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NO. 64234-1-I

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

REC'D
AUG 10 2010
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

SCOTT SOLLESVIK,

Appellant.

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

The Honorable Chris Washington, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence is insufficient to support appellant's conviction.

2. The trial court erred and denied appellant his constitutional right to present a defense when it precluded critical defense evidence explaining the alleged victim's precocious sexual knowledge.

3. The trial court erred when it admitted evidence of prior sexual misconduct under RCW 10.58.090 to prove appellant committed the current offense.

4. RCW 10.58.090 violates state and federal constitutional prohibitions on ex post facto legislation.

5. The Legislature's enactment of RCW 10.58.090 violates the separation of powers doctrine of the state and federal constitutions.

6. RCW 10.58.090 violates the Washington Constitution's fair trial guarantees.

Issues Pertaining to Assignments of Error

1. The State charged appellant with rape of child in the first degree. The "to convict" instruction was drafted in such a way to require a showing that appellant continuously raped the alleged victim throughout a three-year period. There was no evidence at trial, however, to prove this requirement. Must appellant's conviction be reversed and dismissed for

insufficient evidence?

2. The alleged victim was seven years old at the time of the charged conduct and described sexual acts and male anatomy beyond the knowledge of a child her age. It was discovered that prior to her allegations against appellant, the alleged victim and a young boy had engaged in sexual activities similar to those she claimed she had engaged in with appellant. Where this evidence was necessary to explain the child's precocious knowledge, did the trial court err in precluding its use?

3. 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 the 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. Did the court err in admitting evidence that appellant engaged in different sexual contact, with a different victim, more than 15 years earlier?

4. 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, ER 404(b) would have prevented a jury from considering appellant's prior conduct as

evidence of criminal propensity. Is application of RCW 10.58.090, permitting this previously forbidden inference, unconstitutional?

5. 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?

6. 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?

7. 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?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor's Office charged Scott Sollesvik with one count of rape of a child in the first degree, alleging:

That the defendant SCOTT SOLLESVIK in King County, Washington, during a period of time intervening between August 20, 2004 through December 11, 2007, being at least 24 months older than N.B., had sexual intercourse with N.B., who was less than 12 years old and was not married to the defendant.

CP 127. Sollesvik was born November 7, 1967. RP 631. N.B. was born August 20, 1998. RP 364. The State charged a three-year period for the offense because N.B. could not provide a clear date when the alleged conduct occurred. RP 11; CP 2.

The "to convict" instruction given to jurors at trial provides:

To convict the defendant of the crime of Rape of a Child in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the time intervening between August 20, 2004 through December 11, 2007, the defendant had sexual intercourse with [N.B.];

(2) That [N.B.] was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;

(3) That [N.B.] was at least twenty-four months younger than the defendant; and

(4) That this act occurred in the State of Washington.

CP 156.

A jury found Sollesvik guilty, the court sentenced him to a minimum term of 216 months, and Sollesvik timely filed his Notice of Appeal. CP 165, 167, 172.

2. Pretrial Rulings

a. *RCW 10.58.090*

Prior to trial, the State provided notice that it intended to offer evidence, under RCW 10.58.090, that in the 1980s, beginning when Sollesvik was still a teen, he had sexual intercourse with a girl five years his junior. See Supp. CP ___ (sub no. 155, State's Trial Memorandum, at 8-10, 21-31); RP 22-25, 213. The State argued this evidence was necessary to prove its case because there were no eyewitnesses to the charged conduct, there was no physical evidence that N.B. had been raped, there was no confession, and the case would otherwise come down to a credibility contest between N.B. and Sollesvik. RP 211-212, 219, 221-24. With the evidence, argued the State, jurors would recognize "it happened before, it would happen again." RP 221.

The defense asked the trial court to find RCW 10.58.090 unconstitutional or that its requirements had not been satisfied. CP 130-131,

140-147; RP 224-228, 230-232.

The trial court found the statute constitutional and its requirements met. RP 237-238. As discussed below, evidence of Sollesvik's prior conduct became the lynchpin in the State's efforts to convict him on the current charge. RP 622-675, 952, 967-969, 1010, 1012-1014.

b. Prior sexual activity involving N.B.

The defense provided notice that it intended to present evidence that N.B. had engaged in sexual activities with another juvenile, Z.K., prior to her allegation concerning Sollesvik. N.B. claimed that Z.K. did the "[s]ame thing pretty much" as Sollesvik had done to her, which provided an independent basis for N.B.'s knowledge of sexual acts and male anatomy. CP 136; RP 161-168; pretrial exhibit 3; pretrial exhibit 4, at 38. The defense also sought to introduce evidence that whereas N.B. had written in her diary about her sexual contact with Z.K., there were no entries concerning Sollesvik, suggesting it did not happen. RP 202-203.

The State objected to the evidence, arguing it was not relevant and precluded under RCW 9A.44.020, Washington's rape shield statute. Supp. CP ___ (sub no. 155, State's Trial Memorandum, at 7-8, 31-34); RP 156-160, 163-164.

The court excluded the evidence, finding the prior conduct not sufficiently similar to the charged conduct and that the risk of jury confusion

and “misuse” of the evidence outweighed any probative value. RP 165-166, 169, 203-204.

3. Trial Evidence

Ed Brookman and Roxanne Atkins have a daughter, N.B., who turned eleven years old during trial. RP 364, 366. Brookman and Atkins separated when N.B. was about a year old and later divorced. RP 366, 390. The two shared custody of N.B., who split time between their homes. RP 390.

Atkins began dating John Sollesvik, who has a daughter, Ashley, who is three years older than N.B. RP 501-503. Eventually, John Sollesvik moved in with Atkins and became a father figure for N.B., who called him Daddy John. Ashley also lived in the home part time. RP 503-504. Atkins and N.B. became well acquainted with the extended Sollesvik family, including John’s brother, Scott Sollesvik.¹ RP 504-505.

Atkins had a good relationship with Scott Sollesvik. They spoke on the phone often and saw each other at family functions. RP 508. Scott was authorized to pick up N.B. from school or day camp if Atkins had a schedule conflict. He also picked up Ashley, and nothing ever seemed out of the ordinary. RP 509-510, 533. Atkins had no concerns about Scott and N.B.

¹ To avoid confusion, portions of this brief refer to members of the Sollesvik family by first name.

never gave any indication of a problem. RP 538. Scott lived with his elderly father, Harold Sollesvik, and had a bedroom in the basement of the house, which was just a few miles from Atkins' house. RP 504-508.

John Sollesvik died from renal failure in January 2006. RP 501-502. Atkins began dating another man – Joe Dizzard – who spent most nights at Atkins' home. Thereafter, Atkins and N.B. saw less of the Sollesvik family, including Scott. RP 515-516.

Prior to John's death, N.B. developed "sleeping issues," meaning she would not go to sleep. RP 517-520. These continued after John's death and Dizzard attempted to help, giving N.B. a "super tuck" as part of the bedtime routine, meaning the final goodnight for the evening. RP 520-522. One evening in December 2007, while Dizzard was in the bedroom alone with N.B., Atkins heard Dizzard say, "oh, no" and summon her to the bedroom. RP 521-522. Dizzard was upset and N.B. was crying. Dizzard handed Atkins a piece of paper on which N.B. had written "I had sex with Scott." RP 523.

Atkins reassured N.B. that everything was going to be fine. She asked N.B. what she meant by the note and N.B. said that Scott had touched her in her "privacy" area, meaning her vagina. RP 524-525. Atkins attempted to determine whether there had been any penetration and believed, based on N.B.'s response, there had not been. RP 525-526.

Police were contacted the following day. RP 528-529. On December 11, 2007, Caroline Webster, an interview specialist employed by the King County Prosecutor's Office, interviewed N.B.. RP 468-469, 559, 774. During that interview, N.B. claimed that Scott "had sex" with her and that it happened more than one time. Exhibit 3; exhibit 4, at 16-17, 38. She only provided details, however, regarding one time. She claimed that she spent the night in Scott's bedroom. She and Scott were naked, they kissed, touched each other's private areas, and performed oral sex on each other. Exhibit 3; exhibit 4, at 19-38. She believed this happened when she was seven years old. Exhibit 3; exhibit 4, at 19.

The following day, Dr. Rebecca Wiester conducted a physical examination of N.B. at the Harborview Sexual Assault Center. RP 560, 753-754, 759. N.B. used a drawing to describe what happened to her. RP 766-767, 772. In addition to the claims she made the day before, she also claimed that Scott put his private area against her private area. RP 773-774, 777-778. Wiester asked N.B. if she saw anything come out of his private area and N.B. described what sounded like the tip of a penis moving through foreskin. RP 775-776. A thorough head-to-toe examination revealed no physical signs of abuse. RP 782, 791-792.

N.B. testified at trial and once again claimed that when she was seven years old, and while spending the night in Scott's bedroom, she and

Scott had touched each other with their hands and mouths. RP (8/19/09) at 18-31. Although she claimed that Scott had touched her on prior occasions, she testified that she was eager to spend the night at his house and kept begging her mother for permission until she said yes. RP (8/19/09) at 29; exhibit 4, at 17.

Scott denied N.B.'s allegations. RP 872. He testified that N.B. had never spent the night. Nor had she ever seen him naked. RP 868, 908. Based on N.B.'s description of Scott's penis, police believed they would find that Scott was uncircumcised. RP 614. They said he could avoid having his penis photographed if he simply stipulated that he was uncircumcised. He refused. When a detective photographed Scott's penis, it was discovered that he is clearly circumcised. RP 614, 867-868.

The defense took aim at Joe Dizzard as the instigator of N.B.'s false accusations. Dizzard testified that he and Scott used to go scuba diving together, he had considered him a friend, and he bore no ill will towards Scott prior to N.B.'s claims. RP 806-809. Other witnesses, however, disagreed. They testified that Dizzard had been using some of John Sollesvik's belongings after his death, including a boat, a vehicle, and tools. Scott later retrieved these items, which angered Dizzard. Thereafter, Dizzard spoke badly of Scott, sometimes in N.B.'s presence. RP 848-862.

In an attempt to bolster its case, the prosecution made great use of

the court's ruling under RCW 10.58.090.

Jeanne Ward, who was 36 years old by the time of trial, testified that she was childhood friends with Scott's younger sister and lived across the street from the Sollesvik family. RP 644, 646-647. When Ward was eleven years old, and during a period when Scott temporarily lived in Ward's parents' home, Scott – who was about five years her senior – touched her breasts and vagina. RP 654-655. When Ward was twelve, and after Scott had moved out of her parents' home, Scott attempted anal sex with her and then had vaginal intercourse with her despite her protests. He continued to do so from time-to-time until she was fifteen years old. RP 660-671. Ward reported the matter when she was sixteen. RP 671.

The prosecutor questioned Sollesvik extensively about Ward. RP 913-924. The State also called the police officer that investigated the matter in 1989 to testify regarding Ward's allegations. RP 622-642. Ward told him that she had intercourse with Scot eight or more times. RP 632. At the time, Scott initially denied he had sex with Ward, but ultimately ended up pleading guilty to two counts of statutory rape. RP 865, 923.

During closing argument, the defense focused on the fact N.B. had described an uncircumcised penis, yet Scott was circumcised. RP 971-972, 975, 996, 998, 1002-1003. Counsel also pointed out that if it were true, as N.B. claimed, that Scott had molested her on occasions prior to the incident

in the bedroom, N.B. would not have been so eager to spend the night at the Sollesvik home. Yet she was eager. RP 974. Counsel emphasized that Dizzard held a grudge against Scott and asked jurors to consider whether he was behind N.B.'s accusations. RP 975, 984, 998-1001.

During the State's closing, the prosecutor relied heavily on Ward's testimony. In her initial remarks, the prosecutor argued that Ward's claims were similar to N.B.'s claims and corroborated them. RP 952. Specifically, she argued that in both situations, the victim looked up to Scott, he was in a position of trust, and he violated that trust. RP 967-969. She also told jurors that Ward provided a voice for N.B. because – as an adult – she was better able to verbalize what they both experienced. RP 969.

The prosecutor also emphasized Ward in her rebuttal remarks. She repeated that Ward corroborated N.B. and argued that “history repeat[ed] itself on young [N.B.]” RP 1010. The prosecutor criticized Scott for his “arrogance” on the stand concerning Ward and argued that “he didn't give a rip” about her and had no remorse. RP 1012. She also argued that Scott was a liar because he had initially denied sexual contact with Ward before admitting it had occurred. RP 1013. She told the jury this was similar to Scott's lies on the stand concerning N.B. RP 1014.

Sollesvik now appeals.

C. ARGUMENT

1. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT SOLLESVIK'S CONVICTION.

Due process requires that the State prove every element of an offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 316, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

The definition of a crime in the court's instructions to the jury becomes the law of the case and defines the State's proof requirements. See State v. Hickman, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998).² And in reviewing the sufficiency of the evidence on appeal, this Court examines the evidence in light of the jury instructions actually given:

It is the approved rule in this state that the parties are

² Accord State v. Lee, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995) (instructions define law of the case); State v. Hames, 74 Wn.2d 721, 724, 446 P.2d 344 (1968) (State assumed burden to prove nonstatutory element of intent when it failed to except to instructions); State v. Hawthorne, 48 Wn. App. 23, 27, 737 P.2d 717 (1987) (referring to the rule that an item included in the jury instructions must be proved by the State); State v. Barringer, 32 Wn. App. 882, 888, 650 P.2d 1129 (1982) (although the statutes prohibiting forgery of a prescription for a controlled substance "did not require reference to a controlled substance, by including the reference in the information and in the instructions, it became the law of the case and the State had the burden of proving it"); State v. Worland, 20 Wn. App. 559, 565-66, 582 P.2d 539 (1978) (although willfulness is not an element of simple possession of a controlled substance, if the court incorporates an unnecessary element in the instructional language, the State has assumed the burden of proving it).

bound by the law laid down by the court in its instructions where, as here, the charge is approved by counsel for each party, no objections or exceptions thereto having been made at any stage. In such case, the sufficiency of the evidence to sustain the verdict is to be determined by the application of the instructions and rules of law laid down in the charge. . . .

Tonkovich v. Dept. of Labor and Industries, 31 Wn.2d 220, 225, 195 P.2d 638 (1948); see also Barringer, 32 Wn. App. at 887-88 (addressing sufficiency claim based on elements included in jury instructions, not statutory elements); Worland, 20 Wn. App. at 567-69 (same).

The Washington Supreme Court's decision in State v. Hickman demonstrates proper application of these principles. Hickman was charged with insurance fraud for presenting a fraudulent insurance claim regarding the theft of his car. Hickman, 135 Wn.2d at 100. Although there was no statutory requirement that the State prove the county in which the crime occurred, the "to convict" instruction required the State to prove:

(1) That the defendant, James Hickman, on or about the 1st day of July, 1992, . . . did knowingly present or cause to be presented a false or fraudulent claim or any proof in support of such a claim, for the payment of a loss under a contract of insurance; and

(2) That the false or fraudulent claim was made in the excess of . . . (\$1,500); and

(3) That the act occurred in Snohomish County Washington.

Hickman, 135 Wn.2d at 101 (emphasis added).

Hickman was convicted and, on appeal, challenged the sufficiency of the evidence pertaining to the third element -- that the fraudulent act occurred in Snohomish County. Hickman had been in Hawaii when he phoned in the claim, and the insurer was located in King County. Based on the absence of evidence that the crime occurred in Snohomish County, the Supreme Court reversed and dismissed Hickman's conviction. *Hickman*, 135 Wn.2d at 105.

The result should be the same here. Even in the light most favorable to the State,³ the trial evidence did not satisfy the elements contained in Sollesvik's "to convict" instruction, which required the State to prove beyond a reasonable doubt "[t]hat on or about *the time intervening between August 20, 2004 through December 11, 2007*, the defendant had sexual intercourse with [N.B.]." CP 156 (emphasis added).

The State intended to draft an instruction requiring jurors to find that, on a date within the time period from August 2004 to December 2007, Sollesvik had intercourse with N.B. Such an instruction could have simply required jurors to find that "at some time" or "on a date during" the

³ Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Green*, 94 Wn.2d at 220-21.

charged period, the defendant had intercourse with N.B. Instead, as written, the “to convict” instruction required jurors to find that the act of intercourse occurred through the entire time intervening between the two dates. There was no evidence to support that requirement. Therefore, the conviction must be reversed and dismissed.

2. THE TRIAL COURT DENIED SOLLESVIK HIS RIGHT TO PRESENT A DEFENSE WHEN IT EXCLUDED EVIDENCE THAT N.B. HAD PREVIOUSLY ENGAGED IN SIMILAR SEXUAL ACTS WITH Z.K.

The Sixth and Fourteenth Amendments to the United States Constitution, and article 1, § 22 of the Washington Constitution, guarantee the right to trial by jury and to defend against the State's allegations. These constitutional guarantees provide persons accused of crimes the right to present a complete defense. State v. Cheatam, 150 Wn.2d 626, 648, 81 P.3d 830 (2003) (citing Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)).

"The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." State v. Thomas, 150 Wn.2d 821, 857, 83 P.3d 970 (2004). The right to present a defense is a fundamental element of due process. Chambers v.

Mississippi, 410 U.S. 284, 294, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973); Washington v. Texas, 388 U.S. 14, 19, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967); State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976). Absent a valid justification, excluding relevant defense evidence denies the right to present a defense because it "deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." Crane v. Kentucky, 476 U.S. at 689-690.

The Washington Supreme Court's decisions in State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983), and State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002), define the expanse of an accused's right to present evidence in his defense. The accused is allowed to present even minimally relevant evidence unless the State can demonstrate a compelling interest for exclusion. Darden, 145 Wn.2d at 612.

Once defense evidence is shown to be even minimally relevant, the burden shifts to the State to show a compelling interest in excluding it, meaning the evidence would disrupt the fairness of the fact-finding process. If the State cannot do so, the evidence must be admitted. Darden, 145 Wn.2d at 622; Hudlow, 99 Wn.2d at 15-16; see also State v. Reed, 101 Wn. App. 704, 715, 6 P.3d 43 (2000) ("Evidence relevant to the defense of an accused will seldom be excluded, even in the face of a compelling state interest."). For evidence with high probative value, "it

appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22.” State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting Hudlow, 99 Wn.2d at 16).

As an initial matter, contrary to the State’s arguments below, Washington’s rape shield statute does not apply to prior sexual abuse. See State v. Kilgore, 107 Wn. App. 160, 177-179, 26 P.3d 308 (2001), aff’d, 147 Wn.2d 288 (2002); State v. Carver, 37 Wn. App. 122, 123-124, 678 P.2d 842, review denied, 101 Wn.2d 1019 (1984). Moreover, such evidence is “extremely relevant” to demonstrate an alternative source – beyond the charged conduct – for the alleged victim’s sexual knowledge and it does not risk confusion of the issues, misleading the jury, or causing the jury to decide the case on an improper basis. Carver, 37 Wn. App. at 124-125. Its exclusion requires reversal unless the State demonstrates the error was harmless beyond a reasonable doubt. Kilgore, 107 Wn. App. at 178.

N.B. described acts of sexual contact that a girl of her age would not normally experience or know about. During N.B.’s interview with Caroline Webster, Webster asked her about the first time something like this had happened to her. N.B. revealed that when she was about six, and while spending the night at the home of an older boy, Z.K., she and Z.K.

also “had sex.” Pretrial exhibit 3; pretrial exhibit 4, at 38, 40, 42-43. When asked what Z.K. had done with her, N.B. replied “the same thing as Scott” and “[s]ame thing pretty much,” including kissing each other in various places. Pretrial exhibit 3 (at 17:20:57-17:21:04); pretrial exhibit 4, at 38. When Webster asked where they kissed one another, N.B. indicated several areas, including her vagina and his penis. Pretrial exhibit 3 (at 17:26:45-17:27:30); pretrial exhibit 4, at 44-45. N.B. also mentioned sexual contact with Z.K. when speaking to Dr. Wiester. RP 157-158.

As in Carver, evidence that N.B. had done “the same thing” with another individual prior to her allegations against Sollesvik was highly relevant and therefore admissible as part of the defense case. It explained the otherwise unexplainable – how could N.B. describe the sexual acts she attributed to Sollesvik, including mouth to genital contact, unless her allegations against him were true? The evidence provided an alternative source for N.B.’s precocious knowledge.

Moreover, the evidence was relevant for a second, related reason. The fact N.B. wrote in her diary about the sexual contact with Z.K., but did not mention any contact with Sollesvik, tended to demonstrate that the charged conduct never occurred. RP 202-203.

In opposing this evidence, the State indicated that it had interviewed Z.K., who admitted that on three separate occasions, when he

was seven and N.B. was six, he had touched N.B. over and under her underwear. They also kissed on the mouth. But Z.K. claimed that N.B. had not touched or seen his penis. Supp. CP ___ (sub no. 155, State's Trial Memorandum, at 7-8). Based on Z.K.'s claims, the State argued that the conduct was very different from what N.B. alleged regarding Sollesvik. RP 158-160, 163-164.

The court found that the conduct between N.B. and Z.K., compared to the conduct between N.B. and Sollesvik, was "apples and oranges." RP 160. The defense pointed out that N.B. and Z.K. had different versions of events and that N.B. claimed that she and Z.K. engaged in the same activities as she and Sollesvik. RP 161-163, 165. But the court excluded the evidence, finding the two incidents insufficiently similar and that the probative value was outweighed by the resulting prejudice, which the court described as confusion and possible misuse of the evidence. RP 166, 169, 203-204.

This was error. For the reasons already explained, this was highly relevant evidence that explained N.B.'s sexual knowledge and undermined her claim against Sollesvik. In rejecting the evidence, it appears the court assumed the truth of Z.K.'s version of events, discounting N.B.'s claim that she had done "the same thing" with Z.K. as she did with Sollesvik.

But it is not the role of the courts to decide disputed questions of

fact. Rather, the applicable rule is well established:

It is the function and province of the jury to weigh the evidence, to determine the credibility of witnesses, and to decide the disputed questions of fact. The conflicts in the evidence merely present a question of fact for the jury. The jury is the sole and exclusive judge of the evidence, the weight to be given thereto, and the credibility of the witnesses

State v. Snider, 70 Wn.2d 326, 327, 422 P.2d 816 (1967) (citations omitted); see also State v. Randecker, 79 Wn.2d 512, 517, 487 P.2d 1295 (1971) ("the jury is the sole and exclusive judge of the weight of evidence, and of the credibility of witnesses."); State v. Israel, 91 Wn. App. 846, 848, 963 P.2d 897 ("[J]udges determine the competency of witnesses, and juries determine their credibility."), review denied, 136 Wn.2d 1029 (1998).

Washington's leading evidence commentator underscores this point in the context of ER 403's probative versus prejudicial balancing requirement:

Rule 403 does not authorize the exclusion of relevant evidence solely because the judge disbelieves the witness or in some other way regards the evidence as unreliable. The notion runs consistently through the rules and the case law that the jurors alone determine credibility.

5 K. Tegland, Washington Practice § 403.8 (5th ed. 2007).

N.B.'s statements regarding sexual contact with Z.K. were relevant and any dispute regarding what happened was a matter for the

jury. Sollesvik had the right to present this critical evidence as part of his defense. The State had no corroborating witnesses to the charged conduct, no confession, and no physical evidence. Because the State cannot demonstrate this error was harmless beyond a reasonable doubt, Sollesvik is entitled to a new trial.

3. THE TRIAL COURT ERRED WHEN IT ADMITTED EVIDENCE OF PRIOR SEXUAL MISCONDUCT UNDER RCW 10.58.090.⁴

For each of the reasons discussed below, the trial court erred when it admitted evidence of Sollesvik's sexual offenses against Jeanne Ward under RCW 10.58.090.

The improper admission of "bad acts" evidence requires reversal if, within reasonable probabilities, the error affected the outcome at trial. State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). The admission of Ward's testimony most certainly had this impact. Without this evidence, the prosecution was faced with challenging circumstances: no one could corroborate N.B.'s allegations of abuse, there were no eyewitnesses to the sex acts she described, Sollesvik denied sexual

⁴ Division One of this Court has upheld the constitutionality of RCW 10.58.090. See State v. Scherner, 153 Wn. App. 621, 225 P.3d 248 (2009), review granted, 168 Wn.2d 1036 (June 1, 2010); State v. Gresham, 153 Wn. App. 659, 223 P.3d 1194 (2009), review granted, 168 Wn.2d 1036 (June 1, 2010). Because the Supreme Court has now granted review of these decisions, their continuing validity is in doubt.

contact, there was an absence of physical evidence, and N.B. failed to accurately describe Sollesvik's penis as circumcised.

But jurors likely overlooked these deficiencies in the prosecution case once Ward took the stand. Jurors were specifically instructed that they could consider Sollesvik's conduct against Ward in deciding whether he was guilty of the current offense. CP 160; RP 624, 642-643. And the prosecutor used the evidence for that very purpose, focusing extensively on Ward during closing arguments and, at one point, specifically telling jurors "history repeated itself on young [N.B]." RP 1010.

a. Evidence Of Sollesvik's Prior Crimes Was Not Admissible Under RCW 10.58.090.

RCW 10.58.090 provides:

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

RCW 10.58.090(1). 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). These factors weigh against admission of the prior crimes at Sollesvik's trial.

First, there were significant differences between the offenses. Only about five years separated Sollesvik and Ward and both were teenagers when most of the conduct took place. RP 654-655, 660-671. In contrast, Sollesvik is thirty years older than N.B. RP 364, 631. Moreover, Sollesvik attempted anal intercourse with Ward and repeatedly had vaginal intercourse with her. RP 660-671. Neither is true regarding N.B. This weighs against admission.

Second, the prior crimes were remote in time, in the 1980s, which severely diminishes any relevance. This weighs against admission.

Third, regarding the frequency of the acts, it is not clear precisely how many times sexual contact occurred, although it happened multiple

times over the course of several years. RP 632.

Fourth, there were intervening circumstances. Sollesvik admitted his guilt regarding Ward and pled guilty to two counts of statutory rape. RP 865. Moreover, he committed no new offenses for at least the next decade and a half. This weighs against admission.

Fifth, the evidence was not necessary to the State's case. N.B. was old enough to competently convey her allegations against Sollesvik on the witness stand. RP (8/19/09) at 18-31. Moreover, Joe Dizzard, Roxanne Atkins, Caroline Webster, and Dr. Rebecca Wiester testified to statements N.B. made outside of court under various exceptions to the hearsay rule. RP 521-526, 723-728, 771-780; exhibits 3-4. An unrelated incident from the 1980s was not necessary to prove the State's case. This weighs against admission.

Sixth, some of Sollesvik's prior conduct resulted in criminal convictions. RP 865.

Factor (g) of this statute, which mirrors the language of ER 403,⁵ should be interpreted as incorporating a rigorous balancing of probative value against the danger of unfair prejudice, as has always been done under

⁵ ER 403 provides that 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

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 of a similar nature as the current charge 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

cumulative evidence.”

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 15-year-old crime cannot begin to outweigh the danger of unfair prejudice to Sollesvik's defense.

In admitting the evidence concerning Ward, the trial court did not address most of the above factors. The court merely indicated it was persuaded by similarities between the two cases, finding that the sexual activities were similar, the age of the victims was similar, and the relationship between Sollesvik and each victim was similar in that both came from households to which Sollesvik had some connection. RP 237-238.

But the activities were not similar (they were far more extensive with Ward). Nor were the ages of the victims similar – Ward was post-pubescent and N.B. was pre-pubescent. Age eleven to fifteen is not similar to age seven. And the fact Sollesvik had some connection to the girls' households is hardly surprising and insufficient to admit Ward's testimony under the statute.

In the end, most of the criteria under RCW 10.58.090 militated

against admission of the evidence and, importantly, any probative value was far outweighed by the unfair prejudicial impact of this evidence. Sollesvik's prior crimes should not have been admitted under RCW 10.58.090.

b. 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. Additionally, the statute dramatically changes the landscape of evidence law to favor the State.

- i. *RCW 10.58.090 Violates the Ex Post Facto Clause Because It Is Substantive, Retrospective, and Disadvantages Sollesvik.*

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 constitutional ex post facto analysis. In re Pers. Restraint of Smith, 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); Beazell 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. Sollesvik's alleged offense occurred between 2004 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 Sollesvik. RCW 10.58.090 allows evidence that would not have been admissible under ER 404(b) to be admitted for any purpose whatsoever. Indeed, the State asked the jurors to use the evidence in this case as bald propensity evidence. RP 1010.

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 her claim was the only substantive evidence of guilt. 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.

- ii. *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). *Carmell* involved the repeal of a Texas evidentiary rule requiring corroboration of victims' 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 rather than "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 reducing 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 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 Sollesvik's guilt based solely on evidence relevant to the incident charged in this case. Now, the State's case can be bolstered and the State's witnesses' credibility enhanced by the previously forbidden inference that he has a propensity to commit sex crimes.

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 the 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.

- c. Even If Application Of RCW 10.58.090 To Sollesvik’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 that 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. However, the Court had previously distinguished evidentiary laws 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.

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, 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 (turning to interpretations of the Indiana Constitution to interpret similar, although not identical, provisions of Washington Constitution), review denied, 95 Wn.2d 1019 (1981).

Applying an analysis similar to that set forth in State v. Gunwall,⁶ the Oregon Supreme Court determined the ex post facto protections of the Oregon Constitution are broader than the protections the United States 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 that apply equally

⁶ 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 provision's 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.

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." *Eugate*, 332 Or. at 213.

That interpretation of the Indiana Constitution also was available to

the framers of the 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 Eugate.

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), cert. denied, 541 U.S. 909 (2004); 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 the 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.

d. 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 Sollesvik's conviction 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.

i. *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).

ii. *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), cert. denied, 549 U.S. 1254 (2007); 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 “[w]hen a court rule and a statute conflict, the court will attempt to harmonize them, giving effect to both.” Id. However, “[w]henever 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.

iii. *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, Sollesvik was prejudiced by application of this unconstitutional law in his case. 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.”). Sollesvik therefore requests this Court reverse his conviction.

e. 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 ‘inviolat[e]’ 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. 4, 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.), cert. denied, 510 U.S. 1020 (1993). By transgressing this fundamental aspect of a constitutionally guaranteed fair trial, RCW 10.58.090 violates Sollesvik’s state constitutional fair trial protections.

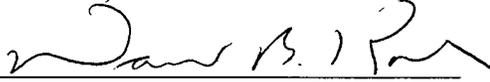
D. CONCLUSION

Under the law as given to the jury in this case, there is insufficient evidence to support Sollesvik’s conviction for child rape. His conviction must be reversed and the case dismissed. Even if there were sufficient evidence to sustain a conviction, Sollesvik is entitled to a new trial based on the trial court’s exclusion of evidence explaining N.B.’s sexual knowledge and the court’s admission of evidence that Sollesvik raped Jeanne Ward.

DATED this 10th day of August, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 64234-1-I
)	
SCOTT SOLLESVIK,)	
)	
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 10TH DAY OF AUGUST, 2010, 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] SCOTT SOLLESVIK
DOC NO. 958639
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF AUGUST, 2010.

x *Patrick Mayovsky*

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