

NO. 63062-8-1

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT KAIL,

Appellant.

2009 DEC 16 PM 3:54  
COURT OF APPEALS  
DIVISION ONE  
JANUARY 13 2010

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Kenneth Cowser, Judge

REPLY BRIEF OF APPELLANT

JOHNATHAN M. PALMER  
DANA M. LIND  
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 East Madison  
Seattle, WA 98122  
(206) 623-2373

**TABLE OF CONTENTS**

	Page
A. <u>ARGUMENT IN REPLY</u> .....	1
1. THE STATE MISCAST KAIL'S ARGUMENT REGARDING ADMISSIBILITY OF THE JOURNAL ENTRY.....	1
2. EVEN UNDER THE STATE'S PROPOSED ANALYSIS, THE JOURNAL ENTRY SHOULD HAVE BEEN ADMITTED.....	2
3. THE PRIOR BAD ACTS EVIDENCE WAS INADMISSIBLE UNDER ER 404.....	8
4. THE PRIOR BAD ACTS EVIDENCE WAS INADMISSIBLE UNDER RCW 10.58.090.....	10
5. RCW 10.58.090 VIOLATES THE CONSTITUTIONAL SEPARATION OF POWERS DOCTRINE.....	12
B. <u>CONCLUSION</u> .....	16

## TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Fircrest v. Jensen</u> 158 Wn.2d 384, 143 P.3d 776 (2006) .....	13, 14, 15
<u>State v. Bradford</u> 56 Wn. App. 464, 783 P.2d 1133 (1989) .....	10
<u>State v. DeVincentis</u> 150 Wn.2d 11, 74 P.3d 119 (2003) .....	9
<u>State v. Dixon</u> 159 Wn.2d 65, 147 P.3d 991 (2006) .....	5, 7
<u>State v. Easter</u> 130 Wn.2d 228, 922 P.2d 1285 (1996) .....	7
<u>State v. Hudlow</u> 99 Wn.2d 1, 659 P.2d 514 (1983) .....	1, 6
<u>State v. Lough</u> 125 Wn.2d 847, 889 P.2d 487 (1995) .....	9
<u>State v. Roberts</u> 25 Wn. App. 830, 611 P.2d 1297 (1980) .....	2, 6
<u>State v. Ryan</u> 103 Wn.2d 165, 691 P.2d 197 (1984) .....	12, 13
<u>State v. Saltarelli</u> 98 Wn.2d 358, 655 P.2d 697 (1982) .....	9
<u>State v. Smith</u> 84 Wn.2d 498, 527 P.2d 674 (1974) .....	14
<u>State v. Whyde</u> 30 Wn. App. 162, 632 P.2d 913 (1981) .....	2, 6

**TABLE OF AUTHORITIES (CONT'D)**

Page

**FEDERAL CASES**

Dickerson v. United States  
530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000) ..... 13

Huddleston v. United States  
485 U.S. 681, 108 S. Ct. 1496, 99 L. Ed.2d 711 (1988) ..... 3, 6

**OTHER JURISDICTIONS**

Opinion of the Justices (Prior Sexual Assault Evidence)  
141 N.H. 562, 688 A.2d 1008 (1997)..... 14

State v. Herrera  
92 N.M. 7, 582 P.2d 384 (N.M. Ct. App. 1978)..... 15

State v. Mallard  
40 S.W.3d 473 (Tenn. 2001) ..... 15

State v. Zimmerman  
121 Idaho 971, 829 P.2d 861, 865 (1992)..... 14

**RULES, STATUTES AND OTHER AUTHORITIES**

ER 104 ..... 2, 4, 7

ER 402 ..... 12

ER 404 ..... 8

ER 602 ..... 6

ER 802 ..... 12

Federal Rule of Evidence 104 ..... 2

RAP 10.3 ..... 9, 11

**TABLE OF AUTHORITIES (CONT'D)**

	Page
RCW 10.58.090.....	10, 11, 12, 13, 15
RCW 9A.44.120 .....	12

A. ARGUMENT IN REPLY

1. THE STATE MISCAST KAIL'S ARGUMENT REGARDING ADMISSIBILITY OF THE JOURNAL ENTRY.

Contrary to the state's assertion, Kail did not argue that the accusing witness' journal entry was relevant "regardless of whether [S.D.] actually had a plan or what her plan was." Brief of Respondent (BOR) at 13. Kail argued that the journal entry was evidence of S.D.'s plan, and the plan was fabricating the charges. Brief of Appellant (BOA) at 14, 17-19.

Kail also explained why the journal entry was relevant. See BOA at 14, 17-18. The evidence explained S.D.'s motive for fabricating – her professed desire to get her parents' attention. RP 125. The journal cast doubt upon her credibility, by indicating she was ready to do something she knew was "stupid" in order to get such attention, even if she risked getting in trouble. Her mindfulness of the potential consequences of her scheme also tend to show a bias to her testimony, as she would need to testify consistently with her allegations to avoid revealing the fabrication. Because the journal entry was relevant to her credibility and her potential bias, it should have been admitted. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983); State v. Whyde, 30 Wn. App.

162, 166, 632 P.2d 913 (1981); State v. Roberts, 25 Wn. App. 830, 834-35, 611 P.2d 1297 (1980).

2. EVEN UNDER THE STATE'S PROPOSED ANALYSIS, THE JOURNAL ENTRY SHOULD HAVE BEEN ADMITTED.

The trial court erred by weighing S.D.'s credibility and accepting her explanation for the journal entry, and by ignoring or discrediting other evidence from which a jury could determine the journal entry referenced a plan to fabricate.

The state argues the admissibility of the journal turned on fulfillment of a condition of fact under ER 104(b), which provides:

When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

See BOR 14-15. The state also cites to the United States Supreme Court's explication of Federal Rule of Evidence 104(b):

In determining [admissibility under Rule 104(b)], the trial court neither weighs credibility nor makes a finding that the [party offering the evidence] has proved the conditional fact by a preponderance of the evidence. ***The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence.***

BOR 11 (emphasis added) (citing, Huddleston v. United States, 485 U.S. 681, 690, 108 S. Ct. 1496, 99 L. Ed.2d 711 (1988)). Under these rules, it was error for the trial court to refuse to admit the journal entry.

It was not the trial court's role to weigh S.D.'s credibility when she testified, outside the jury's presence, that there was, in fact, no plan. RP 132-33. Huddleston, 485 U.S. at 690. Nor was the trial court permitted to make its own determination whether, in fact, S.D. had a plan. Huddleston, 485 U.S. at 690. That it did both is evident from its ruling.

The trial court expressly premised its ruling on S.D.'s testimony: "Now that I've heard the answer from the witness that basically she had no plan . . . I see no relevance, and I'm going to sustain the objection." RP 133. The trial court erred by making this determination itself, given that the other evidence was sufficient for a jury to reasonably conclude the plan was the fabrication of allegations against Kail.

Kail presented ample evidence to support the conclusion that S.D.'s plan was to fabricate her allegations against him. First, there was evidence that two weeks prior to S.D. reporting the allegations, her stepmother asked her if Kail ever touched her, and

she denied it. RP 265-66. Second, S.D. did not mention the alleged abuse in the CHINS petition, even though she knowingly made the false claim that Kail was a “registered sex offender,” because she believed it would hasten her removal from the home. RP 110-12, 115. Thus, S.D. made inconsistent statements about whether Kail touched her, and even admitted making other false allegations against him in order to achieve her ends. Third, the evidence showed S.D. and her stepmother actually discussed whether Kail touched her, around the same the same time the journal entry was written. This demonstrates that one of the very individuals S.D. sought attention from was concerned about whether Kail touched S.D. at about the same time S.D. wrote the journal entry.

This evidence is sufficient to allow a reasonable juror to conclude that S.D.’s plan was to fabricate the allegations. Kail met his burden under ER 104(b). Significantly, ER 104(e) substantially weakens the state’s argument, as it expressly states that the rule does not preclude the admission of evidence pertaining to a witness’ credibility: “This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.” The jury should have been permitted to ascertain S.D.’s credibility

on this matter, and to decide for themselves whether the plan referenced in the journal was to fabricate allegations against Kail. The trial court overstepped its role by concluding there was no plan and ruling the journal entry was irrelevant.

Contrary to the state's argument, this case is distinguishable from State v. Dixon, 159 Wn.2d 65, 73-78, 147 P.3d 991 (2006). The defendant in Dixon sought to present testimony from an alleged child victim's aunt that the child asked her "what to do if [she was] lying," without any indication what she may have been lying about. 159 Wn.2d at 73. The aunt guessed the child was referring to lying about the defendant, because he had come up in conversation shortly before. Dixon, 159 Wn.2d at 73-74. The Court held the aunt's testimony was properly excluded, finding "the defense provided no evidence sufficient to support the needed fact," -- i.e., that the child meant she was lying about the defendant's criminal acts -- other than "speculation." Dixon, 159 Wn.2d at 78-79.

The Dixon Court based its ruling in part on the fact that the proposed testimony was that of the aunt, offering an opinion as to the contents of the alleged victim's statement:

We have the surmise, the inference, the conclusion made by [the aunt] that that's what was in [the child]'s mind. *But we can't allow one witness to speculate on what the other witness is thinking.*

159 Wn.2d at 77 (emphasis in original). The aunt's absence of personal knowledge of the meaning of the child's statement supported excluding the aunt's testimony. See, ER 602 (precluding testimony from a witness lacking "personal knowledge of the matter.").

In this case, by contrast, the journal entry was S.D.'s own writing, and her testimony would have been based on her own knowledge, rather than speculation. S.D.'s personal knowledge about the meaning of her own diary entry favored admitting S.D.'s testimony. This is true even if S.D. were to claim the journal entry concerned a different plan, or that there was no actual plan.

A reasonable juror could have concluded, by a preponderance of the evidence, that the journal entry concerned a scheme to fabricate the allegations against Kail. The jury should have been allowed to consider the journal entry and S.D.'s testimony about what it meant. Huddleston, 485 U.S. at 690; Hudlow, 99 Wn.2d at 14-15; Whyde, 30 Wn. App. at 166; Roberts,

25 Wn. App. at 834-35; ER 104(b), (e), 602. The trial court's ruling to the contrary was error.

The error was not harmless. Because the state's case relied heavily on S.D.'s testimony, this error severely prejudiced Kail. Although the Dixon Court held that any error in that case was harmless beyond a reasonable doubt in the face of "overwhelming untainted evidence," the same is not true here. 159 Wn.2d 79. In Dixon, the evidence consisted not only of the alleged victim's consistent statements to a parent and a detective, but also DNA evidence tending to corroborate the allegations. 159 Wn.2d 79. Here, there was no DNA or other such incriminating physical evidence. The state's case rested almost entirely on S.D.'s testimony. The trial court's decision to exclude the journal entry withheld important evidence from the jury concerning S.D.'s account, her credibility, and her potential motive for fabricating. It cannot be said that "any reasonable jury would reach the same result" that the jury reached in this case, had they been presented with the evidence. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). The erroneous exclusion of such evidence was not harmless.

As argued in Kail's opening brief, the journal entry was erroneously excluded and Kail was thereby deprived of his right to present a defense and confront a witness. BOA 14-19. Accordingly, this Court should reverse his convictions.

3. THE PRIOR BAD ACTS EVIDENCE WAS INADMISSIBLE UNDER ER 404.

The state incorrectly asserts Gorena's claim that Kail allegedly engaged in sexual contact with her 15 years prior is admissible under ER 404(b).

The state argues Kail did not assign error to the trial court's rulings that the evidence was relevant, or that it was more probative than prejudicial. BOR at 16, n. 6. Yet Kail's opening brief expressly sets forth the issue in its Assignment of Error 2: "The trial court erred by admitting evidence of Kail's alleged prior sexual contact with a third party under ER 404(b)." BOA at 1. Furthermore, Kail's Issue Pertaining to Assignment of Error 2 expressly reads: "Should the trial court have excluded testimony by Kail's step-daughter [ . . . ] under ER 404(b) as such evidence was more unfairly prejudicial than probative?" BOA at 2.

The argument pertaining to this issue similarly argues both relevance and prejudice throughout. See, BOA 19-27. Kail cites to

relevant authority about the requirements of relevancy and the risk of unfair prejudice concerning allegations of previous sexual abuse. See BOA at 20-21, citing, *inter alia*, State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003) (“[T]he prior bad act [must] show a pattern or plan with marked similarities to the facts of the case before it”); State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995) (to show common scheme or plan, evidence of prior acts must be relevant and more probative than prejudicial); State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982) (admissibility of evidence of previous sexual misconduct must be determined very carefully in light of its great potential for prejudice.). Furthermore, these issues are directly raised in argument. BOA at 20 (“Gorena’s allegations did not contain sufficient specific similarities to S.D.’s allegations to be relevant to show a ‘common plan.’”) (Gorena’s allegations . . . were sufficiently inflammatory to generate unfair prejudice to Kail’s defense.”).

Because these issues were identified in the assignments of error and issue statements, and supported by argument and citation to relevant authority, they are properly before this Court. RAP 10.3(a)(4), (6). Additionally, the trial court explained its ruling on the record, and the record as a whole is sufficient to permit this

Court to determine the question of admissibility. See, e.g., State v. Bradford, 56 Wn. App. 464, 468, 783 P.2d 1133 (1989).

Although Kail properly raised the issue, the state does not even address the argument that the evidence should have been excluded as unfairly prejudicial, other than acknowledging that the trial court concluded to the contrary. BOR at 16. As argued in Kail's opening brief, this was error. BOA at 19-27.

4. THE PRIOR BAD ACTS EVIDENCE WAS INADMISSIBLE UNDER RCW 10.58.090.

The state erroneously asserts Kail did not assign error to the trial court's ruling, under RCW 10.58.090, that the evidence was more probative than prejudicial. BOR at 24.

However, Kail's Assignment of Error 3 directly assigns error to the trial court's ruling under RCW 10.58.090. BOA at 1. That statute expressly requires the court to consider "[w]hether the probative value is substantially outweighed by the danger of unfair prejudice." RCW 10.58.090(6)(g). Thus, Kail expressly assigned error to the trial court's finding, and cited to relevant authority. Furthermore, Kail's argument directly addressed the issue. See, e.g., BOA at 26-27 ("Because of all of [the RCW 10.58.090] factors, the probative value of Gorena's testimony was not sufficient to

outweigh the dangers of unfair prejudice inherent to her testimony.”). These issues are properly before this Court. RAP 10.3(a)(4), (6).

The state also erroneously claims “the ability of the [alleged] victim to testify is not one of the considerations set out in RCW 10.58.090.” BOR at 22. Yet RCW 10.58.090 (6)(e) provides that it is: “The trial judge shall consider [ . . . ] [t]he necessity of the evidence beyond the testimonies already offered at trial.” Contrary to the state’s argument, S.D.’s willingness and capacity to testify at length and in detail concerning the underlying allegations, and the jury’s ability to weigh her credibility, made Gorena’s testimony considerably less necessary in this case.

The state also argues that Kail’s argument that Gorena’s allegations never resulted in a criminal conviction “ignores the language of the statute.” BOR at 22. Yet the legislature, through the express provisions of RCW 10.58.090 (6)(f) made this a relevant factor: “The trial judge shall consider [ . . . ] [w]hether the prior act was a criminal conviction.” The state’s argument is facially contrary to the relevant statute. This Court should reject the state’s argument on this point.

As argued in Kail's opening brief, the trial court's admission of the testimony under RCW 10.58.090 was error. BOA at 24-27.

5. RCW 10.58.090 VIOLATES THE  
CONSTITUTIONAL SEPARATION OF  
POWERS DOCTRINE.

The state first argues that RCW 10.58.090 does not transgress the separation of powers doctrine. BOR at 27.

The state's argument is weakened by its reliance on RCW 9A.44.120, the child hearsay statute, and State v. Ryan, 103 Wn.2d 165, 178-79, 691 P.2d 197 (1984). That is because that statute is consistent with the court's hearsay rules. ER 802 expressly provides that hearsay evidence may be admissible pursuant to statute: "Hearsay is not admissible except as provided by these rules, by other court rules, or by statute." No such exception exists in the rules governing admissibility of evidence of prior bad acts. While ER 402 expressly allows the Legislature to bar relevant evidence by statute, it does not allow the Legislature to make evidence otherwise excluded under the rules admissible:

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

Yet that is precisely what RCW 10.58.090 does -- it expands the court rule by allowing admission of evidence not otherwise admissible under the rules of evidence. This violates the separation of powers doctrine.

Second, the state relies on cases from other jurisdictions to attempt to demonstrate similar legislation did not violate those states' constitutions. BOR at 27-28. It is true in some other jurisdictions, including the federal courts, that the legislature retains the ultimate authority to modify or set aside judicially created rules of evidence and procedures not required by the federal constitution. See, e.g., Dickerson v. United States, 530 U.S. 428, 437, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000) (Judiciary power to create non-constitutional rules of procedure and evidence exists only in absence of a relevant Act of Congress.).

Yet in Washington, the Supreme Court's rules of evidence "will prevail" over a conflicting statute. See Fircrest v. Jensen, 158 Wn.2d 384, 394, 143 P.3d 776 (2006) (4-3-2 decision); State v. Ryan, 103 Wn.2d 165, 178, 691 P.2d 197 (1984) ("[S]tatutory enactments of evidentiary rules are subject to judicial review, this court being the final arbiter of evidentiary rules."); State v. Smith, 84

Wn.2d 498, 502, 527 P.2d 674 (1974) (“Since the promulgation of rules of procedure is an inherent attribute of the Supreme Court and an integral part of the judicial process, such rules cannot be abridged or modified by the legislature.”).

In Washington, the court’s constitutional authority to govern matters of court procedure contrasts with the Legislature’s authority to govern matters of “substance.” See Jensen, 158 Wn.2d at 394; Smith, 84 Wn.2d at 501. Rules of evidence are procedural rules, because they “[p]ertain to the essentially mechanical operations of the courts by which substantive law, rights and remedies are effectuated.” Jensen, 158 Wn.2d at 394 (quoting Smith, 84 Wn.2d at 501).

Furthermore, courts in other jurisdictions where the courts retain ultimate authority regarding procedural rules agree that statutes concerning the rules of evidence are subject to separation of powers analysis. See, e.g., State v. Zimmerman, 121 Idaho 971, 974, 829 P.2d 861, 865 (1992) (statute allowing admission of child’s out-of-court statements concerning sexual abuse violated court’s rulemaking authority); Opinion of the Justices (Prior Sexual Assault Evidence), 141 N.H. 562, 577, 688 A.2d 1008 (1997) (“A court’s constitutional function to independently decide controversies

is impaired if it must depend on, or is limited by, another branch of government in determining and evaluating the facts of the controversies it must adjudicate.”); State v. Herrera, 92 N.M. 7, 12, 582 P.2d 384 (N.M. Ct. App. 1978) (statute regulating admission of victim’s past sexual conduct “goes to practice and procedure and, thus, pertains to matters within the control of the Supreme Court.”); State v. Mallard, 40 S.W.3d 473, 483-84 (Tenn. 2001) (statute governing admission of defendant’s prior convictions subject to separation of powers doctrine).

Because RCW 10.58.090 conflicts with the Court’s ultimate authority to prescribe rules of procedure, and the statute is in conflict with those rules, it violates the constitutional separation of powers between the judiciary and the legislature. The Court’s rules of evidence prevail. Jensen, 158 Wn.2d at 394.

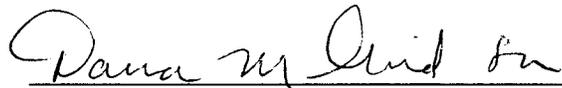
B. CONCLUSION

For the reasons stated herein and those stated in appellant's opening brief, this Court should reverse appellant's convictions.

DATED this 16<sup>th</sup> day of December, 2009

Respectfully submitted,

NIELSEN BROMAN & KOCH, PLLC.

  
\_\_\_\_\_  
JONATHAN M. PALMER, WSBA 35324

  
\_\_\_\_\_  
DANA M. LIND, WSBA 28239  
Office ID No. 91051  
Attorneys for Appellant

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Respondent,	)	
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v.	)	COA NO. 63062-8-I
	)	
ROBERT KAIL,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 16<sup>TH</sup> DAY OF DECEMBER 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE  
3000 ROCKEFELLER AVENUE  
EVERETT, WA 98201
  
- [X] ROBERT KAIL  
DOC NO. 326380  
STAFFORD CREEK CORRECTIONS CENTER  
191 CONSTANTINE WAY  
ABERDEEN, WA 98502

**SIGNED** IN SEATTLE WASHINGTON, THIS 16<sup>TH</sup> DAY OF DECEMBER 2009.

x *Patrick Mayovsky*