

63736-3

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NO. 63736-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

KURT SCHAUER,

Appellant.

REC'D
DEC 31 2009
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Appellate Div.

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

The Honorable Helen Halpert, Judge

BRIEF OF APPELLANT

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A. INTRODUCTION

Appellant Kurt Schauer was convicted of five counts of child molestation. At trial, the court admitted evidence he had molested a child 22 years before under RCW 10.58.090. Admission of this evidence was error under that statute as well as ER 404(b) and ER 403.

Even if the evidence were admissible under RCW 10.58.090, the statute is unconstitutional. The current offenses occurred well before the effective date of the statute. Thus, application to Schauer violates the ex post facto clause. Additionally, RCW 10.58.090 violates the separation of powers doctrine because it directly conflicts with ER 404(b)'s traditional ban on propensity evidence. RCW 10.58.090 also violates the Washington Constitution's fair trial guarantee, which incorporates the ban on propensity evidence.

Finally, the prosecutor's closing argument violated Schauer's right to confront witnesses at trial. The prosecutor argued that the reason the child witnesses had to be put through the trauma of testifying (one even attempted suicide) was Schauer's constitutional right to confront witnesses.

Schauer requests this Court reverse his convictions because the jury was influenced by inadmissible and unconstitutional evidence of criminal propensity as well as by the prosecutor's argument that impliedly encouraged the jury to penalize him for exercising his right to trial.

B. ASSIGNMENTS OF ERROR

1. The trial court erred by admitting evidence of appellant's prior sexual contact with a third party under RCW 10.58.090.
2. The trial court erred in ruling RCW 10.58.090 was not unconstitutional. 2RP¹ 9-10.
3. The Legislature's enactment of RCW 10.58.090 violates the separation of powers doctrine of the state and federal constitutions.
4. RCW 10.58.090 violates state and federal constitutional prohibitions on ex post facto legislation.
5. RCW 10.58.090 violates the Washington Constitution's fair trial guarantees.
6. Prosecutorial misconduct during closing argument violated appellant's constitutional right to confront witnesses.

Issues Pertaining to Assignments of Error

1. Under RCW 10.58.090, evidence of prior sex offenses is admissible in a sex offense case, notwithstanding ER 404(b). The court is to consider facts and circumstances including the danger of unfair prejudice, the similarity of the prior offense to the charged offense, and the proximity in time of the prior offense. Appellant is charged with

¹ There are 14 volumes of Verbatim Report of Proceedings referenced as follows: 1RP – 4/9/2009; 2RP – 4/13/2009; 3RP – 4/14/2009; 4RP – 4/16/2009; 5RP – 4/21/2009; 6RP – 5/5/2009; 7RP – 5/6/2009; 8RP – 5/7/2009; 9RP – 5/11/2009; 10RP – 5/12/2009; 11RP – 5/13/2009; 12RP – 5/14/2009; 13RP – 5/18/2009; 14RP – 6/26/2009.

molesting two young boys. Did the court err in admitting evidence he engaged in different sexual contact with a young boy more than 20 years earlier under RCW 10.58.090 and ER 404(b)?

2. A retrospective law violates the ex post facto provisions of the federal constitution if it is substantive and disadvantages the person affected by it. In enacting RCW 10.58.090 the Legislature stated it intended the statute to work a substantive change and that it applies retroactively. At the time of the offense in question, a jury would not have been permitted to consider appellant's prior offense as evidence of criminal propensity. Is application of RCW 10.58.090, permitting the previously forbidden inference, unconstitutional?

3. The framers of the Washington Constitution copied the language of Article I, section 23, regarding ex post facto laws, from the Indiana and Oregon constitutions. The Supreme Courts of both those States have interpreted those provisions to bar the retroactive application of evidentiary rules that operate in a one-sided fashion to make convictions easier to obtain. RCW 10.58.090 alters the rules of evidence in a one-sided fashion to make convictions easier to obtain. Does application of RCW 10.58.090 to appellant's case violate Article I, section 23?

4. The Separation of Powers doctrine prohibits one branch of government from usurping the prerogatives and duties of another branch of government. Article 4, section 1 of the Washington Constitution vests the Washington Supreme Court with the sole authority to govern court procedure. Because it is a procedural rule regarding the admission of evidence, did the Legislature unconstitutionally usurp the judiciary's constitutional function by enacting RCW 10.58.090?

5. The understanding that a fair trial precludes the use of propensity evidence of other crimes pre-dates the federal and state constitutions. By permitting such evidence, does RCW 10.58.090 violate Article 1, sections 21 and 22 of Washington's constitution, guaranteeing the right to a fair trial?

6. Prosecutors may not comment on the defendant's exercise of a constitutional right. The prosecutor told the jury it was very difficult for the complaining witnesses to testify, but it was necessary because appellant had a constitutional right to confront them. Did the prosecutor commit misconduct violating appellant's constitutional rights to a jury trial and to confront the witnesses against him?

C. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Kurt Schauer with six counts of first-degree child molestation. CP 1-3. A jury found him guilty on five of the six counts. CP 73, 75, 77, 79, 81, 83. The jury also found the aggravating factors that Schauer used a position of trust on each count, and engaged in a pattern of abuse on the first three counts. CP 74, 76, 78, 80, 82. The court imposed an indeterminate sentence with an exceptional minimum of 346 months to the statutory maximum of life. CP 98. Notice of appeal was timely filed. CP 91.

2. Substantive Facts

After acting as a father to his friend's ten-year-old son T.V. for nearly the child's entire life, Schauer was accused of molesting the boy as well as T.V.'s cousin, A.A. CP 1-3; 6RP 64-65, 70-71; 7RP 17. T.V.'s mother described Schauer as reliable and helpful, always willing to pitch in. 6RP 73-74; 7RP 7. Over the years, she and Schauer developed an informal schedule whereby T.V. spent most long weekends and school vacations with Schauer in Seattle. 7RP 17. Schauer took T.V. on vacations to destinations like Yellowstone and Disneyland, sometimes with his mother, sometimes without her. 7RP 19-27. He also provided financial support to help T.V.'s mother, a single parent. 6RP 66, 73-74. Schauer was welcomed into T.V.'s

family as a parent to him, since T.V.'s biological father did not care to be a part of his life. 7RP 6.

In February, 2008, after a cub scout meeting regarding safety issues, T.V. told his mother he thought the things described in the meeting were happening to him. 7RP 43. When asked what he meant, he said "Daddy" told him to "drop them" and then tickled his privates, meaning his penis, bottom, and testicles. 7RP 44-45. The next day, T.V.'s mother asked her sister to talk with T.V. because she was too distraught. 7RP 48-49. T.V. repeated the same allegations to his aunt. 7RP 50. He also asked what the white stuff was that came from Daddy's penis. 7RP 50, 52.

Realizing that their own son, A.A., had spent several days with T.V. at Schauer's home the previous summer, the next morning T.V.'s aunt and uncle asked A.A. whether anything had happened at "Uncle Kurt's" that made him ashamed. 10RP 135. A.A. told his mother that, in the bath, Schauer had rubbed his penis until it got bigger. 8RP 144.

In retrospect, T.V.'s mother and aunt recalled a prior incident in which T.V. said his father French kissed him by putting his tongue in his mouth. 7RP 41. A.A.'s mother also recalled that while staying at Schauer's home, A.A. complained he was made to take two baths a day and wanted to come home. 8RP 124-25. The parents dismissed both comments as childish "goofing" and homesickness at the time. 10RP 119-20, 122, 124-25.

At trial, A.A. described Schauer fondling his genitals and penetrating his anus with a soapy hand in the bath while he visited T.V. and Schauer in Seattle. 7RP 128-134. T.V. described repeated sexual contact with Schauer every time he visited over the years. 8RP 23-30. He also described Schauer touching A.A. in the bath during the summer visit. 8RP 31-32.

The boys showed no physical symptoms of abuse. 10RP 69, 93. The parents, however, described changes in behavior such as increased bed-wetting, aggression, nightmares, and difficulty sleeping alone. 7RP 11-12, 72; 8RP 127-30; 10RP 128. Shortly before trial, T.V. tried to hang himself and told his mother he was worried about testifying in court. 7RP 65, 67.

Twenty-two years before the events in this case, Schauer pled guilty to one count of indecent and immoral acts with a minor in Wyoming. 11RP 80-81. He completed his sentence and fulfilled the conditions of his probation including sexual deviancy treatment. 11RP 81-82. Under RCW 10.58.090, permitting evidence of prior sex offenses notwithstanding ER 404(b), Travis Persinger testified Schauer was his “big brother” through the Big Brothers and Sisters program, and fondled his penis on one occasion. 8RP 83-84, 86. The investigating officer also related Schauer’s statement admitting the conduct. 9RP 11. Before each of these witnesses, the court instructed the jury:

In a criminal case in which the defendant is accused of an offense of child molestation, evidence of defendant's commission of another offense of child molestation is admissible and may be considered for its bearing on any matter to which it is relevant.

However, evidence of a prior offense on its own is not sufficient to prove the defendant guilty of the crime charged in the information. Bear in mind, as you consider this evidence, that at all times the State has the burden of proving that the defendant committed each of the elements of the offense as charged in the information.

I remind you the defendant is not on trial for any act, conduct or offense not charged in the information. And the State at all times has the burden of proving each element of each crime charged beyond a reasonable doubt.

8RP 78; 9RP 4. A written jury instruction provided essentially the same warning. CP 65.

The State argued the jury could convict Schauer based solely on T.V.'s and A.A.'s testimony, but that their testimony was also corroborated by reports of their changed behavior, by their consistent statements to their parents and others over time, and by Schauer's conviction for similar conduct 22 years before. 13RP 28-29, 30-38. The defense argued inconsistencies in their accounts and suggestive questioning by adults in their lives created a reasonable doubt as to the veracity of the boys' accusations. 13RP 44.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN ADMITTING PRIOR BAD ACTS EVIDENCE THAT WAS MORE UNFAIRLY PREJUDICIAL THAN PROBATIVE.

The trial court erred in admitting evidence of Schauer's sexual contact with Persinger 22 years before the current allegations. This evidence was not admissible under the statutory criteria of RCW 10.58.090. Nor would it have been admissible under ER 404(b) because it was more unfairly prejudicial than probative and did not meet the exception for evidence of a common scheme or plan.

a. Evidence of the Prior Sex Offense Was Not Admissible Under RCW 10.58.090 Because It Was Unfairly Prejudicial and Too Remote in Time to Be Relevant.

RCW 10.58.090, enacted as a new statute in 2008, allows the state to present evidence concerning a criminal defendant's prior sex offenses.

The statute provides, in pertinent part:

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

RCW 10.58.090. Under the statute, in evaluating whether to exclude evidence of a prior sex offense, the trial judge is to consider the following factors:

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

- (b) The closeness in time of the prior acts to the acts charged;
- (c) The frequency of the prior acts;
- (d) The presence or lack of intervening circumstances;
- (e) The necessity of the evidence beyond the testimonies already offered at trial;
- (f) Whether the prior act was a criminal conviction;
- (g) Whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; and
- (h) Other facts and circumstances.

RCW 10.58.090(6). Factor (g) directly mirrors the language of ER 403.²

These factors largely weigh against the trial court's decision to admit evidence of the prior crime in this case.

First, there were significant differences between the offenses. Persinger described only brief fondling of the genitals, while T.V. and A.A. described much more extensive sexual conduct including actual penetration. 7RP 139; 8RP 27-28, 86. Second, the prior crime was remote in time, 22 years earlier, severely diminishing any relevance. Third, the trial court found the frequency of the prior acts was "confusing." 5RP 50. Schauer pled guilty to only one count. Some evidence presented at the pre-trial hearing suggested there might have been more incidents, but the court found it would necessitate a second trial

² ER 403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

to prove them and excluded evidence of the other incidents on that basis. 5RP 51. Given the lack of clarity, this factor should weigh as neutral.

Fourth, as the trial court noted, Schauer's successful completion of probation and sexual deviancy treatment was a significant and relevant intervening circumstance. 5RP 50; accord United States v. Meacham, 115 F.3d 1488, 1492-93, 1495 (10th Cir. 1997) (district court did not abuse discretion in admitting evidence of prior offense under Fed. R. Evid. 404(b) or 414 where defendant received no sexual deviancy treatment since the prior offense). In addition to completing treatment, Schauer's life circumstances changed dramatically since the prior offense. Schauer was discharged from the military. 11RP 79. He became a successful realtor and was involved in a long-term romantic relationship with another man. 10RP 163-64; 11RP 72-74. This factor weighs strongly against admission.

Significantly, the evidence was not necessary to the State's case. T.V. and A.A. were old enough to competently convey their allegations against Schauer on the witness stand. 7RP 118-165; 8RP 4-77. They testified in detail and at length. Id. Numerous out-of-court statements by the boys were also admitted under various exceptions to the hearsay rule. 7RP 44-50; 8RP 135-38; 10RP 54-55, 72, 131, 136. An unrelated incident

from more than 20 years before was not necessary to prove the State's case.

Factor (g) of this statute should be interpreted as incorporating a rigorous balancing of probative value against the danger of unfair prejudice, as has always been done under ER 403. See generally, Blythe Chandler, Balancing Interests Under Washington's Statute Governing the Admissibility of Extraneous Sex-Offense Evidence, 84 Wash. L. Rev. 259 (2009). In the process of passing substitute senate bill 6933, which became RCW 10.58.090, Washington's legislature "emphasized the importance of Rule 403 balancing." Id. at 273. Here, the minimal relevance to this case was substantially outweighed by the danger of unfair prejudice.

The newly enacted RCW 10.58.090 does not alter the inherently inflammatory nature of evidence of prior sex offenses. Evidence causes unfair prejudice when it is more likely to arouse an emotional response than a rational decision by the jury. City of Auburn v. Hedlund, 165 Wn.2d 645, 654, 201 P.3d 315 (2009) (citing State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000)). Substantial prejudice is inherent in evidence of prior crimes. State v. Lough, 125 Wn.2d 847, 863, 889 P.2d 487 (1995). Sexual misconduct in particular must be examined very carefully in light of its great potential for prejudice. State v. Saltarelli, 98

Wn.2d 358, 363, 655 P.2d 697 (1982). Evidence that a defendant previously committed crimes similar to the current charges is particularly likely to unfairly prejudice a defendant: “There is no more insidious and dangerous testimony than that which attempts to convict a defendant by producing evidence of crimes other than the one for which he is on trial.” State v. Smith, 103 Wash. 267, 268, 174 P. 9 (1918).

Substantial probative value is needed to outweigh the prejudice of such evidence. State v. DeVincentis, 150 Wn.2d 11, 23, 74 P.3d 119 (2003). Here, the minimal relevance of a more than 20-year-old crime cannot begin to outweigh the danger of unfair prejudice to Schauer’s defense.

The only one of the six factors that favors admission of this testimony is (f), whether there was a criminal conviction. This factor decreases the likelihood that the jury will consider unproven allegations as if they were true. However, it in no way diminishes the danger the jury will convict based on inflammatory evidence of an unrelated crime that occurred more than 20 years ago. This one factor is not sufficient to justify admission of Schauer’s prior offense. Schauer’s prior crime should not have been admitted under RCW 10.58.090.

b. The Evidence Was Not Admissible Under ER 404 (b) and ER 403.

The State may argue that even without the recent enactment of RCW 10.58.090, Schauer's prior crime would have been admissible under ER 404(b) to show a common scheme or plan. This argument should be rejected because Schauer's past offense was too remote and too distinct from the charged crime to show a common scheme or plan. And even if minimally relevant, its probative value was outweighed by the potential for unfair prejudice.

Where the state seeks to offer evidence of the defendant's sexual contacts with a person other than the alleged victim, Washington courts have determined admissibility under ER 404(b). That rule provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. 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.

ER 404(b). Thus, evidence of prior sexual molestation may be admissible to establish a common scheme or plan. A trial court's decision to admit or exclude prior bad acts evidence is reviewed for abuse of discretion. Lough, 125 Wn.2d at 864-65.

Under ER 404(b), "A trial court must always begin with the presumption that evidence of prior bad acts is inadmissible." DeVincentis,

150 Wn.2d at 17. The State must meet a substantial burden before evidence is admitted under an exception. Id. Evidence of prior bad acts are only admissible to prove a common scheme or plan if the acts are: (1) proved by a preponderance of the evidence; (2) admitted for the purpose of proving a common scheme or plan; (3) relevant to prove an element of the crime charged or to rebut a defense; and (4), more probative than prejudicial. Lough, 125 Wn.2d at 852.

Caution is called for in application of this exception. DeVincentis, 150 Wn.2d at 18. Admission of evidence of a common scheme or plan requires substantial similarity between the prior bad acts and the charged crime. Id. at 21. “Random similarities are not enough.” Id. at 18. To be admissible, the prior bad acts must show a pattern or plan with marked similarities to the facts in the case before it such that the various acts are naturally to be explained as caused by a general plan. Id. at 13, 21. For example, in Lough, the defendant’s prior acts were admitted to show scheme or plan to drug and rape women. 125 Wn.2d at 847. In State v. Baker, 89 Wn. App. 726, 733-34, 950 P.2d 486, 490-91 (1997), prior acts were admitted to show a common scheme or plan to sexually assault sleeping children.

The requisite cautious approach to evidence of criminal propensity reveals Schauer’s prior crime was not part of a common scheme or plan

with the current offenses. First, the incident with Persinger occurred 22 years earlier, weighing against a finding that the alleged conduct was part of a single plan, rather than two completely separate occurrences. Second, the nature of the alleged acts were substantially different, with the current allegations involving far more invasive molestation including actual penetration. 7RP 139, 8RP 27-28, 86. This is not sufficient similarity to show a common scheme or plan.

Finally, the evidence would have been excluded under the fourth prong of the Lough analysis because it is not more probative than prejudicial. The prejudicial effect outweighs the probative value of even similar prior offenses when they are too remote in time. United States v. Fawbush, 900 F.2d 150 (8th Cir.1990). The Eighth Circuit in Fawbush held the defendant's daughters' testimony he sexually abused them eight years earlier was improperly admitted under Rule 404(b). The Fawbush court concluded that the evidence, which included one daughter's testimony that the defendant impregnated her, was too remote and "so inflammatory on its face" that its prejudicial effect outweighed any probative value. 900 F.2d at 152. The court stated that the prior acts were relevant only to show propensity to commit such acts. Id. at 151. Here, the prior offense was 22 years ago, far more than the 8 years held to be too remote under Fawbush. ER 404(b) similarly compels exclusion of this

inflammatory evidence that could only be used to show criminal propensity.

The irrelevant evidence painting Schauer as a serial child abuser likely improperly influenced the jury to believe that Schauer committed the charged acts, contrary to the proscription against propensity evidence in ER 404(b). The prior incident, so remote in time, had little probative value on the issue of a common scheme or plan, and carried a high risk of unfair prejudice to Schauer. Thus, under the analysis required by ER 404(b), this evidence should have been excluded.

c. The Error In Admitting Evidence of a Prior Sex Crime Was Not Harmless.

Given the danger of unfair prejudice from evidence of prior sex crimes, admission of this evidence was not harmless. There was no physical evidence implicating Schauer. Therefore, the State attempted to corroborate the boys' testimony as much as possible. The corroboration provided by an arguably similar crime more than 20 years ago was extremely likely to tip the scale as the jurors weighed credibility. Schauer denied T.V.'s and A.A.'s allegations and revealed inconsistencies in their testimony. Given this context, evidence of the prior crime unfairly prejudiced Schauer both by bolstering T.V.'s and A.A.'s credibility and by painting Schauer as a serial abuser. Cf. State v. Holmes, 122 Wn. App.

438, 447, 93 P.3d 212 (2004) (officer's comment on right to silence not harmless when case hinged on credibility). The error here was not harmless.

2. ADMITTING PROPENSITY EVIDENCE UNDER RCW 10.58.090 VIOLATES THE STATE AND FEDERAL CONSTITUTIONAL PROHIBITIONS AGAINST EX POST FACTO LAWS.

Article I, § 10 of the United States Constitution and article 1, § 23 of the Washington Constitution, the ex post facto clauses, forbid the State from enacting any law that imposes punishment for an act that was not punishable when committed, increases the quantum of punishment, or alters the rules of evidence to permit conviction based on less or different evidence than the law required at the time of the offense. Ludvigsen v. City of Seattle, 162 Wn.2d 660, 668-69, 174 P.3d 43 (2007) (citing Calder v. Bull, 3 U.S. (3 Dall.) 386, 1 L. Ed. 648 (1798)).

A law violates the ex post facto clause when it: (1) is substantive, as opposed to merely procedural; (2) is retrospective (applies to events which occurred before its enactment); and (3) disadvantages the person affected by it. State v. Hennings, 129 Wn.2d 512, 525, 919 P.2d 580 (1996) (citing Weaver v. Graham, 450 U.S. 24, 29, 101 S. Ct. 960, 964, 67 L. Ed. 2d 17 (1981); Collins v. Youngblood, 497 U.S. 37, 45, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990)). RCW 10.58.090 violates the prohibition

on ex post facto legislation because each of these elements is met in this case. Additionally, the statute dramatically changes the landscape of evidence law to favor the State.

a. RCW 10.58.090 Violates the Ex Post Facto Clause Because It Is Substantive and Retrospective and Disadvantages Schauer.

First, the legislative notes following RCW 10.58.090 state that, as an evidentiary rule, the statute is substantive in nature. Laws of 2008, ch. 90, §1. The Legislature's characterization of a statute does not necessarily control the constitutional ex post facto analysis. In re Pers. Restraint of Gronquist, 139 Wn.2d 199, 208, 986 P.2d 131 (1999). However, the statute is substantive in nature because it does not fit within the understanding of a procedural statute.

While . . . cases do not explicitly define what they mean by the word "procedural," it is logical to think that the term refers to changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes.

Collins, 497 U.S. at 45 (citing Dobbert v. Florida, 432 U.S. 282, 292, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977); Bezell v. Ohio, 269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216 (1925); Mallett v. North Carolina, 181 U.S. 589, 597, 21 S.Ct. 730, 45 L.Ed. 1015 (1901)). RCW 10.58.090 does not merely define the procedure by which a case is adjudicated but rather redefines the

bounds of relevancy for sex offenses. Thus, the Legislature appropriately recognized the substantive reach of the statute.

Second, the statute applies to events that occurred before its enactment. The legislature specifically stated the statute should apply to any case tried after its enactment without concern for when the alleged offense may have occurred. Laws 2008, ch. 90 § 3. But more importantly Schauer's offense occurred between 2005 and 2007, well before the effective date of the statute, June 12, 2008. Thus the statute applies retrospectively.

Finally, RCW 10.58.090 substantially disadvantages Schauer. RCW 10.58.090 allows evidence that is not admissible for a more limited purpose under ER 404(b) to be admitted for any purpose whatever. The State asked the jurors to use the evidence in this case as bald propensity evidence; arguing that Schauer must have committed the offense in this case because "history had a way of repeating itself." 13RP 38. Washington courts have long excluded this class of evidence precisely because that sort of conclusory logic was deemed incompetent, irrelevant, and greatly prejudicial. See State v. Bokien, 14 Wash. 403, 414, 44 P. 889 (1896). This incompetent, irrelevant, and greatly prejudicial evidence was used to bolster the credibility of the complaining witnesses in a trial where those witnesses' reports were the only substantive evidence of guilt.

Schauer was convicted. Under the test enunciated in Hennings, application of RCW 10.58.090 to offenses committed prior to its enactment violates the ex post facto clause of the United States Constitution.

b. RCW 10.58.090 Violates the Ex Post Facto Clause Because It Dramatically Tilts the Playing Field in Favor of the State.

Laws have been held to violate ex post facto when they permit conviction on the testimony of one person, where two were previously required. See Carmell v. Texas, 529 U. S. 513, 516-19, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (1999)516-19. Carmell involved the repeal of Texas evidentiary rule requiring corroboration of victim's testimony in rape cases. Id. The court discussed at length the Fenwick case in which English law previously requiring two witnesses to convict for treason was changed to require only one. Id. at 526-29. Such laws are substantive and disadvantage defendants because they affect the quantum of evidence necessary for a conviction, in contrast to laws that "simply let more evidence in to trial." Ludvigsen, 162 Wn.2d at 674.

By contrast, laws that merely expand the permissible universe of witnesses are generally upheld against ex post facto challenges. For example, courts have upheld changes in law that permitted convicts or spouses to testify. Hopt v. People of Territory of Utah, 110 U.S. 574, 4 S.

Ct. 202, 28 L. Ed. 262 (1884); State v. Clevenger, 69 Wn.2d 136, 417 P.2d 626 (1966).

By permitting evidence of prior sex offenses for the purpose of showing criminal propensity, RCW 10.58.090 falls into a third category somewhere in between the laws directly lowering the amount of proof and those that merely expand the permissible universe of witnesses. On the one hand, RCW 10.58.090 does expand the permissible universe of evidence. But it also does more than that. It permits a previously forbidden inference of guilt based on criminal propensity.

This is a far more dramatic change than merely permitting spouses and convicts to give the same type of testimony under the same conditions as other witnesses. Previously, the State would have had to prove Schauer's guilt based solely on evidence relevant to the incidents charged in this case. Now, the State's case can be bolstered, the State's witnesses' credibility enhanced by the previously forbidden inference that he has a propensity to commit crime.

Recently in State v. Scherner, this Court held that RCW 10.58.090 is not such a dramatic change, that it is merely the logical extension of the already recognized exceptions to the ER 404(b) prohibition on propensity evidence. State v. Scherner, ____ Wn. App. ____, ____ P.3d ____ (No. 62507-1-I, filed Dec. 21, 2009). But the reasoning of Scherner fails to

distinguish between simple admissibility of evidence on the one hand and the permissible purposes of that evidence on the other. What all the exceptions to ER 404(b), including the so-called “lustful disposition” exception, have in common is that they all permit evidence of prior offenses when it is relevant to some inference other than propensity. In every case, the jury must be carefully instructed as to the permissible purposes, and that propensity is not one of them. Saltarelli, 98 Wn.2d at 362. This statute does not merely expand the lustful disposition exception to include crimes against other persons than the victim, as the Scherner court suggests. Scherner, slip op. at 15. If relevant for some purpose other than mere propensity, prior sex offenses against others were already admissible under ER 404(b) exceptions such as common scheme or plan, intent, motive, or lack of mistake. Allowing the jury to weigh a defendant’s criminal propensity into the determination of guilt or innocence on a given charge dramatically changes the landscape of the jury’s determination.

This Court should hold RCW 10.58.090 violates the ex post facto clauses because this change tilts the playing field in favor of the State. See City of Seattle v. Ludvigsen, 162 Wn.2d 660, 671, 174 P.3d 43 (2007). The “different evidence” prong of the Calder standard was also at issue in Ludvigsen. Ludvigsen moved to suppress his breath test because

at the time of his offense, regulations required the breath testing machine to contain a thermometer certified to national standards. Id. at 664-65. After his offense, the regulations were amended to no longer require the national certification. Id. The court held this change in the rules governing admission of breath tests violated the ex post facto clause because it permitted conviction on less evidence than was previously required. Ludvigsen, 162 Wn.2d at 674.

The concerns expressed in Ludvigsen are similarly at play here, and this court should reach the same result. The court in Ludvigsen noted that crucial distinction was between ordinary rules of evidence, which do not fall afoul of the ex post facto prohibition, and substantive changes in the amount of evidence required to sustain a conviction. 162 Wn.2d at 671. In explaining this distinction, the court stated, “Ordinary rules of evidence are procedural and neutral. Though in some cases, the State may benefit from a change in evidence law, such changes are not inherently beneficial to the State.” Id. at 671. By contrast, rules that reduce the amount of evidence necessary for a conviction “inherently disadvantage the defendant.” Id. Like the repealed thermometer certification requirement in Ludvigsen, RCW 10.58.090 inherently and systematically benefits the State and disadvantages defendants by allowing juries to consider criminal propensity in determining guilt.

3. EVEN IF APPLICATION OF RCW 10.58.090 TO SCHAUER'S CASE DOES NOT VIOLATE THE FEDERAL EX POST FACTO CLAUSE, IT NONETHELESS VIOLATES THE GREATER PROTECTIONS OF ARTICLE I, SECTION 23.

Article I, section 10 of the United States Constitution provides, "No State shall . . . pass any Bill of Attainder, ex post facto law, or Law impairing the Obligation of Contracts." The Washington Constitution provides: "[n]o bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed." Const. art. I, § 23.

The Supreme Court long ago held the provisions of Article I, section 10 reach four classes of laws:

1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive.

Calder v. Bull, 3 U.S. (3 Dall.) 386, 390-91, 1 L. Ed. 648 (1798). While the fourth category identified in Calder, seems to clearly bar retroactive changes in the type of evidence which is admissible, the Supreme Court has concluded, "[o]rdinary rules of evidence do not implicate ex post facto

concerns because they do not alter the standard of proof.” Carmell, 529 U.S. at 513. But the Court had previously distinguished evidentiary law that applied equally to the State and defendants and those that did not. Thompson v. Missouri, 171 U.S. 380, 387-88, 18 S. Ct. 922, 43 L. Ed. 204 (1898). The Thompson Court held a law permitting the admission of a defendant’s letters to his wife for the purposes of comparing them to letters admitted into evidence was not an ex post facto violation because the change in law

. . . did nothing more than remove an obstacle arising out of a rule of evidence that withdrew from the consideration of the jury testimony which, in the opinion of the legislature, tended to elucidate the ultimate, essential fact to be established, namely, the guilt of the accused. Nor did it give the prosecution any right that was denied to the accused. It placed the state and the accused upon an equality.

Id. This same distinction was made by other states at the time, including Indiana, the inspiration for the Oregon and Washington Constitutions. Therefore, this Court should hold that Washington’s ex post facto clause provides broader protection against changes in evidence law that act in a one-sided manner to disadvantage criminal defendants.

a. Washington’s Constitution Provides Broader Ex Post Facto Protection Than Its Federal Counterpart.

The Washington clause is textually different from the federal clause and mirrors the provisions of the Oregon and Indiana Constitutions.

Compare, Const. art. I, § 23; Or. Const. Art. I, § 21; Ind. Const. art. I, § 24. Indeed, the Declaration of Rights, of which Article I, section 23 is a part, was largely based upon W. Lair Hill's proposed constitution and its model, the Oregon Constitution. R. Utter and H. Spitzer, The Washington State Constitution, A Reference Guide, 9 (2002). Because it is borrowed from the Oregon Constitution, which in turn took its ex post facto language from the Indiana Constitution,³ it is useful to look to how the courts of those states have interpreted the relevant provisions of their constitutions. Biggs v. Dep't of Retirement, 28 Wn. App. 257, 259, 622 P. 2d 1301 (1981) (turning to interpretations of the Indiana Constitution to interpret similar, although not identical, provisions of Washington Constitution).

Applying an analysis similar to that set forth in State v. Gunwall,⁴ the Oregon Supreme Court determined the ex post facto protections of the Oregon Constitution are broader than the protections the United States

³ State v. Cookman, 324 Or. 19, 28, 920 P. 2d 1086 (1996).

⁴ State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986). Specifically, when determining whether a provision of the Oregon Constitution provides greater protection than the federal constitution, Oregon courts consider the provisions' specific wording, the case law surrounding it, and the historical circumstances that led to its creation. Billings v. Gates, 323 Or. 167, 173-74, 916 P.2d 291 (1996); Priest v. Pearce, 314 Or. 411, 415-16, 840 P.2d 65, 67- 69 (1992). By comparison, Gunwall directs a court to consider six nonexclusive factors: the textual language of the state constitution; significant differences in the texts of parallel provisions of the federal and state constitutions; state constitutional and common law history; preexisting state law; differences in structure between the federal and state constitutions; and whether the matter is of particular state interest or local concern. Gunwall, 106 Wn.2d at 61-62.

Supreme Court has recognized in the federal constitution. State v. Fugate, 332 Or. 195, 213, 26 P.3d 802, 813 (2001). Specifically, the Oregon court has interpreted the mirror provisions of the Oregon Constitution's ex post facto clause to prohibit retroactive application of laws that alter the rules of evidence in a manner favoring only the prosecution. Id. Fugate took pains to distinguish that result from changes in evidentiary rules which apply equally to both the defense and the prosecution, finding that sort of law of general application was never viewed as resulting in the evil to which the ex post facto clause is addressed. Id.

In reaching its conclusion, the Oregon court looked to Indiana's interpretation of its ex post facto protections. Id. at 211, 213. Prior to adoption of the Oregon Constitution, the Indiana Supreme Court determined

The words ex post facto have a definite, technical signification. The plain and obvious meaning of this prohibition is, that the Legislature shall not pass any law, after a fact done by any citizen, which shall have relation to that fact, so as to punish that which was innocent when done; or to add to the punishment of that which was criminal; or to increase the malignity of a crime; or to retrench the rules of evidence, so as to make conviction more easy.

Id. at 211 (quoting Strong v. The State, 1 Blackf. 193, 196 (1822)).

Because that interpretation of Indiana's constitution was available to the framers of the Oregon Constitution when they chose to adopt the language

of Indiana's ex post facto clause, the Oregon court interpreted the Oregon provisions as, "forbid[ding] ex post facto laws of the kind that fall within the fourth category in Strong and Calder, viz., laws that alter the rules of evidence in a one-sided way that makes conviction of the defendant more likely." Fugate, 332 Or. at 213.

That interpretation of the Indiana Constitution was also available to the framers of Washington Constitution in 1889. Rather than simply adopt the language of Article I, section 10, the framers instead chose to adopt the language of the Oregon and Indiana constitutions. By adopting the different language of the Oregon and Indiana Constitutions, logically, the framers of the Washington Constitution did not intend Article I, section 23 to be interpreted identically to the federal ex post facto provision. Robert F. Utter, Freedom And Diversity In A Federal System: Perspectives On State Constitutions And The Washington Declaration Of Rights, 7 U. Puget Sound L. Rev. 491, 496-97 (1984); State v. Silva, 107 Wn. App. 605, 619, 27 P.3d 663 (2001) (decision to use other states' constitutional language indicates the framers did not consider the language of the U.S. Constitution to adequately state the extent of the rights meant to be protected by the Washington Constitution).

In fact, two years after Washington became a state, the Supreme Court cited to Calder as providing "a comprehensive and correct definition

of what constitutes an ex post facto law.” Lybarger v. State, 2 Wash. 552, 557, 27 P. 449 (1891). Applying an analysis that resembles that of Strong, Lybarger concluded the statute did not violate ex post facto provisions, in part, because “[i]t does not change the rules of evidence to make conviction more easy.” 2 Wash. at 560. Lybarger applied precisely the analysis that the Oregon Supreme Court applied in Fugate.

Aside from the textual differences and differences in the common-law and constitutional history, the United States Constitution is a grant of limited power to the federal government, whereas the Washington constitution imposes limitations on the otherwise plenary power of the state. Gunwall, 106 Wn.2d at 61. That fundamental difference generally favors a more protective interpretation of the Washington provision. Id. So too does the fact that regulation of criminal trials is a matter of particular state concern. State v. Smith, 150 Wn.2d 135, 152, 75 P.3d 935 (2003); State v. Schaaf, 109 Wn.2d 1, 13-14, 743 P.2d 240 (1987); see also Moran v. Burbine, 475 U.S. 412, 434, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986) (case did not warrant federal intrusion into the criminal process of states).

The framers of Washington Constitution adopted language that differs from the language of the federal constitution; language that had been interpreted 67 years prior to its inclusion in the Washington

Constitution to bar retroactive legislation altering the rules of evidence in a one-sided fashion. By doing so, the framers intended to apply that same protection in Washington.

b. Violation of the Constitutional Protection Against Ex Post Facto Legislation Is Presumed Prejudicial.

Because he was denied this important protection, Schauer's convictions must be reversed. Constitutional error is presumed prejudicial unless the State can prove beyond a reasonable doubt the jury would have reached the same verdict had the error not occurred. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Thus, the State must convince this Court beyond a reasonable doubt the jury would have reached the same result without the erroneously admitted propensity evidence. The State cannot meet that burden here. This trial was essentially a credibility contest, with the words of the two children juxtaposed against Schauer's vehement denials and the absence of physical evidence. Given the inherently prejudicial and inflammatory nature of propensity evidence, the State cannot prove beyond a reasonable doubt that the jury was not influenced, and this Court should reverse Schauer's conviction.

4. THE ENACTMENT OF RCW 10.58.090 VIOLATES THE SEPARATION OF POWERS DOCTRINES OF THE STATE AND FEDERAL CONSTITUTIONS.

Even if this Court finds the evidence of a prior sex offense was admissible under the statutory criteria of RCW 10.58.090 and that admission did not violate ex post facto prohibitions, it should nevertheless reverse Schauer's convictions because the statute is an unconstitutional intrusion upon the Court's rule-making authority by the legislature. The statute changes the very nature of a trial for a defendant charged with a sex offense by allowing the state to generate otherwise inadmissible evidence of prior sex offenses. This amounts to a violation of the Court's inherent authority to govern court procedures.

a. The State and Federal Constitutions Prevent One Branch of Government From Usurping the Powers and Duties of Another.

One of the fundamental principles of the American constitutional system is that the governmental powers are divided among three departments--the legislative, the executive, and the judicial--and that each is separate from the other.

Carrick v. Locke, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994) (citing State v. Osloond, 60 Wn. App. 584, 587, 805 P.2d 263 (1991)). The separation of powers doctrine is recognized as deriving from the tripartite system of government established in both constitutions. See, e.g., Const. Arts. II, III, and IV (establishing the legislative department, the executive,

and judiciary); U.S. Const. Arts. I, II, and III (defining legislative, executive, and judicial branches); Carrick, 125 Wn.2d at 134-35 (“the very division of our government into different branches has been presumed throughout our state’s history to give rise to a vital separation of powers doctrine”).

The fundamental principle of the separation of powers is that each branch wields only the power it is given. State v. Moreno, 147 Wn.2d 500, 505, 58 P.3d 265 (2002). This separation ensures the fundamental functions of each branch remain inviolate. Carrick, 125 Wn.2d at 135; In the Matter of the Salary of the Juvenile Director, 87 Wn.2d 232, 239-40, 552 P.2d 163 (1976). Separation of powers principles are violated when “the activity of one branch threatens the independence or integrity or invades the prerogatives of another.” Moreno, 147 Wn.2d at 505-06 (internal quotation marks omitted).

b. The Washington Constitution Vests the Supreme Court With Sole Authority to Adopt Procedural Rules.

Article 4, section 1 of the Washington Constitution vests the Washington Supreme Court with the sole authority to govern court procedures. City of Fircrest v. Jensen, 158 Wn.2d 384, 394, 143 P.3d 776 (2006); State v. Fields, 85 Wn.2d 126, 129, 530 P.2d 284 (1975). “[T]here is excellent authority from an historical as well as legal

standpoint that the making of rules governing procedure and practice in courts is not at all legislative, but purely a judicial, function.” State ex rel. Foster-Wyman Lumber Co. v. Superior Court for King County, 148 Wash. 1, 4, 267 P. 770 (1928).

More recently, the plurality in Jensen explained that “the judiciary’s province is procedural and the legislature’s is substantive.” Jensen, 158 Wn.2d at 394. The court concluded that evidentiary rules straddle the substantive and procedural domains and thus may be promulgated both by the judiciary and the legislature. Id.

Given this shared power, the court moved on to consider which branch controls if the two are in conflict. The first principle is that “When a court rule and a statute conflict, the court will attempt to harmonize them, giving effect to both.” Id. However, “[w]hen 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.” Id.

Thus, when a court rule and a statute conflict, the nature of the right at issue determines which one controls. State v. W.W., 76 Wn.App. 754, 758, 887 P.2d 914 (1995). If the right is substantive, then the statute prevails; if it is procedural, then the court rule prevails. Id.

c. If RCW 10.58.090 Is a Procedural Rule, Its Enactment Violates the Separation Of Powers Doctrine.

The legislative notes following RCW 10.58.090 claim the act is substantive. Laws 2008, ch. 90, §1. If that is the case, then as argued above the retroactive application of that substantive change violates the Ex Post Facto provisions of the federal and state constitutions. In the alternative, if defining the bounds of the admissibility of evidence and the permissible inferences to be drawn from that evidence is a procedural function lying at the heart of the judicial power, then the Legislature's effort to alter the rules of admissibility violates the Separation of Powers doctrine.

Substantive law "prescribes norms for societal conduct and punishments for violations thereof." Jensen, 158 Wn.2d at 394 (quoting State v. Smith, 84 Wn.2d 498, 501, 527 P.2d 674 (1974)). By contrast, practice and procedure relates to the "essentially mechanical operations of the courts" by which substantive law is effectuated. Id. RCW 10.58.090 does not prescribe societal norms or establish punishments. It does not create, define, or regulate a primary right. Instead, it alters the mechanism by which those substantive rights and remedies are determined by allowing admission of otherwise inadmissible evidence and permitting

juries to draw otherwise impermissible inferences based on criminal propensity.

As discussed above, Schauer was prejudiced by application of this unconstitutional law in his case. See section D. 2.a., supra. If this Court determines that application did not violate ex post facto prohibitions because it is procedural, then the Legislature did not have authority to enact it, and the statute is void. Jensen, 158 Wn.2d at 394; State v. Thorne, 129 Wn.2d 736, 762, 921 P.2d 514 (1996) (“Legislation which violates the separation of power doctrine is void.”). Schauer therefore requests this Court reverse his conviction.

5. RCW 10.58.090 IS AN UNCONSTITUTIONAL VIOLATION OF THE WASHINGTON CONSTITUTION’S FAIR TRIAL GUARANTEE.

The Washington right to jury trial incorporates broader protection than its federal counterpart, because it codifies the understanding of state rights at the time. City of Pasco v. Mace, 98 Wn.2d 87, 96, 653 P.2d 618 (1982) (article 1, section 21 of Washington’s constitution preserves the right to jury trial “as it existed at common law in the territory at the time of its adoption”).

The Washington Constitution’s jury trial right is comprised of two provisions. Article I, section 21 provides that [t]he right of trial by jury shall remain inviolate. Article I, section 22 provides that [i]n criminal prosecutions the accused shall have the right to trial by an impartial jury.

[T]he right to trial by jury which was kept inviolate by our state constitution [is] more extensive than that which was protected by the federal constitution when it was adopted in 1789. The state jury trial right preserves the right as it existed at common law in the territory at the time of [our constitution's] adoption.

State v. Recuenco, 163 Wn.2d 428, 444, n. 11, 180 P.3d 1276 (2008) (Fairhurst, J., dissenting) (internal citations omitted) (citing Mace, 98 Wn.2d at 99).

The understanding that a fair trial must be free from propensity evidence predates the federal constitution: “The rule against using character evidence to show behavior in conformance therewith, or propensity, is one such historically grounded rule of evidence. It has persisted since at least 1684 to the present.” McKinney v. Rees, 993 F.2d 1378, 1381 (9th Cir. 1993). By transgressing this fundamental aspect of a constitutionally guaranteed fair trial, RCW 10.58.090 violates Schauer’s state constitutional fair trial protections.

6. THE PROSECUTOR DEPRIVED SCHAUER OF HIS RIGHT TO A FAIR TRIAL BY IMPROPERLY INVITING THE JURY TO PENALIZE HIM FOR EXERCISING HIS RIGHT TO CONFRONT WITNESSES AT TRIAL.

After repeatedly emphasizing T.V. and A.A.’s fear of Schauer, their difficulties in testifying, and T.V.’s suicide attempt, during closing argument the prosecutor argued,

[I]t was not only difficult for [A.A.] but difficulty for [T.V.] to testify in front of the defendant. And let me be clear on

this point. The defendant has a constitutional right to confront witnesses. Our constitution demands that. And that is why, folks, [T.V.] had to testify and [A.A.] had to testify.

13RP 25. This argument was flagrant misconduct because the prosecutor drew negative inferences from Schauer's exercise of his constitutional rights to a jury trial and to confront witnesses.

Prosecutorial misconduct during closing argument may deprive the defendant of the right to a fair and impartial trial guaranteed by the Sixth Amendment to the United States Constitution and Const., art. 1, § 22 (amend. 10). State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). When objected to, prosecutorial misconduct requires reversal if there is a substantial likelihood the misconduct affected the verdict. Reed, 102 Wn.2d at 145. Even absent an objection, prosecutorial misconduct requires reversal when the prosecutor's remarks were so flagrant and ill-intentioned that they produced an enduring prejudice which could not have been neutralized by a curative instruction to the jury. Belgarde, 110 Wn.2d at 507.

Prosecutorial misconduct that also affects a separate constitutional right, however, has been analyzed under the stricter standard of constitutional harmless error. State v. Johnson, 80 Wn. App. 337, 341, 908 P.2d 900 (1996); State v. Contreras, 57 Wn. App. 471, 473, 788 P.2d 1114, rev. denied, 115 Wn.2d 1014, 797 P.2d 514 (1990); State v. Traweek, 43

Wn. App. 99, 107-08, 715 P.2d 1148, rev. denied, 106 Wn.2d 1007 (1986), overruled on other grounds, State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991).

a. The Prosecutor Improperly Encouraged the Jury to Penalize Schauer for Exercising his Constitutional Right to Confront Witnesses at Trial.

Due process prohibits the State from drawing adverse inferences from a defendant's exercise of a constitutional right, such as the right to a jury trial under the Sixth Amendment and Const. art. 1, § 22. See, e.g., United States v. Jackson, 390 U.S. 570, 581, 20 L. Ed. 2d 138, 88 S. Ct. 1209 (1968) (capital punishment provision of Federal Kidnapping Act unconstitutionally chilled Fifth Amendment right not to plead guilty and Sixth Amendment right to demand jury trial); Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) (drawing adverse inference from defendant's failure to testify unconstitutionally infringed on defendant's Fifth Amendment rights); State v. Frampton, 95 Wn.2d 469, 478-79, 627 P.2d 922 (1981) (previous Washington death penalty statute needlessly chilled defendant's right to plead not guilty and demand a jury trial).

Such inferences amount to a "penalty imposed . . . for exercising a constitutional privilege." Griffin, 380 U.S. at 614. To protect the integrity of constitutional rights, the courts have developed two related propositions.

The State can take no action that will unnecessarily “chill” or penalize the assertion of a constitutional right, and the State may not draw adverse inferences from the exercise of a constitutional right. State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984) (citing Jackson, 390 U.S. at 581; Griffin, 380 U.S. at 614; State v. Mace, 97 Wn.2d 840, 650 P.2d 217 (1982); Frampton, 95 Wn.2d 469).

Here, the prosecutor improperly used Schauer’s exercise of his right to trial by jury as a way to ignite the jurors’ passions against him. First, the prosecutor made repeated references to the difficulty of testifying in front of one’s abuser. 13RP 18, 19, 26, 76, 78. The prosecutor also referred to the evidence that one of the young boys attempted suicide in order to avoid testifying at trial. 13RP 26. This alone might not be problematical, but then the prosecutor directly attributed the extreme hardship suffered by these young boys to Schauer’s right to confront witnesses at trial. 13RP 25-26.

General comments on the emotional cost of testifying, used to support a witness’s credibility, are permissible. State v. Gregory, 158 Wn.2d 759, 808, 147 P.3d 1201 (2006). However, such comments go too far when they focus on the defendant’s exercise of his constitutional rights to trial and to confront witnesses. Id. Assuming the prosecutor was merely attempting to make the type of credibility argument permitted in Gregory, that the boys should be believed based on how difficult it was for them to testify, it was

entirely unnecessary to connect that cost to Schauer's constitutional rights. By turning the focus away from the emotional cost of testifying and toward Schauer's right to confront witnesses, the prosecutor went too far.

The right to confrontation was compromised in State v. Jones when the prosecutor focused the jury on the traumatic impact of the trial on the child witness and connected it to the defendant's exercise of his rights to jury trial and to confront witnesses. State v. Jones, 71 Wn. App. 798, 863 P.2d 85 (1993). During the child's testimony, the prosecutor stood so as to block her from Jones' view. Id. at 805. During a break, Jones brought this to the court's attention and was permitted to adjust his position so he could see. Id. The prosecutor cross-examined Jones about this, saying, "[W]eren't you frustrated because I was blocking your view from her such that you could not stare at her as she was testifying?" Id. During closing argument, the prosecutor referred to this again, arguing that while society professes to care about children,

we still have a system that requires that child to have to walk in through those two big doors as a very, very small person and walk up here in front of twelve people, twelve grownups whom they don't know, and sit in this chair in a courtroom such as this, with the defendant sitting right there, staring at them.

Id. at 805-06. The prosecutor later returned to the point, saying that although Jones professed to care for the child,

he wants to have direct eye contact with her. Why? And what was the result of that direct eye contact that first day? She broke down and she cried and she told you she was afraid. She was afraid of who? Of [Jones]. And the CPS worker told you that outside how upset and how disturbed and how frightened she was so that she refused to walk through those two big doors again.

Id. at 806. The court held this questioning and argument was improper because it invited the jury to draw a negative inference from Jones' exercise of a constitutional right. Id. at 811-12. The prosecutor here also committed misconduct in violation of Schauer's constitutional rights because the closing argument emphasized the trauma to the child witnesses and directly connected that trauma to Schauer's exercise of his right to confront witnesses at trial.

Standing alone, the statement that Schauer has a constitutional right to confront witnesses may be unproblematic. But the court views prosecutorial argument in the context of the entire argument and the evidence at trial. State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008) (citing State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359, cert. denied, ___ U.S. ___, 128 S. Ct. 2964 (2008)). During the trial, there were repeated references to the boys' fear of Schauer. 6RP 32-33; 7RP 66; 10RP 138. The jury heard that T.V. was so worried about testifying in court that he attempted suicide. 7RP 65. Then in closing argument, the prosecutor argued four times that it was extremely hard for the boys to testify in Schauer's

presence. 13RP 18, 19, 76, 78. In addition, the closing argument specifically referenced T.V.'s suicide attempt. 13RP 26. This was the context for the prosecutor's statement that "The defendant has a constitutional right to confront witnesses. Our constitutional demands that. And that is why, folks, [T.V.] had to testify and [A.A.] had to testify." 13RP 25-26. As in Jones, the prosecutor's argument invited the jury to blame Schauer not just for the crimes he was charged with, but for traumatizing two small boys by exercising his constitutional rights.

This case is not similar to Portuondo v. Agard, 529 U.S. 61, 65, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000), where the Court held prosecutors may point out that the defendant has an opportunity to tailor or fabricate testimony because he hears all the other witnesses before testifying. Id. This type of argument is permitted because by testifying, the defendant subjects himself to impeachment on the same grounds as any other witness. Id. at 69. The argument merely invites the jury to do something it is entitled to do as part of the truth seeking function of the adversary system – weigh the defendant's opportunity to fabricate as it pertains to his credibility as a witness. Id. at 68.

But here, the prosecutor's comments had no bearing on Schauer's credibility. They served only to point out that his exercise of his constitutional right to a jury trial was traumatic for these two children,

driving one to attempt suicide. The only possible effect was to burden his exercise of the right to confront witnesses at trial.

b. The Flagrant Violation of Schauer's Right to Confront Witnesses at Trial Requires Reversal Because It Caused Incurable Prejudice.

Under the constitutional harmless error standard, the state has the heavy burden of proving the error was harmless beyond a reasonable doubt. Constitutional error is presumed prejudicial and is harmless only if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. Guloy, 104 Wn.2d at 426; Johnson, 80 Wn. App. at 341; State v. Jones, 71 Wn. App. 798, 812, 863 P.2d 85 (1993). With no physical evidence, the jury was entitled to believe either the boys or Schauer. It is far from certain beyond a reasonable doubt that the out come would have been the same without the unconstitutional penalty on Schauer's exercise of the right to trial.

The State may argue that the constitutional harmless error standard does not apply because Washington's Supreme Court has repeatedly declined to decide whether prosecutorial misconduct that directly impacts a constitutional right is subject to a more stringent harmless error analysis. Warren, 165 Wn.2d at 26 n.3; Gregory, 158 Wn.2d at 808. However, even under the general standard requiring reversal when prosecutorial misconduct was so flagrant and ill-intentioned that it could not have been cured by

instruction, Schauer's convictions should be reversed. Belgarde, 110 Wn.2d at. 507.

First, the comment on Schauer's right to confront witnesses was flagrant and ill-intentioned because it was entirely unnecessary to the credibility argument the prosecutor was trying to make. Thus, the only possible purpose was to invite the jury to penalize him for exercising that right. Second, the prejudice is incurable because the jury is unlikely to be able to erase from its mind the implication that Schauer's insistence on going to trial caused a small boy to try to hang himself in the schoolyard. Finally, any objection by defense counsel would only have drawn even more attention to the lamentable hardship testifying imposed on these children and could not have diminished the jury's desire to punish Schauer for it.

c. Alternatively, Reversal Is Required Because Schauer's Attorney Was Ineffective in Failing to Object to This Violation of His Constitutional Rights.

Alternatively, assuming the court finds this constitutional error could have been ameliorated by an instruction to the jury, counsel's failure to object and request such an instruction was ineffective. Burns v. Gammon, 260 F.3d 892 (8th Cir. 2001). Whether counsel provided ineffective assistance is a mixed question of fact and law reviewed de novo. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

“A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude.” State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

Defense counsel is constitutionally ineffective where (1) the attorney’s performance was unreasonably deficient and (2) the deficiency prejudiced the defendant. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). The presumption of competent performance is overcome by demonstrating “the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.” State v. Crawford, 159 Wn.2d 86, 98, 147 P.3d 1288 (2006). Failure to preserve error can also constitute ineffective assistance and justifies examining the error on appeal. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980); see State v. Allen, 150 Wn. App. 300, 316-17, 207 P.3d 483 (2009) (addressing ineffective assistance claim where attorney failed to raise same criminal conduct issue during sentencing).

There is “no sound trial strategy” in failing to object when the prosecutor improperly comments on the right to confront witnesses in a jury trial. Burns, 260 F.3d at 897. In Burns, the prosecutor argued the

defendant had humiliated a rape victim by requiring her to re-live the experience through testimony and cross-examination. Id. at 895. The court found the prosecutor's argument infringed the rights to jury trial and to confront witnesses. Id. at 897. The argument "allowed, and in fact, invited the jury to punish Burns for exercising his constitutional rights." Id. There could be no strategic reason for failing to object. Id. The failure to object was deficient in this case as well. The prosecutor's argument here invited a similar penalty when it linked Schauer's right to confront witnesses at trial to the hardship of testifying, including T.V.'s suicide attempt.

The Burns court held the defendant was prejudiced by counsel's deficient performance for two main reasons, both of which are present here. First, Burns was prejudiced because the failure to object deprived him of a cautionary instruction that could have ameliorated or even eliminated the prejudice. Id. at 897. Second, the court noted that the failure to object prejudiced Burns on appeal because it left him in the unenviable position of arguing the prosecutor's misconduct was "plain error." Id. at 897-98. This was a more difficult standard to meet, analogous to Washington's requirement that when there is no objection, prosecutorial misconduct requires reversal only if it is so flagrant and ill-intentioned that no instruction could have cured the prejudice. The impact of the prosecutor's argument in

this case was no different, and Schauer was also prejudiced when his attorney failed to object to argument that penalized him for exercising his constitutional rights. Schauer's convictions should be reversed either due to flagrant prosecutorial misconduct that directly violated his constitutional rights or due to ineffective assistance of counsel.

E. CONCLUSION

The admission of Schauer's prior sex offense was error under RCW 10.58.090, ER 404(b), and ER 403. Even if the evidence was admissible under RCW 10.58.090, that statute is unconstitutional. As applied to Schauer, it violates state and federal constitutional prohibitions on ex post facto legislation. Additionally, it violates the separation of powers doctrine and Washington State's constitutional fair trial guarantee. Finally, the prosecutor's comment on Schauer's exercise of his right to confront witnesses at trial denied him a fair trial. Therefore, Schauer requests this Court reverse his convictions and remand for a new trial.

DATED this 31st day of December, 2009.

Respectfully submitted,

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Office ID No. 91051

Attorney for Appellant

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

| | | |
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| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | COA NO. 6373-3-I |
| |) | |
| KURT SCHAUER, |) | |
| |) | |
| Appellant. |) | |

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 31ST DAY OF DECEMBER, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KURT SCHAUER
DOC NO. 936855
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF DECEMBER, 2009.

x *Patrick Mayovsky*