation between the plaintiff and a police informant who called to speak with the plaintiff's father, a police suspect. The conversation consisted of the daughter telling the informant her father was not home. In rejecting the daughter's argument that the interception of the conversation violated the Privacy Act, the court stated: ****1203 When Ms. Kadoranian answered the home telephone, there is no indication she knew who the caller was. She gave general information, without requiring identification from the caller, *142 and without asking the caller's reason for wanting to talk to her father. There is no reason to believe that Ms. Kadoranian would have withheld this information from any caller.** It does not appear that Ms. Kadoranian intended to keep the information (the fact that her father was not home) “secret” or that she had any expectation that her conversation was private. *Kadoranian*, 119 Wash.2d at 190, 829 P.2d 1061.

[3] **In the instant case, there is no reason to believe the appellants would have withheld any information they gave Glass, including the fact that they had cocaine to sell, from any other prospective buyer.** There is no indication that any of the appellants intended to keep this information from anyone other than, of course, the police. A desire to conceal one's conversation from the police is not enough to make that conversation private. We find no indication that the appellants had any expectation of privacy in their conversations with Glass. [footnote omitted]. . . .

In sum, giving the term “private conversation” its ordinary and usual meaning, we conclude that the conversations between the appellants and Glass were not private. Consequently, recording the conversations did not violate the Privacy Act because the Act applies only to private conversations.

State v. D.J.W, supra (emphasis added).

When comparing the fleeting conversations above, hawking drugs on the street and answering the telephone and giving general information to the 10 minute conversation regarding sexual molestation in this matter they are different by orders of magnitude. When considering the conversation and facts laid out for Mr. Kipp above, and because of the intimate subject matter and relatively long length of the conversation, a logical conclusion is the conversation was considered private by the parties. The very nature of the subject matter tends to have it discussed privately by people rather than openly as a public matter. They were alone in a room upstairs. Mr. Kipp asked if they were alone. They were brothers in law. There were incriminating statements made. All of these go to the privacy which was reasonably expected by Mr. Kipp.

However, the trial court starts its analysis by misstating the first part of the rule, “The first factor is the **nature and duration** of the conversation” RP at 64 (emphasis added). The analysis provided by *Lewis supra*, uses

duration and subject matter; not “nature”¹². *Lewis*, at 459. Nature is defined as “[T]he inherent character or basic constitution of a person or thing : essence b: disposition, temperament.”¹³ The court focuses on the nature – describing it as: “It is a confrontation by a father to someone he believes has molested his daughters. . . . **And that sort of confrontation is not the kind of thing that remains private.** However, it was also long and isn’t these offhand remarks to a stranger that we see.”RP at 64 (emphasis added). Mr. Kipp argues this misstatement of the rule leads the court from focusing on the **subject matter**¹⁴ of the conversation, ignoring this factor.

¹² Miriam Webster online dictionary at <http://www.merriam-webster.com/> on 3-1-2010, states: “Main Entry: **na·ture**, Pronunciation: \ˈnā-chər\, Function: *noun*, Etymology: Middle English, from Middle French, from Latin *natura*, from *natus*, past participle of *nasci* to be born — more at **NATION**

Date: 14th century

1 a : the inherent character or basic constitution of a person or thing ; **ESSENCE b** : **DISPOSITION, TEMPERAMENT**

2 a : a creative and controlling force in the universe **b** : an inner force or the sum of such forces in an individual

3 : a kind or class usually distinguished by fundamental or essential characteristics <documents of a confidential nature> <acts of a ceremonial nature>

4 : the physical constitution or drives of an organism; *especially* : an excretory organ or function —used in phrases like *the call of nature*

5 : a spontaneous attitude (as of generosity)

6 : the external world in its entirety

7 a : humankind's original or natural condition **b** : a simplified mode of life resembling this condition

8 : the genetically controlled qualities of an organism

9 : natural scenery”.

¹³ Miriam Webster online dictionary at <http://www.merriam-webster.com/> on 3-1-2010.

¹⁴ Miriam Webster online dictionary at <http://www.merriam-webster.com/> on 3-1-2010, states: “Main Entry: **subject matter** Function: *noun* , Date: 1657: matter presented for consideration in discussion, thought, or study”.

The court by focusing on the “nature” leaps to drawing a conclusion of law that the “nature” of such a conversation is that it will be disclosed; however, a proper application of the rule in the analysis would have focused the court on a 10 minute plus conversation regarding alleged admission to illegal sexual acts, which the defense argues tilts toward the sort of conversation, which is reasonably expected to be private for the reasons argued above. Again, why else would the defendant been willing to admit to the incriminating allegations¹⁵ assuming for the moment the State’s theory that this was a confession, rather than the defense theory presented at trial that this was a conversation made under duress. *See* RP at 313-333 and proffers for the motion hearing CP at 38-39. Additionally, would such a conversation have been made causally to some stranger, say for instance an unknown caller such as described in *Kadoranian supra*., Of course, no such incriminating statements would have been made to a stranger. They were made to a family member with the expectation of privacy.

Kadoranian vs. Bellingham Police Dept., 119 Wn.2d 178, 191 829

P.2d 1061 (1992) held: “We thus conclude that the very brief

¹⁵ Again, the court’s unwillingness to grant an evidentiary hearing despite proffers, which raised issues of coercion by Mr. Tan against Mr. Kipp in getting this secret recording prevented the defense from being able to fully explore this issue before the court. Note Mr. Kipp’s testimony at trial did raise this issue and was argued by the defense to the

communication between Mr. Carino and Ms. Kadoranian was not a “private” communication or conversation. Like the long distance operator's comments, the comments of Ms. Kadoranian were inconsequential, **non-incriminating** and made to a stranger. They were not the kind of communication that the privacy act protects.” (emphasis added). In this case, the comments were not inconsequential, they were incriminating and made to relative. The facts are essentially the exact opposite of *Kadoranian supra*, which infers that the communication at issue here should have been protected by the as private.

Second factor the location of conversation and presence or potential presence of a third party, The trial court correctly stated the standard, the location of conversation and presence or potential presence of a third party. RP at 63-64. The trial court accepts that the conversation occurred in the private residence, in its kitchen, and that Mr. Tan’s son had left. RP at 63-64. However, the court draws a conclusion regarding the potential of third party coming into the kitchen being high because it was a kitchen and not some other room in the house. RP at 64.

This finding ignored Mr. Kipps offer of proof on this issue, which included the explicit proffer by counsel to have Mr. Kipp testify as to why

jury, unsuccessfully, as to why he allegedly confessed to wrong doing on the tape. See RP at 313-333.

he believed the room was private and why he responded in the way he did. RP at 57. Because the court chose not to have an evidentiary hearing, this conclusion is made without substantial evidence in the record, despite the defense request in their motion to suppress that an evidentiary hearing was warranted. CP at 39. Again without this finding or inference the balance tilts toward finding the conversation private, because the conversation took place within a private residence, while the two men were alone.

Mr. Kipp's¹⁶ or Mr. Tan's in testimony, could have established the layout of the room and that it was upstairs, and as Mr. Tan subsequently testified everyone else was downstairs during the conversation. RP at 205. Once again the court did not allow Mr. Kipp the opportunity to submit evidence on an issue in violation of *Lewis supra*; and instead accepted proposed facts without substantial evidence in the record to substantiate that the kitchen was a room with a low level of potential privacy.

The Third factor the role of the nonconsenting party and his or her relationship to the consenting party.

The trial court found, "And again, we've got a couple of things going on; they are family members, and typically that would be private. But they weren't talking as family members; they weren't talking as brothers-

¹⁶ Mr. Kipp testified regarding the kitchen, where people were at and that they could not hear the conversation during trial at 314-316, 323.

in-law. They were talking as father of a daughter and the accused molester. And I think that's really the nature of the relationship.” RP 65.

Once again the trial court strays from the factors. The relationship was that Mr. Kipp and Mr. Tan were family, brothers in law. RP at 60. Instead the trial court focuses on the inference it drew from the conversation, which again goes back to the courts characterization of its nature, and was made without allowing Mr. Kipp to present his version of what occurred. Further, there is no authority to argue that the court should substitute the nature of the conversation over the family relationship.

The trial court’s analysis misses the factor listed by *Lewis supra*, which does not address the nature of the conversation, but the relationship and role of Mr. Kipp. Second, Mr. Kipp alleged that he had tried to insure they were alone by asking if they were, which goes to his role. RP at 202-03. Third, the inference drawn by the court that he asked to talk elsewhere, with just the two of them, could as easily be argued in favor of Mr. Kipp as he was still insuring secrecy even after 10 minutes of conversation going to his role. Fourth, unlike *Kardorian supra*, or *D.J.W. supra*, Mr. Kipp was not speaking with a stranger discussing some inconsequential matter or selling something in the street.

Again, as to the nature of the conversation it depends on whose facts one accepts, was he responding to a madman, who had put Mr. Kipp under

duress or to a father concerned his daughters had been molested? The essential role of Mr. Kipp was determined despite opposing proffers advanced by the State and the Defense, without allowing Mr. Kipp to present testimony on this issue. The court made its finding without substantial evidence in the record and in error of law, since under *Lewis supra* the facts must be agreed or established by a hearing. The nature of the conversation should not have been determined by the trial court because of the opposing proffers of evidence on this point without an evidentiary hearing allowing both sides the opportunity to present evidence.

The available evidence to the trial court, as argued above then strongly supports that the recorded conversation was private. The recording and any evidence regarding the conversations should be suppressed as private. *See State v. Townsend*, 105 Wn.App. 622, 627, 20 P.3d 1027, 1030 (2001).

No claim of a constitutional error is made for the Privacy Act violation, so a nonconstitutional error warrants reversal only if this court finds that, within a reasonable probability, the outcome would have been different but for the error. *State v. Aamold*, 60 Wn.App. 175, 181, 803 P.2d 20 (1991).

Reasonably Probability Analysis for issues above, if the tape had been suppressed then not only would the jury not have heard Mr. Kipp's alleged confession; but, without this evidence it is very conceivable that the trial may not have found that the ER404b and RCW 10.58.090 evidence was proved by a preponderance. Additionally, even if the ER404b and RCW 10.58.090 had still been allowed into evidence; the two alleged victims suffered in cross examination because their stories had changed from their previous statements. RP at 156-57, 161-66, 170-71, 178, 184-85. And further, there was a time line of evidence indicating that Mr. Kipp was gone during a period of time that Ms. Colon testified he was present and assaulting her. RP at 181-83 and 250-55. Further, the defense had developed a theory arguing that these allegations were a plot for the Joseph Tan family to be in a position to become favored by the mother or take property from the Kipps' on a conviction. See RP at 214-227; 241-274; 309-347; and 397-412. The taped confession is more likely than not what tipped the balance for the State. Therefore, the recording and Mr. Tan's testimony as to the content of the conversations should be excluded and a new trial is required.

IV. The trial court in applying RCW 10.58.090 and ER404b did so incorrectly when assessing the ancient allegations raised by JMC,

which unfairly prejudice Mr. Kipp both to disproving the ancient allegations and/or the lack of a need for them in this case.

a. Standard of Review. “This court reviews the correct interpretation of an evidentiary rule de novo as a question of law. *See State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). Once the rule is correctly interpreted, the trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *See Lough*, 125 Wn.2d at 856, 889 P.2d 487.” *State v. DeVincentis* 150 Wn.2d 11, 17, 74 P.3d 119, 123 (2003).

The allegations of JMC¹⁷, which came in under both RCW 10.58.090 and ER404b allowed the State to put into evidence allegations dating from 1995. RP at 175. Consider the memories of those involved and that because of the time involved the defense cannot find witnesses who remember specific incidences of conduct or times at issue or as, in this case, the grandfather who would have been in the home during the time period of the allegations had died in the intervening years. RP at 169, 176, & 177. Further JMC claimed these acts happened many times. RP at 176. Thus, there may well have been evidence from the grandfather

¹⁷ The two sisters JMC the older sister and DGT the alleged victim in the case at bar. RP at 95-96.

available if the time period had not been so long that he died in the intervening years.

First, Mr. Kipp's alleged assaults of JMC would be outside the statute of limitations. RCW 9A.04.080. Mr. Kipp argues *State v. Rohrich*, 149 Wn.2d 647, 659, 71 P.3d 638, 644 (2003) is instructive on this issue as it discussed a case well within the statute, but delayed for some 18 months. An argument was raised even though the charges were within the statute of limitations of a claim of witness loss of memory, but it was without any hard evidence, and not enough to show prejudice as analyzed:

“ ‘Appellees rely solely on the real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence be lost. In light of the applicable statute of limitations, however, these possibilities are not in themselves enough to demonstrate that appellees cannot receive a fair trial and to therefore justify the dismissal of the indictment.’ ” *Ansell*, 36 Wash.App. at 498, 675 P.2d 614 (quoting *United States v. Marion*, 404 U.S. 307, 325-26, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971)).

Rohrich, 149 Wn.2d at 659.

However, in the case at bar the statute had run¹⁸ and so the burden would now seem to fall on the state to show the lack of prejudice. Further, a key witness, the grandfather, who would have been in the home 15 years

¹⁸ Statute of limitations RCW 9A.04.080 ran three years's after the alleged acts around JMC's 18th birthday, by trial her 28th birthday had passed. See RP at 173.

ago had died. The defendant suffered actual prejudice in this case by losing a witness.

Additionally, the State had for evidence the recorded confession of Mr. Kipp. RP at 207-213. This recording provided a less prejudicial means of supporting the testimony of DGT, without the inclusion of another prior bad act allegation before the jury. The testimony of JMC was not necessary. Further, under one of the eight nonexclusive factors of RCW 10.58.090 (6)(e) the court should consider, “The necessity of the evidence beyond the testimonies already offered at trial.” Further, “ER 403 itself requires the trial court to weigh the necessity of the evidence to determine whether it will be needlessly cumulative or duplicative.” *State v. Scherner*, 2009 WL 4912703, 11 (2009).

DeVincentis, supra, at, 23, also discussed this issue noting approvingly that the trial court in weighing the necessity of the evidence considered whether, there were “[n]o less inflammatory documentation or corroboration that the crime occurred was available.” *Id.* The trial court in applying ER 403 and or the equivalent balancing test under both RCW 10.58.090 and ER 404b abused its discretion and allowed the prior allegations into evidence. See RP at 98-106 decision of the court on these issues.

IV. Under CrR 4.7 or ER 403 Alan Tan’s testimony should not have been excluded as he was one of the few witnesses to events around the alleged assaults to both JMC or DGT.

a. Standard of Review: Suppression of evidence for discovery violation is an extraordinary remedy and should be applied narrowly and sparingly. *State v. Hutchinson*, 135 Wn.2d 863, 882-883, 959 P.2d 1061 (1998). The appeals court reviews issues of law de novo. *Johnson*, 128 at 443. Mr. Kipp argues that the trial court did not adhere to the factors stated *Hutchinson supra*, and so in an error of law failed to allow the testimony of Alan Tan.

b. The late disclosure of Alan Tan did not merit exclusion: Alan Tan had originally been offered as a witness to the court on 22 July 2009¹⁹. See 22 July RP at 2. Alan Tan had been out at West-Pac and had been unavailable to the defense until almost two weeks before 22 July 2009. 22 July RP at 3. The State objected to the addition of Alan Tan because they would be prejudiced, as he might be a potential alibi witness. 22 July RP at 2. Defense counsel noted that the State had just interviewed Ms. Kipp and her mother on 22 July and that he would try to make Alan Tan available by Friday. 22 July RP at 5. The court ruled that because of the lateness of the disclosure it prejudiced the State and made an initial ruling that Alan Tan would not be permitted to testify. 22 July RP at 5-6.

¹⁹ 22 July 2009 was a Wednesday.

Alan Tan was reoffered to the trial court as a witness on 28 July 2009 some six days later as testimony was about to commence in the case²⁰. See RP at 123, 125. Defense counsel proffered what he believed Alan Tan could testify to including the allegations raised by JMC and DGT as he was present in the homes where and when the assaults were alleged²¹. RP at 123-124. The State had been offered his contact

²⁰ 28 July 2009 was a Tuesday.

²¹ Below is the offer of proof made by defense counsel.

MR. MCFADDEN: Yes, Your Honor. The second issue would be Mr. Alan Tan, who I was finally able to speak with last evening, and had the opportunity to go through with him what he observed. He actually was living -- both during the '95/'96 time period was living not only in the same house as Joanna initially, but then he also subsequently ended up moving in for a period of time with the Kipps at that period of time, so he was in both residences. He was able to see the interaction between Mr. Kipp and Joanna during that period of time. And I apologize, JMC.

THE COURT: She is going to have to be called by her name in court, so let's call her Joanna.

MR. MCFADDEN: Ms. Colon. And was able to see that at that time, observe the interaction between them. I believe his testimony was that he never saw anything inappropriate, never saw any undue attention, never saw

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Ms. Colon ever left alone with Mr. Kipp during that period of time that he was there in both residences. He could testify also regarding when everybody moved out of the, if I am not mistaken, the Pine Tree residence, the one where Mr. Tan had killed Shawna, and for a brief period of time resided -- all of them resided in a two-bedroom house with my client and his wife, and Mr. Alan Tan, all of them were there at that period of time, a total of nine people. He could testify as to there just was no privacy, there was no place to be in a two-bedroom house with nine people and really be assured of being alone. He would be able to testify subsequently in the time period of the 2003 to 2005 time period at issue in this case, regarding that although he was stationed at Whidbey Island, he was coming and spending almost, but

information the previous week and declined it. RP at 126. The State still objected claiming prejudice because of late disclosure, but did not deny it had been offered the contact information the week before. See RP at 125-126. Defense counsel argued that the information was similar to some of the expected testimony of Ms. Kipp-Tan (defendant's wife) and to Virginia Tan (grandmother of DGT and JMC). RP at 127.

The court ruled:

Well, those are many of the things that are swirling around in my head if you will, and that is the lateness of the **disclosure, the similarity or duplicativeness of the testimony, and the fact that we would have to halt the proceedings**, give Ms. Pendas a chance to talk with Mr. Tan, who doesn't sound like he's completely responsive to inquiries, have her then talk to her witnesses, causing perhaps a half day or longer delay, and I am not inclined to do that for somebody who is going to have testimony that is duplicative of two other witnesses. On balance, it seems to me my initial ruling stands, that Mr. Tan was disclosed too late to provide an orderly trial process, and I am going to continue my ruling and disallow his testimony.

RP at 127.

The factors to be considered in deciding whether to exclude evidence as a sanction are: (1) the effectiveness of less severe sanctions; (2) the

not all, but almost every weekend with the Kipps and residing there during that period of time. And he could testify again as to how often Ms. Tan, Desiree Tan was present in the residence, the fact that Mr. Kipp did not pay her any undue attention that he observed, and again, the lack that he will testify to that he ever saw Mr. Kipp alone with Desiree Tan.

RP at 123-124

impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the opposing party will be surprised or prejudiced by the witness's testimony; and (4) whether the violation was willful or in bad faith. *Hutchinson*, 135 Wn.2d at 882-883. As can be seen from the trial court's ruling above, it did not address any consideration to the factors *Hutchinson supra* requires.

Mr. Kipp argues the following is a correct application of *Hutchinson supra* to the record showing that the witness should not have been excluded. Regarding the first factor, the court identified that perhaps a "half day or longer delay" would be the resulting prejudice of allowing Alan Tan's testimony. RP at 127. Given this minimal prejudice, the court could have fined the defense, or imposed costs on the defense for the late disclosure.

Regarding the second factor, the impact, the defense argues that from the offer of proof Alan Tan's exclusion had a very significant impact at trial as demonstrated below.

Alan Tan is the brother Cristina Tan-Kipp and the uncle of DGT and JMC. 22 July RP at 2, See also RP at 179-80. His testimony would have included him being in all of the residences during the times both DGT and JMC would have been assaulted by Mr. Kipp. As the uncle of DGT and JMC his testimony in support of Mr. Kipp should have had significant

impact on the jury that their Uncle testimony opposed them. Further, as compared to Mr. Kipp's wife, Ms. Tan-Kipp, Alan Tan is arguably less open to a prosecution claim of bias. A similar bias analysis would also seem to apply to Virginia Tan (the grandmother) as testimony showed some problems between her and Joseph Tan, as he was her only child that had not received gifts of real estate and Joseph Tan was accused of stealing money from her and her husband. See RP 270-74; 300-04.

JMC testified they moved to the Kipp house in October of 1995 and that they moved back before Christmas, sometime in December (RP at 178-9). Mr. Kipp was deployed starting 27 November 1995. RP at 251. Virginia Tan testified JMC and her family only stayed with the Kipps for two to three weeks starting after the death in their residence. RP at 287-9. Cristina Tan-Kipp, (Mr. Kipp's wife) testified that after the 17 October 1995 death, her family, including JMC, stayed with them at their residence for only a week. RP at 244-5. Alan Tan's offered testimony dealt with this time period specifically, represented as a "brief" time the entire family was in the residence with the Kipps. RP at 122.

The Defense again could have argued that the brief period of time closer to a week than a month and this lends weight to the argument that JMC story of being at the residence until December was a lie, allowing the implication that her entire story was a lie. Further, Alan Tan would have

been asked to specify to the best of recollection when JMC moved out, which time period was not agreed by any of the previous witnesses.

JMC also testified she was regularly left alone with Mr. Kipp. RP at 180-81. Alan Tan offered testimony was that he did not ever observe JMC being left alone with Mr. Kipp, which the Defense would have argued to the jury directly contradicted her claim. RP at 122-3. Also that he never observed inappropriate attention being paid to either JMC or DGT. RP at 122-3. While this testimony is consistent with Cristina Tan Kipp and Virginia Tan's testimony, Alan Tan is not subject to the same attacks regarding bias, as there was no proffer of disputes with Joseph Tan or his family. Mr. Kipp contends he would have had great impact.

The third factor is the surprise and prejudice to the State. There was little if any because Alan Tan's contact information had been offered to the State the week before and had been declined. RP at 126. The State had six days from the time they were informed of Alan Tan as a witness to attempt to contact him and interview him; they chose not to do so. Additionally, the testimony offered was similar in nature to that being presented by Cristina Tan-Kipp and Virginia Tan; and therefore, presumably the State was prepared for such testimony already. There was little if any surprise or prejudice.

The fourth factor is whether the violation was willful or in bad faith. The court did not make a finding using either of these terms in describing Mr. Kipp's delay in making the information available. 22 July RP at 5. The court did find that his actions delayed the information being brought forward about two weeks later than it could have been. 22 July RP at 5.

On this record, there is no basis to suppress the testimony of Mr. Alan Tan for a discovery violation because a short half day continuance would have eliminated any prejudice the State might have incurred. Further, the State's own dilatory action of not trying to interview Alan Tan, in the six days from when they were notified of he was a potential witness to when testimony started is at least as much to blame for any surprise as Mr. Kipp's actions.

c. ER403 did not provide a basis for exclusion of Alan Tan: This court reviews the correct interpretation of an evidentiary rule de novo as a question of law. *DeVincentis* at 17. Once the rule is correctly interpreted, the trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Id.*

Mr. Kipp argues that ER 403²² as basis to exclude a witness because of late discovery is generally disfavored and would need a significant

²² ER 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or

showing of prejudice, which is not present in this case as argued above.

The case law strongly supports this position as can be seen as follows:

Surprise, standing alone, is not recognized as a ground for exclusion of evidence under ER 403.^{FN1} 1 J. Weinstein & M. Berger, *Evidence*, ¶ 403[01], 20 (1985); 5 K. Tegland, *Evidence* § 106 at 361 (1989). The comment to ER 403 states, in relevant part:

FN1. We note also exclusion of previously undisclosed evidence has been expressly rejected as a sanction for failure to comply with the criminal rules on discovery. CrR 4.7(h)(7)(i); *State v. Stamm*, 16 Wash.App. 603, 610, 559 P.2d 1 (1976), *review denied*, 91 Wash.2d 1013 (1977).

The rule does not specify surprise as a ground of exclusion, following Wigmore's view of the common law. 6 Wigmore § 1849. The advisory committee note to Federal Rule 403 observes that claims of unfair surprise may still be justified in some cases despite procedural requirements of notice and the availability of discovery, but that the granting of a continuance is a more appropriate remedy than exclusion of the evidence.

State v. Gould, 58 Wn.App. 175, 181, 791 P.2d 569, 572 (1990). Mr.

Kipp argues that the application of *Hutchinson supra* factors are a valid method of any unfair prejudice and if exclusion of the evidence is required. Not only did the trial court fail to do that, but as seen in the application of the factors above exclusion is not warranted in part because of the lack of prejudice.

misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

Also, exclusion of Alan Tan's testimony on the basis of cumulative evidence is not warranted on these facts. As held in the case cited below presentation of several witnesses testify to each of their views as to the facts of a material issue are not cumulative and the facts at issue here are:

1. when was JMC present in the residence, through October of 1995, or than longer until December of 1995 as she testified;
2. the lack of privacy at the Kipps' residence going to lack of opportunity;
3. when or if Mr. Kipp was ever observed alone with DGT and JMC, going to Kipp's lack of opportunity;
4. that no inappropriate attention paid to either DGT or JMC;
5. a lack of showing of Alan Tan's bias toward his brother or nieces DGT and JMC in the record.

See RP at 123-4. *State v. Smith*, 82 Wn.App. 327, 333, 917 P.2d 1108 (1996) *overruled on other grounds Portuondo v. Agard*, 529 U.S. 61, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000) discussed this issue in some detail as follows:

Smith also argues that because the statements repeated Brown's account of the rape, the trial court should have excluded them as needlessly cumulative. Under ER 403, the trial court may exclude relevant evidence if its probative value "is substantially outweighed by ... considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The decision to limit trial testimony is within the broad discretion of the trial court.^{FN10}

FN10. *State v. Weiss*, 73 Wash.2d 372, 378, 438 P.2d 610 (1968).

[3] Presentation of evidence relating to a material issue is not needlessly cumulative or a waste of time

simply because it comes in through several witnesses whose accounts are consistent. The statements that Brown made to the friend, the officer, and the doctor were not identical. This was not a case where the State attempted to call numerous witnesses of the same type to say the same thing. Instead, each witness had a perspective that helped the State, in different ways, to rebut Smith's assertion that the sex was consensual. In much the same way, different eyewitnesses might help a jury to assemble its view of a fight or a car accident. The record reflects that the court took steps to prevent the testimony from being needlessly cumulative.

Id., (emphasis added).

Mr. Kipp argues that Alan Tan had a unique perspective and his lack of a bad relationship to the Joseph Tan side of the family, would have diminished any bias argument and made him a key and valuable witness. His exclusion was an abuse of discretion.

A nonconstitutional error warrants reversal only if this court finds that, within a reasonable probability, the outcome would have been different but for the error. *Aamold*, 60 Wn.App. at 181, Mr. Kipp argues that because of the arguments above, and specifically the analysis under *Hutchinson supra* focusing on the impact of Alan Tan that there was a reasonable probability that the outcome would have been different, for if the jury ultimately decided JMC and DGT could not be trusted, then they had a basis for reasonable doubt.

5. RCW 10.58.090 is Unconstitutional Violating Separation of Powers.

a. Standard of Review. Any Constitutional challenges to legislation are questions of law we review de novo and the statute is presumed constitutional, and the party challenging it bears the burden of proving the legislation is unconstitutional beyond a reasonable doubt. *State v. Gresham*, 2009 WL 4931789 (2009).

The analysis starts with the statute, RCW 10.58.090²³, which states in the relevant portions:

Sex offense proceedings--Evidence of other sex offense
(1) In a criminal action in which the defendant is accused of a sex offense, **evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403.**

...

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

- (a) The similarity of the prior acts to the acts charged;
- (b) The closeness in time of the prior acts to the acts charged;
- (c) The frequency of the prior acts;
- (d) The presence or lack of intervening circumstances;
- (e) The necessity of the evidence beyond the testimonies already offered at trial;
- (f) Whether the prior act was a criminal conviction;
- (g) Whether the probative value is substantially outweighed

²³ With due respect to the decisions of the Court of Appeals, division one and in *State v. Scherner*, COA No. 62507-1-I (Dec. 21, 2009) and *State v. Gresham*, COA No. 62862-3-I (Dec. 21, 2009) where the State's arguments prevailed this is provided to this court should it wish to address this issues.

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.

Id. (emphasis added).

The plain language states that the sex offense is admissible,

notwithstanding Evidence Rule 404(b). Mr. Kipp argues effectively voids

ER 404b. The relevant portion of ER 404 states:

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

Id. (emphasis added).

The Washington State Constitution vests the judicial power in the Washington Supreme Court, which propagates the court rules and evidence rules: "The judicial power of the state shall be vested in a supreme court" WASH. CONST. art. IV, § 1. A separation of powers on evidence issues arose in, *Fircrest v Jensen*, 158 Wn.2d 384, 393- 94, 143 P.3d 776 (2006), which outlines the contours of the separation of powers analysis as follows:

The doctrine of separation of powers, implicit in our state constitution, divides the political power of the people into three co-equal branches of government. 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 *394 must exist. " '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.' " *State v. Moreno*, 147 Wn.2d 500, 505-06, 58 P.3d 265 (2002) (quoting *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)). The issue here is whether the legislature is threatening the independence or integrity or invading the prerogative of the judiciary by passing SHB 3055.

Id. Emphasis added.²⁴

The issue in *State v. Ryan*, 103 Wn.2d 165, 178, 691 P.2d 197 (1984) was the enactment of the of the child hearsay exception in RCW 9A.44.120²⁵ by the legislature. The court laid out its analytical framework on separation of powers saying:

²⁴ At issue in *Fircrest supra*, was the admissibility of BAC evidence by statute after the required prima facie showing. The language at issue stated:

Nothing in this section shall be deemed to prevent the subject of the test from challenging the reliability or accuracy of the test, the reliability or functioning of the instrument, or any maintenance procedures. *Such challenges, however, shall not preclude the admissibility of the test* once the prosecution or department has made a prima facie showing of the requirements contained in (a) of this subsection. Instead, such challenges may be considered by the trier of fact in determining what weight to give to the test result.

SHB 3055, § 4(4)(c) (emphasis added).

²⁵ *Ryan*, 103 Wn.2d at 167-8, quoted the child hearsay statute at issue, in that case, as follows:

RCW 9A.44.120, which provides in relevant *168 part:

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings in the courts of the state of Washington if:

(1) The court finds, in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

Defendant argues that the enactment of RCW 9A.44.120, a hearsay exception, violates the separation of powers doctrine in that the statute is a legislative invasion of the judicial province. We disagree.

[24][25] Where a rule of court is inconsistent with a procedural statute, the court's rulemaking power is supreme. *Petrarca v. Halligan*, 83 Wash.2d 773, 522 P.2d 827 (1974). Nonetheless, apparent conflicts between a court rule and a statutory provision should be harmonized, and both given effect if possible. *Emwright v. King Cy.*, 96 Wash.2d 538, 543, 637 P.2d 656 (1981).

[26] Legislative enactment of hearsay exceptions is specifically contemplated by the Rules of Evidence. ER 802 states: "Hearsay is not admissible except as provided by these rules, by other court rules, or *by statute*." (Italics ours.) **Nevertheless, statutory enactments of evidentiary rules are subject to judicial review, this court being the final arbiter of evidentiary rules.**

Ryan, 103 Wn.2d at 178, (Emphasis added). The Washington Supreme

Court is unequivocally stating that it holds the final and supreme power on evidence rules²⁶. Although it is also clear that the legislature may also create evidence rules if they don't conflict with the court's evidence rules.

(2) The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness: *Provided*, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

The issue under the separation of powers analysis was did this invade the power of the court.

²⁶ See also *City of Spokane v County of Spokane*, 158 Wn.2d 661, 679, 146 P.3d 893 (2006) "When a court rule involves "a matter related to the court's inherent power and we are unable to harmonize the court rule and [a] statute, 'the court rule will prevail.' " *Id.* (quoting *Wash. State Bar Ass'n v. State*, 125 Wn.2d 901, 909, 890 P.2d 1047 (1995)). However, "inability to harmonize a court rule with a statute occurs *only* when the statute directly and unavoidably conflicts with the court rule." *Id.*

This was followed by *State v. Zwicker*, 105 Wn.2d 228, 238, 713 P.2d 1101 (1986), where the Washington Supreme Court again re-enforced that it had the final say on evidence admissibility stating: “The resolution of this claim turns on whether the language of SHB 3055 is permissive, **preserving the courts' authority to exclude BAC test results under the rules of evidence, or mandatory, in which case it would be invalid.**” *Zwicker*, 105 Wn.2d at 238 (Emphasis added).

In *Zwicker Supra*, the court held the statute at issue was valid, interpreting "is admissible" as permissive and not mandating admissibility in all cases. However, Division One stated the following analysis regarding *State v Long supra* in *State v. Gresham*, 2009 WL 4931789:

Central to the court's reasoning was its decision in *State v. Long*.^{FN25} In *Long*, the court interpreted a legislative response to an earlier court decision. This legislation made BAC test refusal evidence admissible in the State's case in chief for the purpose of inferring guilt or innocence in criminal DUI prosecutions. The court deferred to the legislature's determination that refusal evidence was relevant and admissible because the trial court retained the right in any particular case to exclude refusal evidence under ER 403

State v. Gresham, 2009 WL 4931789, 4 (2009).

But as noted in the footnote below, *State v. Long*, 113 Wn.2d 266, 778 P.2d 1027 (1989)²⁷ dealt with the legislature removing its own barriers to

²⁷ *State v. Long*, 113 Wn.2d 266, 272-73, 778 P.2d 1027, 1030 (1989) states:

the admissibility of refusal evidence and not the invalidation of an evidence rule of the court.

Additionally, the *Zwicker* court cautioned that "**any conflict with ER 401 and 403 ... would require invalidation of the statute.**" *Zwicker*, 105 Wn.2d at 238. (emphasis added)²⁸.

The barriers against admitting refusal evidence set forth in *Zwicker* are thus statutory and, as we now conclude, nonexistent given the 1985 and 1986 amendments to RCW 46.61.517. The statute no longer requires a jury instruction that calls for no speculation about the reason for a refusal and for no inference to be drawn from the refusal. Nor does the statute any longer require refusal testimony to be admitted "without any comment". The legislative determination that refusal evidence is relevant and fully admissible to infer guilt or innocence thus now seems clear.

We perceive no credible reason why this legislative determination should not be honored by this court.^{FN17} While we retain our power to determine the relevancy and thus the admissibility of certain types of evidence, we perceive no valid reason not to accept the Legislature's recognition of relevancy in this instance.^{FN18} Since the right to refuse to submit to a breath test is a matter of legislative grace, the Legislature may condition that right by providing that a refusal may be used as **1031 evidence in a criminal proceeding.^{FN19} It has now done so. This is not to say, however, that depending on the facts of the particular case, the trial court may not exclude such evidence if the probative value of such evidence is found to be substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury.^{FN20} (footnotes admitted)

Previous justifications for limiting the admissibility of refusal evidence are no longer persuasive given the legislative amendments to RCW 46.61.517. We see no satisfactory reason not to follow the Legislature's now clear intent of *273 rendering refusal evidence fully admissible in a criminal trial for driving while under the influence of intoxicants.

State v. Long supra,

²⁸ *Zwicker*, 105 Wn.2d at 238 states:

This interpretation of RCW 46.61.517 requires that the language of the provision "is admissible" be read as permissive language and as not mandating admissibility in all cases. This interpretation also avoids any

In this case the statute specifically and unequivocally conflicts with ER 404b. It eliminates the application of ER 404b in sexual crimes, if and only if, the State makes the choice to invoke the statute and eliminate ER 404b for the evidence at issues. *Fircrest* requires the attempt to harmonize the statute and evidence rule, but again, noting the court was supreme in its own area as follows:

Therefore, rules of evidence may be promulgated by both the legislative and judicial branches. When a court rule and a statute conflict, the court will attempt to harmonize them, giving effect **782 to both. **Whenever there is an irreconcilable conflict between a court rule and a statute concerning a matter related to the court's inherent power, the court rule will prevail.** *Wash. State Council of County & City Employees v. Hahn*, 151 Wn.2d 163, 168-69, 86 P.3d 774 (2004).

Fircrest, 158 Wn.2d at 394. (Emphasis added).

Therefore, is application of RCW 10.58.090 to ER 404b permissive can it be harmonized with evidence rule? The language of the statute contains the words “is admissible” like *Fircrest*; however, unlike *Fircrest* or any of the above cited cases, it specifically addresses and invalidates an evidence rule promulgated by the Washington Supreme Court. The key language is, “defendant's commission of another sex offense or sex offenses is admissible, **notwithstanding Evidence Rule**

conflict with ER 401 and 403 which would require invalidation of the statute.

404(b)". None of the other cases cited above have the legislature attempting to invalidate a court evidence rule. This is the key difference in the interpretation of this statute. While the admissibility is still permissive, its premised admissibility is based upon eliminating ER 404b. ER 404b may not be applied to determine relevance. The statute at issue violates separation of powers and cannot be harmonized.

6. Evidence for a Common Scheme or Plan should be excluded.

a. Standard of review. An appeals court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *State v. Scherner*, 2009 WL 4912703, 13 (2009). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Id.*

b. Argument. The trial court must always begin with the presumption that evidence of prior bad acts is inadmissible under ER 404(b) *State v. Scherner*, 2009 WL 4912703, 13 (2009). *State v. Lough*, 125 Wn.2d 847, 852-3, 889 P.2d 487 (1995) summarizes the requirements for admission of evidence under ER 404b as follows: Proof of such a plan is admissible if the prior acts are (1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial.

Mr. Kipp argues that the State did not meet its burden under the second element of the *Lough* test because it did not demonstrate a “specific design or system that included the crime charged.... A mere general similarity between the other offenses and the crime charged is insufficient.” *State v. Scherner*, 2009 WL 4912703, 13 (2009).

In sum, admission of evidence of a common scheme or plan requires substantial similarity between the prior bad acts and the charged crime. Such evidence is relevant when the existence of the crime is at issue. Sufficient similarity is reached only when the trial court determines that the “various acts are naturally to be explained as caused by a general plan....”

DeVincentis, 150 Wn.2d at 21.

The court in this matter based its admission of the ER 404b evidence upon “And in this case it seems to me that the most striking similarity, as I said before, is the age of the girls and their relationship to Mr. Kipp. That, I think, is enough to make these cases similar enough to pass muster under 404(b).” RP at 106. Mr. Kipp argues that when compared to the many similarities found in *DeVincentis supra* at 22 or in *Scherner supra* at 13, the trial court in this matter had very little it relied to meet the substantial burden required.

Again, a nonconstitutional error warrants reversal only if the appeals court finds that, within a reasonable probability, the outcome would have

been different but for the error. *Aamold*, 60 Wn.App. at 181. Other prior bad acts evidence is very prejudicial.

The highly prejudicial effect of such propensity evidence was noted in *State v. Jones*, 101 Wn.2d 113, 120, 677 P.2d 131 (1984) *overrule on other grounds*, *State v. Brown*, 111 Wn.2d 124, 157, 761 P.2d 588 (1988).

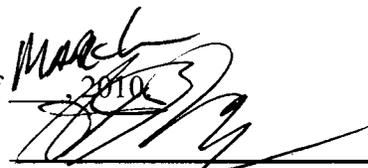
Federal courts have consistently recognized that prior conviction evidence is inherently prejudicial. [*citations omitted*] Statistical studies have shown that even with limiting instructions, a jury is more likely to convict a defendant with a criminal record. H. Kalven & H. Ziesel, *The American Jury* 146, 160-69 (1966). It is difficult for the jury to erase the notion that a person who has once committed a crime is more likely to do so again. The prejudice is even greater when the prior conviction is similar to the crime for which the defendant is being tried.

Jones, 101, Wn.2d at 120. Thus, admission of the above evidence, creates a reasonable probability, the outcome would have been different because of its inherent impact and prejudice against Mr. Kipp.

F. CONCLUSION

Based upon the foregoing analysis and facts, Mr. Kipp respectfully requests this court to rule in his favor and reverse this case.

Respectfully submitted this ^{cp} day of ^{March} 2010.


Alton B. McFadden WSBA #28861
Attorney for Mr. William Kipp.

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DIVISION II

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STATE OF WASHINGTON

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WASHINGTON STATE COURT OF APPEALS

DIVISION II

NO. 39750-1-II

STATE OF WASHINGTON,

RESPONDENT,

Vs.

WILLIAM J. KIPP, JR.,

APPELLANT

DECLARATION OF SERVICE

ALTON B. McFADDEN
Attorney for Appellant
WSBA No. 28861

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DECLARATION OF SERVICE – Page 1

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ORIGINAL

I, ALTON B. McFADDEN, declare the following:

1. I am over the age of 18 years old, and I am not a party to this action.
2. On MARCH 8, 2010, I placed one copy of the following document:

1) BRIEF OF APPELLANT

FOR the following party:

William John Kipp, Jr.
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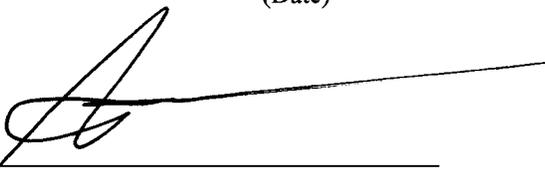
3. Service was made pursuant to Ch. 21 L 2000 Section 6:

- by delivery to the person named in paragraph 2.
 by delivery to _____, a person of suitable age and discretion residing at the usual abode of the person named in paragraph 2.
 by mailing a copy to the person named in paragraph 2, by any form of mail requiring a return receipt.

4. Other:

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

Signed at Bainbridge Island, on 8 Mar, 2010.
(City and State) (Date)


ALTON B. McFADDEN

I, KRISTY McFADDEN, declare the following:

1. I am over the age of 18 years old, and I am not a party to this action.
2. On **MARCH** 8, 2010, I placed one copy of the following document:

1) BRIEF OF APPELLANT

FOR the following party:

Russ Hauge, Prosecuting Attorney
KITSAP COUNTY PROSECUTORS OFFICE
DPA for Appeals
614 Division Street, MS-35
Port Orchard, WA 98366-4681

3. Service was made pursuant to Ch. 21 L 2000 Section 6:

by delivery to the person named in paragraph 2, given personally to a staff member in his office on his behalf.

by delivery to _____, a person of suitable age and discretion residing at the usual abode of the person named in paragraph 2.

by mailing a copy to the person named in paragraph 2, by any form of mail requiring a return receipt.

4. Other:

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

Signed at Bainbridge Is., WA, on Mar. 8, 2010.
(City and State) (Date)

Kristy McFadden
KRISTY McFADDEN