

NO. 65455-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BRYAN ROSS,

Appellant.

COURT OF APPEALS  
DIVISION ONE  
2011 JAN 31 PM 4:52  
*[Signature]*

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

Bryan Ross, a fifty-year old man without any criminal history, was accused of have forcible sexual intercourse with a 53-year old woman during a date. Ross told police he thought the encounter was consensual but when the complainant had an unexplained seizure during the incident, he immediately called her family for help and assisted her as best he could.

Claiming that its case rested on the questionable credibility of one woman, the prosecution sought to offer testimony that one time in 1996, and once in 2001, Ross had engaged in unwanted sexual intercourse with two women, neither of whom had wanted to press charges against Ross. Relying on a loose interpretation of RCW 10.58.090 and ER 404(b), the trial court admitted these earlier uncharged allegations because they would be help “bolster” the prosecution’s case.

The court misunderstood the rules governing the admissibility of such evidence and misapplied them to the allegations at issue, thus denying Ross a fair trial for the charged offense. Ross was further denied a fair sentencing by the court’s reliance on more uncharged allegations to impose the maximum sentence.

B. ASSIGNMENTS OF ERROR.

1. The court denied Ross a fair trial and his right to be tried on the charged offense by admitting unduly prejudicial allegations of uncharged wrongful acts, contrary to Article I, sections 3, and 22; and the Fifth and Fourteenth Amendments to the United States Constitution.

2. The court misapplied the statutory criteria of RCW 10.58.090.

3. The court misapplied the criteria of common scheme or plan under ER 404(b).

4. The prosecution denied Ross a fair trial by misrepresenting the similarity of prior allegations, and misusing the evidence contrary to the court's limiting instruction.

5. RCW 10.58.090 violates the separation of powers under the state and federal constitutions.

6. The court considered and relied on uncharged and unproven allegations at sentencing.

7. The trial court erred by prohibiting Ross from accessing the internet without preapproval from the community custody officer.

8. The trial court erred by ordering Ross not to possess or consume any alcohol as a condition of community custody.

9. The trial court erred by ordering Ross not to enter any establishment where alcohol is the primary commodity for sale as a condition of community custody.

10. The trial court erred by ordering Ross to not possess drug paraphernalia as a condition of community custody.

11. The trial court erred by ordering Ross not to possess or look at pornographic material as a condition of community custody.

12. The court's restriction on Ross contacting women "in any setting" where he may "exchange personal information" is void for vagueness and subject to arbitrary enforcement, thus denying Ross his right to notice of his conditions of community custody.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The recently enacted statute RCW 10.58.090 permits a court to admit uncharged allegations of unrelated sexual offenses based upon certain statutory criteria. Washington has long enforced the principle that a person may be tried only for the charged crime. Did the court's admission of uncharged allegations that were remote in time but were used to allege Ross was a repeat

sexual predator deny him a fair trial and violate his right to be tried only for the offense charged?

2. The court admitted allegations against Ross without meaningfully weighing the factors mandated by RCW 10.58.090 and by ignoring the factors that weighed against admissibility. Did the court misunderstand or disregard the mandatory statutory criteria of RCW 10.58.090?

3. The common scheme or plan exception to ER 404(b) requires substantially similar acts that form a distinct overarching plan. Ross was accused of two offenses in which most similarities occurred largely by happenstance and were not uncommon. Did the two different accusations constitute a single plan of substantial similarity as required by ER 404(b)?

4. Under the constitutionally required separation of powers, the legislature may not impermissibly intrude into the realm of the judiciary. By enacting RCW 10.58.090, the legislature created new procedural rules that conflict with existing rules created by the judiciary. Does RCW 10.58.090 violate the separation of powers?

5. By statute, a court may base its sentencing determination only upon facts proved at trial or acknowledged by the accused. At Ross's sentencing hearing, the court relied on an array of

allegations about uncharged wrongful acts over Ross's repeated objections. Did the court impermissibly rely on uncharged allegations to impose its sentence? Should the uncharged allegations be stricken from the record?

6. Under the Sentencing Reform Act (SRA), the trial court may impose prohibitions on an offender as discretionary conditions of community custody only if the prohibitions are crime-related. In the absence of any evidence that Ross's use of the internet, alcohol consumption, or drug use contributed to Ross's offense, was the court authorized to impose non-crime-related conditions of community custody prohibiting him from accessing the internet without preapproval; possessing or using alcohol; entering any business where alcohol is the primary commodity for sale; or possessing drug paraphernalia?

7. The word "pornography" does not provide adequate notice of what conduct is prohibited or an ascertainable standard to prevent arbitrary enforcement. Possession of pornography is protected by the First Amendment and article I, section 5. Is the condition of community custody prohibiting Ross from possessing pornography unconstitutionally vague?

8. Is the court's prohibition on Ross exchanging personal information with any woman in any setting unconstitutionally vague and subject to unduly arbitrary enforcement?

D. STATEMENT OF THE CASE.

When Bryan Ross met Kathleen Shaffer in a Fred Meyer parking lot, he complimented her on her beauty, asked for her telephone number, and pressed her to go on a date. 2RP 266-69. Ross was 50 years old and had no criminal history. CP 3, 5. Shaffer was 53 years old and widowed. 2RP 265, 268. When Shaffer got home that day, Ross had left several messages insisting that she was his soul mate and expressing a desire to see her. 2RP 274, 277. Shaffer did not return any of Ross's calls and after several weeks, Ross stopped calling her. 2RP 277.

Several weeks later, Shaffer was on her way to attend an Easter dinner at her daughter's home. 2RP 277-78. She called Ross, who lived near her daughter. Id. He explained that he had plans earlier in the day but would be happy to meet Shaffer later. 2RP 279. Shaffer agreed to meet him at his home at 6 p.m. Id.

Ross lived about a five minute drive from the home of Shaffer's daughter and son-in-law, Sandi and Ryan Johnson.<sup>1</sup> 3RP 494. Sandi and Ryan accompanied Shaffer to Ross's home. They spent about one hour talking to Ross and touring his house. 3RP 537. Ross invited all three to watch a movie with him, but Sandi and Ryan needed to return home. 3RP 539. Shaffer stayed. Id.

Ross explained that he and Shaffer began kissing and started consensual sexual relations. 3RP 656, 661. Shaffer agreed that she kissed Ross voluntarily, but said that Ross then forced himself on her and she resisted. 3RP 439-40. She said Ross tried to have sexual intercourse with her but was unable to penetrate her because she kept moving. 3RP 444.

Then Shaffer began shaking, as if having a seizure. 3RP 450. Shaffer said she faked the seizure as a way to end Ross's assault. Id. Ross became very concerned and thought she was ill. 3RP 656. He brought her the medicine she asked for, and he called her daughter to come over and help. 3RP 661. Sandi and Ryan returned within minutes of being called. 3RP 460. Sandi

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<sup>1</sup> The Johnsons are referred to by their first names herein to avoid confusion between the couple as well as with an unrelated witness, Desiree Johnson Husby, who is at times referred to as Johnson in the testimony. No disrespect is intended.

found Shaffer sitting on the living room couch, looking disheveled. 3RP 509. Ross looked concerned about Shaffer and asked about her medical needs. 3RP 541, 544. Ryan helped Shaffer out of the house, which was common to him as Shaffer regularly required his assistance due to medical issues. 3RP 555.

Shaffer said Ross had tried to rape her. 3RP 558. Sandi and Ryan advised calling the police and drove Shaffer to a nearby police station. 3RP 545. The police took Shaffer to a hospital, where a trained forensic nurse examined her and collected biological samples, and Shaffer spoke at length with a detective. 3RP 651, 4RP 713.

The police returned to Ross's home with a search warrant. 3RP 566. They did not find the bra that Shaffer said she left there. 3RP 568. Ross was cooperative and calm. 3RP 570. The State's forensic scientist Mariah Low did not locate male DNA or sperm in swabs taken from Shaffer, but found the possible presence of unidentified sperm proteins in her vaginal area. 3RP 633, 641-42.

At Ross's trial for one count of rape in the second degree, the prosecution insisted it would help its case if it introduced two allegations it had uncovered from years earlier. 3/4/09RP 28; CP 200-17. In 1996 and in 2001, two women had accused Ross of

nonconsensual sex. 3/4/09RP 44. Neither woman had pressed charges against Ross nor did the police investigate the allegations, although they retained records of the initial reports. Id. Ross objected to the introduction of this information both before and during his trial, but the court allowed its admission. Id. at 43, 50-66. During the trial, the complainant in the 1996 incident was unable to identify Ross as the perpetrator and the court told the jury to disregard her testimony. 4RP 778-98.

Ross was convicted after a jury trial. CP 163. At Ross's sentencing, the court permitted people to testify who claimed to have been emotionally abused or physically assaulted by Ross in the past, despite Ross's objection that Ross should not be sentenced based on unproven allegations. 4/29/10RP 16, 25-48. The court imposed the maximum standard range sentence, labeling Ross a "vicious predator" even though he had only been charged with and convicted of a single felony offense. Id. at 59.

The pertinent facts are addressed in further detail in the relevant argument sections below.

E. ARGUMENT.

1. ROSS WAS DENIED A FAIR TRIAL BY THE IMPROPER AND EXTREMELY PREJUDICIAL ALLEGATIONS OF A REMOTE CLAIM OF SEXUAL MISCONDUCT USED TO PROVE HIS PROPENSITY

Before trial, the prosecutor convinced the trial court to admit allegations that Ross sexually assaulted two women in separate incidents many years earlier, neither of which was ever prosecuted. In order to gain the admission of this evidence, the prosecutor misrepresented the expected testimony of the complainants in the earlier incidents. The trial testimony did not proceed as predicted by the prosecution. Instead, one complaining witness did not identify Ross as the perpetrator, and the other described a relationship with Ross that did not bear all the markedly similar traits asserted by the prosecution. The court misapplied the law in allowing the State to admit these uncharged accusations and their admission denied Ross a fair trial.

a. The right to a fair trial includes the right to be tried for the charged offense, without irrelevant accusations of other wrongful conduct years ago. An accused person's right to a fair trial is a fundamental part of due process of law. United States v. Salerno, 481 U.S. 739, 750, 107 S.Ct. 2095, 95 L.Ed.2d 697

(1987); U.S. Const. amend. 14; Wash. Const. art. I, §§ 3, 22.

Erroneous evidentiary rulings violate due process by depriving the defendant of a fundamentally fair trial. Estelle v. McGuire, 502 U.S. 62, 75, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); Dowling v. United States, 493 U.S. 342, 352, 107 L. Ed. 2d 708, 110 S. Ct. 668 (1990) (the introduction of improper evidence deprives a defendant of due process where “the evidence ‘is so extremely unfair that its admission violates fundamental conceptions of justice.’”).

Compliance with state evidentiary and procedural rules does not guarantee compliance with the requirements of due process. Jammal v. Van de Kamp, 926 F.2d 918, 919-20 (9<sup>th</sup> Cir. 1991); citing Perry v. Rushen, 713 F.2d 1447, 1453 (9<sup>th</sup> Cir. 1983), cert. denied, 469 U.S. 838 (1984). Due process is violated where evidence was admitted that renders the trial fundamentally unfair. Walters v. Maass, 45 F.3d 1355, 1357 (9<sup>th</sup> Cir. 1995); Colley v. Sumner, 784 F.2d 984, 990 (9<sup>th</sup> Cir. 1986).

An accused person has a fundamental right to be tried only for the offense charged. State v. Mack, 80 Wn.2d 19, 21, 490 P.2d 1303 (1971); Const. art. I, §22; U.S. Const. amend. 5. The “fundamental concept” that a “defendant must be tried for what he did, not who he is,” is violated by introducing evidence designed to

show a propensity for committing sex offenses. State v. Cox, 781 N.W.2d 757, 769 (Iowa 2010).

In Cox, the Iowa Supreme Court held that Iowa statute permitting accusations of uncharged sex offenses, similar to RCW 10.58.090,<sup>2</sup> violated state constitutional due process clause and fundamental notions of fairness, even though trial court weighed probative value of evidence against potential for prejudice. 781 N.W.2d at 769. Missouri's Supreme Court similarly held that the corollary Missouri statute unconstitutionally denied defendants the right to be tried only for offense charged even though the statute allowed the trial court to balance probative value of evidence against potential for prejudice. State v. Ellison, 239 S.W.3d 603, 605-06 (Mo. 2007) (copy of statute attached as App. C).

Although the Court of Appeals upheld the constitutionality of RCW 10.58.090, the Supreme Court is presently reviewing these challenges.<sup>3</sup> Moreover, even if RCW 10.58.090 was constitutionally applied in those cases, in Ross's trial, the court

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<sup>2</sup> A copy of RCW 10.58.090 is attached as Appendix A, Iowa Code § 701.11(1) is attached as Appendix B.

<sup>3</sup> State v. Scherner, 153 Wn.App. 621, 225 P.3d 248 (2009), rev. granted, 168 Wn.2d 1036 (2010); State v. Gresham, 153 Wn.App. 659, 223 P.3d 1194 (2009), rev. granted, 168 Wn.2d 1036 (2010).

misunderstood and misapplied the critical components of RCW 10.58.090 and thereby denied Ross a fair trial.

b. The court misunderstood and misapplied ER 404 (b) and RCW 10.58.090. RCW 10.58.090 permits the court to admit, 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 . . . notwithstanding Evidence Rule 404(b).” RCW 10.58.090(1).

Over objection, the court admitted accusations by two women who claimed to have had nonconsensual sexual intercourse with Ross, as adults, many years earlier. One prior allegation was from 1996 and the other occurred in 2001. None of the incidents were related to each other or involved people who knew each other. None of the earlier allegations were prosecuted.

The trial court admitted the accusations under ER 404(b), as a common scheme or plan, and pursuant to RCW 10.58.090.

At trial, Kimberly Speck Armstrong, the accuser from 1996, testified about meeting a man, exchanging contact information, and later getting together with him for an outing. 4RP 779-85. However, Armstrong did not recognize Ross in the courtroom, and she had never previously identified him as the person who

assaulted her. 4RP 780, 784-85. Unable to secure an identification of Ross as the perpetrator against Armstrong, the prosecution conceded that it could not elicit further allegations from her. 4RP 794. The court told the jury to disregard her testimony. 4RP 798. Left without Armstrong's unproven accusations against Ross when it could not show he was involved in the 1996 incident, the State relied on another person's 2001 accusation even though it was not markedly similar to the accusation at issue and was not necessary for the prosecution.

This Court reviews *de novo* whether a trial court correctly interpreted an evidentiary rule in deciding to admit evidence. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

i. The court misunderstood and ignored the criteria of RCW 10.58.090. In order to admit accusations of other offenses under RCW 10.58.090, the statute lists mandatory criteria the court must consider. The statute mandates that:

the trial judge shall consider the following factors:

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

- (g) Whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; and
- (h) Other facts and circumstances.

RCW 10.58.090. The trial judge identified each mandatory factor but determined that many factors did not apply. But the court simply disregarded the inapplicable factors, rather than considering them to weigh against admissibility. The court thereby circumvented the plain terms of the statute. The mandatory factors that did not provide a basis for admissibility were as follows:

The acts were not close in time; they were remote in time.

3/4/09RP 54.

The acts were not frequent: the two unrelated allegations were separated by many years and the State later conceded the first could not be proved. 3/4/09RP 54; 4RP 794.

The factor of “intervening circumstances” did not bear on the probative value one way or the other, because the acts were separate, isolated occurrences separated by many years.

3/4/09RP 54.

No prior allegation resulted in criminal conviction, or even prosecution. 3/4/09RP 59-60.

The court conceded that no other facts or circumstances had been presented or had any bearing on admissibility. 3/4/09RP 61-62.

Accordingly, five criteria did not favor the admissibility of the prior allegations. Yet the court relied on the remaining three criteria to admit the uncharged allegations as if they were the only criteria that mattered, and it misconstrued these three criteria. The three remaining criteria are: (a) similarity of the prior acts to the acts charged; (e) necessity of the evidence beyond the testimonies already offered at trial; and (g) the mandatory ER 403 balancing test.

The purported “similarity” on which the court relied was disingenuous because the trial testimony did not bear out the similarities posited by the prosecution which evaporated upon closer examination and were not testified to at trial. The events were only “similar” if viewed broadly.<sup>4</sup> In both, Ross introduced himself to women in grocery store parking lots, and after significant time passed and for wholly unrelated reasons, the two women

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<sup>4</sup> RCW 10.58.090 does not provide concrete guidance on the degree of similarity required for admissibility. Because the court relied on the same finding of similarity for its ER 404(b) common scheme analysis, this factor is further addressed in the following section regarding ER 404(b). 3/4/09RP 57-58, 65.

came to his house, whereupon, after different types of interactions inside his home, Ross insisted upon unwanted sexual intercourse. 3/4/09RP 53. These broad-brush similarities cannot alone qualify these two unrelated accusations as so alike as to be markedly similar as to be fairly admissible.

In evaluating the “necessity” of the evidence, the court conceded that the necessity was simply to bolster the complainant’s credibility. 3/4/09RP 56. The prosecution agreed the evidence was not “absolutely necessary,” but said “necessity” should be viewed as “helpful,” and there is “no question it will help.” 3/4/09RP 41-42.

The prosecution disingenuously represented the necessity of the evidence, claiming that its case rested on the credibility of the complainant. 3/4/09RP 41-42. But Shaffer’s allegations had several witnesses and forensic evidence as available sources of corroboration.<sup>5</sup> Shaffer’s adult daughter and son-in-law went to Ross’s house with her, and these three adults spent over one hour with Ross, talking and touring Ross’s home. Shaffer’s daughter

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<sup>5</sup> As discussed in subsection (c) below, the available corroborative evidence did not wholly favor Shaffer’s description of events, but the fact that other evidence does not support the State’s case does not mean the prosecution should revert to uncharged claims to taint the accuser.

and son-in-law went to Ross's home with the express purpose of ascertaining whether they thought Shaffer would be safe with Ross, and they were sensitive to noting Ross's demeanor close to the time of the incident. 3RP 532, 539.

Sandi and Ryan returned to Ross's home within minutes of the sexual assault ending. 3RP 460. Believing Shaffer to be having a medical emergency, Ross had called Shaffer's adult daughter and son-in-law to help. 3RP 458. They escorted Shaffer out of Ross's home, witnessing the demeanor of both parties and the condition of the home. 3RP 541. Shaffer immediately reported the assault to her daughter and son-in-law; she called the police; and she went to the hospital for a forensic examination where she was interviewed by a police detective and examined by a nurse trained in investigating sexual assaults. 3RP 456-57. Thus, the prosecution had many sources for locating corroborative evidence. The allegation of a 2001 rape was thus "necessary" only to the extent to painted Ross as a dangerous predator and encouraged the jury to disregard contrary evidence that might have called Shaffer's account of the incident into question.

The court deemed that the "necessity" for the evidence arose from the need to "bolster" the prosecution's case. 3/4/09RP

56. Although the statute does not define “necessity,” the term should be given its ordinary meaning. State v. Agueta, 107 Wn.2d 532, 536, 27 P.2d 242 (2001) (“rules of statutory construction require that we give undefined words their common and ordinary meaning,” which may be taken from the dictionary).

“Necessity” means:

1: the quality or state or fact of being necessary as: a: a condition arising out of circumstances that compels to a certain course of action . . . b: INEVITABLENESS, UNAVOIDABILITY . . . c: great or absolute need: INDISPENSABILITY . . . 3: something that is necessary: REQUIREMENT, REQUISITE

Webster’s Third New International Dictionary, p. 1511 (1993). The legislature’s use of this specific requirement of necessity should not be interpreted as superfluous, or indicative of a lesser standard such as “helpful.” “If the plain language of the statute is unambiguous, then this court's inquiry is at an end. The statute is to be enforced in accordance with its plain meaning.” State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007) (citations omitted). If helpful was what the legislature intended when it said “necessary,” it would have said so.

To “bolster” is not the equivalent of “necessity.” Its dictionary definition is “to support with” and to “give additional strength to.”

Webster's, p. 249. The court's determination that bolstering the prosecution's case with uncharged allegations does not comply with the specific, express statutory requirement of "necessity." RCW 10.58.090(e).

Finally, the court concluded the uncharged allegations would not unduly confuse and prejudice the jury. 3/4/09RP 60. Because the court reached this determination without accurately understanding the prior accusations, its conclusion cannot be credited.

ii. Husby's claims do not meet the legal criteria of common scheme or plan under ER 404(b). The common scheme or plan exception may be used to prove whether a crime occurred, because the acts that might not otherwise demonstrate that a crime had occurred. DeVincentis, 150 Wn.2d at 21.

The prior acts must have "a substantial similarity" and be marked by a concurrence of features that are naturally explained as caused by a general, single plan. Id. at 19-20. As the DeVincentis Court said, "caution is required in applying the common scheme or plan exception." Id. This caution applies to equating random or usual similarities as those that show a common scheme. Id.

In DeVincentis, the court found a common scheme or plan existed when the defendant spent extensive time with young victims, getting them used to him wearing skimpy underwear, giving him massages, and then convincing the victims to take off their clothes and engage in sexual acts with him. 150 Wn.2d at 15-16. The court found DeVincentis used singular mechanisms to gain the trust of the girls and then assault them in a way that they would be hesitant to report, thus showing a common scheme to lure his victims into submitting to his sexual requests. The trial court relied heavily on DeVincentis in determining that Ross had engaged in a single markedly similar plan. 3/4/09RP 57-59, 65-67.

According to the trial court, the offenses were part of a single plan because in each one, the woman met Ross in a parking lot, the victim had a slight build and was same age as Ross, Ross forced himself on the woman by overpowering and ignoring her struggle, and he mentioned a future with each. 3/4/09RP 53.

These cursory similarities did not demonstrate a single plan. When testifying, Desiree Johnson Husby explained that she met Ross while leaving a grocery store and he held open a door for her. 4RP 738-39. He gave her his telephone number, she refused to give him her number. 4RP 740. Then Husby called Ross a number

of times, confiding in him about her personal life. 4RP 741-42. They met at a restaurant and talked more about each other's lives. 4RP 742. She told him that she was in a troubled marriage and he encouraged her to leave her abusive husband, and later offered her to a place to live in his home while she tried to separate from her husband. 4RP 742, 44. She did not testify to her age. She did not recall Ross promising a future together. 4RP 761. Husby tried to convey to Ross that she did not want to have sex by her words but she did not resist. 4RP 755. He was not "aggressive" but was "persistent." 4RP 758.<sup>6</sup>

On the other hand, when Ross approached Shaffer in a parking lot, he was not simply friendly. He lauded her with praises for her beauty, spoke of his Christianity, and begged to get together. 2RP 266, 268. She agreed and they exchanged telephone numbers. 2RP 270. He telephoned her repeatedly, leaving messages that she was the love of his life and his soul mate, but she never responded. 2RP 277. Almost two months later, when Ross had stopped calling, Shaffer called Ross and said

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<sup>6</sup> Being the same age as Ross; Ross promising a future together as part of the sexual assault; and Ross using physical force when each complainant struggled were similarities emphasized by the prosecutor and court in finding the allegations admissible. 3/4/09RP 34-35, 53.

she was coming to his neighborhood for dinner with her family on Easter. 2RP 278. He offered to have her come to his home, which was close to her daughter's home. 2RP 279. When Shaffer arrived, Ross looked like he was asleep, and he admitted he did not expect Shaffer to come. 2RP 286. Then after spending some time talking and a brief kiss, he took her to his bedroom, removed her clothes, and forced himself upon her, despite her physical resistance. 2RP 303-12, 315, 319.

The events and patterns of behavior are not substantially similar and do not show a single plan, beyond a very generic and commonplace effort to meet and date women who Ross encounters in innocuous circumstances. Husby reached out to Ross to develop a platonic relationship and they became friendly through a series of meetings and conversations. Husby went to Ross's home for non-romantic reasons. On the other hand, Ross made plain his romantic intent toward Shaffer throughout their interactions.

In both cases, it was happenstance that women went to Ross's home. Ross was asleep when Shaffer came because he did not think she was coming. 2RP 285-86. The idea of going to Ross's home cannot be attributed to a clear plan on Ross's part.

Ross could not have predicted when meeting Husby that she would need a room in which to live or that Shaffer would visit her daughter on Camano Island and offer to meet him at his home.

Under the court's theory of common scheme or plan, any effort to meet a person that ultimately results in an unwanted sexual encounter in someone's home would fit the "common scheme" definition. Yet similar results are insufficient to prove a common scheme or plan. DeVincentis, 150 Wn.2d at 20. In DeVincentis, the Court expressed held, "we emphasize that the degree of similarity for the admission of evidence of a common scheme or plan must be substantial." 150 Wn.2d at 20. The court did not exercise such caution here, and instead found two incidents that contained only the most common of commonalties to equal a single overarching plan.

c. The prosecutor circumvented fair application of ER 404(b) and RCW 10.58.090 by misrepresenting the critical facts on which the uncharged allegations could be admitted and using the uncharged incident to claim Ross was a repeat predator. The court relied on the prosecutor's assessment of the facts in ruling on the admissibility of the various prior allegations. Defense counsel explained that it was hard to gather sufficient information about the

prior incidents to fairly evaluate what actually occurred, especially because the incidents were not investigated at the time they occurred. 3/4/09RP 43-45. She tried to point out dissimilarities, and renewed her objection based inaccuracies in the prosecution's offer of proof. Id. at 45-48; 4RP 698.

The prosecutor relied on short police reports, for offenses that were never investigated by the police or vetted in detail. CP 203, 209. Ultimately, the prosecutor misrepresented the similarities and the admission of the prior offense prejudiced Ross's right to a fair trial. By securing admission of evidence portraying Ross as a repeat sexual predator through misrepresenting the similarities of the prior incident and the necessity of that evidence at trial, the prosecution contributed to the deprivation of Ross's right to a fair trial.

Furthermore, even if the evidence was admissible, the prosecution encouraged the jury to use it for the improper purpose of deeming Ross to be a predator. A prosecutor may undermine the effect of the limiting instruction by urging the jury to use evidence for an improper purpose. CP 30 (limiting instruction); Richardson v. Marsh, 481 U.S. 200, 211, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987). Here, the prosecution "sought to undo the

effect of the limiting instruction by urging the jury” to consider Husby’s and Shaffer’s allegations as representing proof that Ross was a dangerous person, and implying that there were more instances of Ross engaging in such conduct, which undermined the effect of the limiting instruction. Id.

Traditionally in Washington, the State may not introduce evidence of a defendant's prior bad acts, because “such evidence has a great capacity to arouse prejudice.” State v. Kelly, 102 Wn.2d 188, 199, 685 P.2d 564 (1984); State v. Jones, 101 Wn.2d 113, 120, 677 P.2d 131 (1984), overruled on other grounds by State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989) (“Statistical studies have shown that even with limiting instructions, a jury is more likely to convict a defendant with a criminal record”). This Court has recognized the potential for unfair prejudice is particularly high in sex abuse cases: “Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, that he could not help be otherwise.” State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982) (citation omitted). This longstanding principle should not be disregarded

simply because RCW 10.58.090 allows the admission of uncharged offenses in certain instances.

In her closing argument, the prosecutor emphasized Ross's repeat offender statute as a theme. Even though Armstrong's testimony had been stricken, the prosecutor spoke as if Ross engaged in such bad acts repeatedly. 5RP 838, 848. Even though Armstrong's testimony was stricken, the prosecution's insinuation of Ross's pattern of behavior drew upon these allegations as well, and the likelihood that the jury would speculate that Armstrong would allege similar bad acts against Ross. 5RP 838.

The prosecutor explicitly drew upon Husby's testimony throughout, drawing parallels between the incidents. 5RP 838, 844-49. She insisted that "no doesn't mean no to Ross," and this remark only makes sense if it is taken to show Ross repeatedly refuses to listen to someone saying no. 5RP 848. The prosecutor described Ross as a predator, who picks skinny women unable to resist his larger body, and "that's the way he does it," again implying it is something he does regularly, and conjuring up Armstrong's unfinished testimony. 5RP 848-49. The prosecutor encouraged the jury to judge Shaffer based on "what Johnson

[Husby] said,” as if Husby’s story proved the truth of Shaffer’s claims.” RP 849, 1058.

The prosecution conceded before trial that Shaffer’s testimony alone may not have been enough to convict Ross, arguing Husby’s allegations were “practically necessary.” 3/4/09RP 42. Yet the necessity was not due to the lack of corroboration, but rather because the existing corroborative evidence did not support Shaffer’s story.

The two adult eyewitnesses to Shaffer and Ross’s meeting, Shaffer’s daughter Sandi and her husband Ryan, did not agree with many of the details to which Shaffer testified. While Shaffer testified Ross appeared hostile and angry as they met and talked, Sandi and Ryan thought he was attentive, and interesting. 3RP 503, 523, 535-37, 553. Sandi and Ryan thought Shaffer wanted to stay with Ross and watch a movie, while Shaffer insisted that she had not wanted to stay. 3RP 506, 523, 539. Neither Ryan nor Sandi heard Shaffer complain about Ross when they picked her up inside Ross’s home. 3RP 555. Neither heard Shaffer insist they go to the bedroom, as Shaffer claimed. 3RP 509, 555. Both Sandi and Ryan thought Ross appeared legitimately concerned about Shaffer’s health, rather than an angry, violent abuser as Shaffer

alleged. 3RP 541, 544. After the incident, Ross stayed in his home, went to sleep, and seemed calm when they arrived in the middle of the night to serve a search warrant and interview him. 3RP 570. He did not display a consciousness of guilt.

The forensic evidence was also less than fully supportive of Shaffer's rendition of events. There was no male DNA or sperm found in the many swabs taken of Shaffer's vaginal area. 3RP 633, 643. There was no blood found in the swabs despite Shaffer's claim she was bleeding. 3RP 642. The only potential evidence was the presence of unidentified sperm protein, P 30, in the vaginal area, but this evidence was consistent with Ross's explanation that they began engaging in consensual intimate acts when Shaffer had a seizure and he stopped. 3RP 633.

As the prosecution conceded in her closing argument, Shaffer was "an eggshell," who had a lot of medical problems, and was in a questionable mental state. 5RP 872. She took many prescription medications at the time of the incident, including a variety of pain relievers and anxiety medication. 5RP 823. At the hospital, she told the nurse she had lost consciousness during the incident, and at trial, she described the incident as an out of body

experience, where she considered herself to be in a hospital being tended to by an orderly. 3RP 441-42; 4RP 727.

RCW 10.58.090 and ER 404(b) do not justify the reliance on an uncharged offense as substantive evidence that he accused person is a predator who will never stop or take no for an answer. The fact that available sources for corroborative evidence do not fully support the allegations, causing jurors to discount the accusation, should not justify the State's reliance on uncharged acts that were not previously prosecuted and occurred many years ago. It denies an accused person the right to be presumed innocent and to be tried on only the charged against him, and introduces an irreparable taint upon the character of the accused.

d. RCW 10.58.090 violates the separation of powers. The Washington Supreme Court is presently considering the constitutionality of RCW 10.58.090. This Court found these statutes constitutional in Scherner and Gresham, both of which are being review by the Supreme Court. In order to preserve these issues, Ross joins in the constitutional challenges to the statute raised by the petitioners in those cases.

"If 'the activity of one branch threatens the independence or integrity or invades the prerogatives of another,' it violates the

separation of powers.” Waples v. Yi, 169 Wn.2d 152, 158, 234 P.3d 187 (2010) (quoting City of Fircrest v. Jensen, 158 Wn.2d 384, 394, 143 P.3d 776 (2006) and State v. Moreno, 147 Wn.2d 500, 505-06, 58 P.3d 265 (2002)). This Court has inherent power to govern court procedures, stemming from article IV of the state constitution. Jensen, 158 Wn.2d at 394; State v. Fields, 85 Wn.2d 126, 129, 530 P.2d 284 (1975); Const. art. IV, § 1. The Court's authority over matters of procedure contrasts with the Legislature's authority over matters of substance. Fields, 85 Wn.2d at 129; State v. Smith, 84 Wn.2d 498, 501, 527 P.2d 674 (1974). Rules of evidence are rules of procedure that fall under the Court's inherent authority.<sup>7</sup>

The Court's authority to govern the admissibility of evidence in Washington trials is embodied in the Rules of Evidence. ER 101 makes clear that in the event of an irreconcilable conflict between a rule and a statute, the rule will govern. ER 101 (“These rules govern proceedings in the courts of the state of Washington”). Where the Rules of Evidence do not contemplate a particular statutory exception, an evidence statute that conflicts with the

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<sup>7</sup> The Court also has authority delegated by the Legislature to enact rules of evidence. RCW 2.04.190 (supreme court has power to prescribe procedures

Rules violates the separation of powers doctrine. See e.g., State v. Saldano, 36 Wn. App. 344, 675 P.2d 1231, rev. denied, 102 Wn.2d 1018 (1984) (holding ER 609 supersedes conflicting statute allowing broader admission of an accused's prior convictions).

RCW 10.58.090 violates the separation of powers because it conflicts with ER 404(b), which *precludes* a court from admitting evidence of a person's character "in order to show action in conformity therewith." Its purpose is to limit a court's discretion in admitting such prejudicial evidence without a legitimate purpose.

RCW 10.58.090 allows the State to rely upon inflammatory evidence of a defendant's past sexual misconduct, which would otherwise be inadmissible, in order to convict him of a current sexual offense. The statute permits courts to consider the "necessity" for the evidence in light of the other evidence of guilt, presumably making the evidence admissible in the weakest cases. RCW 10.58.090(6)(e). The statute effectively alters the standard of proof required for conviction and it should be construed as violating the separation of powers.

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for "taking and obtaining evidence").

For the above stated reasons, including the trial court's misapplication of the mandatory statutory criteria of RCW 10.58.090, its misunderstanding of the parameters of ER 404(b), its erroneous determination that the factual allegations should be admitted under either rule of evidence, the prosecution's misrepresentation critical facts and efforts to undermine the effect of the limiting instruction, and the unconstitutionality of RCW 10.58.090, all of which had a distinct and direct effect on the outcome the trial, Ross should receive a new trial.

2. THE COURT VIOLATED THE REAL FACTS DOCTRINE BY SENTENCING ROSS BASED ON UNCHARGED ALLEGATIONS

a. The SRA limits the court's sentencing authority to consider allegations of other crimes at sentencing. Under the real facts doctrine, the sentencing court cannot consider facts not proven at trial or facts probative of a more serious crime. State v. Quiros, 78 Wn.App. 134, 138-39, 896 P.2d 91, rev. denied, 127 Wn.2d 1024 (1995); RCW 9.94A.530(2). The purpose of this doctrine is to protect the defendant from the trial court's "consideration of unreliable or inaccurate information." State v. Morreira, 107 Wn.App. 450, 456-57, 27 P.3d 639 (2001) (quoting State v. Handley, 115 Wn.2d 275, 282, 796 P.2d 1266 (1990)).

Under the real facts doctrine, a defendant's sentence may be based only on the current crime of which he is convicted, his criminal history, and the circumstances surrounding the crime. State v. Houf, 120 Wn.2d 327, 333, 841 P.2d 42 (1992). A defendant may not be held accountable for uncharged crimes. State v. McAlpin, 108 Wn.2d 458, 466, 740 P.2d 824 (1987).

RCW 9.94A.530(2) codifies the real facts doctrine as follows:

In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537.<sup>8</sup>

If the defendant “disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point.” RCW 9.94A.530(2). If the sentencing court holds an evidentiary hearing on a disputed fact, it must determine whether the proponent of the challenged fact proved that fact by a preponderance of the evidence. RCW 9.94A.530(2).

Ross objected to the prosecution’s request that the court hear statements from people alleging uncharged crimes at the

sentencing hearing. 4/29/10RP 6-8. The judge stated that it could not consider the sentencing recommendations of these other people but invited them to speak without restrictions. Then the court relied on the uncharged allegations to label Ross a “vicious predator” and impose the maximum sentence available under the standard range. 4/29/10RP 59. The judge sentenced Ross based on its belief Ross as a “vicious predator” even though he was charged with a single offense, occurring on one day, and it was his first felony conviction.

b. The court sentenced Ross based upon its consideration of uncharged, irrelevant acts. Ross objected to the uncharged allegations being presented at his sentencing hearing as well as in the presentence report. 4/29/10RP 6-8, 16, 32. 48-50. The court admitted it had read the presentence report but agreed that it would not consider allegations in the presentence report “related to other alleged victims of Mr. Ross.” 4/29/10RP 11. Then, rather than strike those allegations, the court welcomed statements from anyone who was attending the sentencing hearing.

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<sup>8</sup> RCW 9.94A.537 is not at issue here, because it pertains to an exceptional sentence above the standard range.

Ross specifically objected to the court hearing statements from Armstrong and Debbie Jones about Ross. 4/29/10RP 16. The court overruled the objections, saying that they had “every right” to “speak to the court and make recommendations.” 4/29/10RP 17. The court then asserted that it would disregard “the specific facts and circumstances that I noted previously,” presumably referring to its ruling that it would not consider allegations contained in the written presentence report recounting allegations of uncharged crimes. 4/29/10RP 11, 17.

At sentencing, in addition to hearing from the complaining witness and her father and brother, the court heard from Armstrong and Jones. Jones spoke at length about her relationship with Ross, which spanned 1994 through 1997 and she had not seen him since. 4/29/10RP 25-44. She described an abusive and unhealthy relationship. Id. He tried to control her finances, he cheated on her, he admitted he was a sex addict, on one occasion he raped her by engaging in unwanted intercourse, another time he killed a neighbor’s dog, and he intentionally damaged a hose in her car. 4/29/10RP 25-44. In the middle of her lengthy description of a difficult relationship with Ross, defense counsel reiterated her objection to the court hearing and considering these claims about

unrelated acts. 4/29/10RP 32. The judge overruled the objection, obliquely referred to there being “some limits” on the information it could take into account but said, “I want to hear your testimony.” 4/29/10RP 32 (emphasis added). Jones pleaded with the court to sentence Ross “to the full extent of the law.” 4/29/10RP 44.

Kimberly Armstrong had been unable to identify Ross at trial while sat in the courtroom. 4RP 780 (“I don’t think he is here” in the courtroom). Yet at the sentencing hearing, Armstrong proclaimed, “sir, I’m here to tell you that that man attacked me in 1996.” 4/29/10RP 47. She explained she did not press charges at the time because she was very preoccupied with her other obligations. Id. at 47-48. Armstrong insisted that Ross “has no conscience” and lacks any ability to know “right from wrong.” Id. at 48. Armstrong begged the court to give him the “maximum allowable sentence to enable other women to come forward and keep him behind bars where he belongs.” Id. at 48.

The prosecutor told the court that Husby was not present at sentencing but she “did what she needed to do” at trial and urged the court to “remember her here today.” 4/29/10RP 48. Before pronouncing sentence, the court announced it was “so helpful to

receive information” from everyone, including Husby, Armstrong and Jones. 4/29/10RP 52-53.

The court said that in this case, “it is not just one victim, it’s all of those of you who have experienced what Ms. Shaffer has gone through in this case; and so we need to be aware of that in determining an appropriate and just sentence for Mr. Ross.”

4/29/10RP 53. The court said that Ross had violated the “trust he owed to Shaffer and all others with whom he has come in contact.” 4/29/09RP 54.

Presumably aware that it may be violating the prohibition on considering uncharged allegations at sentencing, the court proclaimed that it was complying with RCW 9.94A.530(2). 4/29/10RP 55. But the judge then informed Ross that the real facts doctrine did not apply because there was no exceptional sentence at issue. 4/29/10RP 53-54. The court made clear that it was not considering that information that it had “specifically referred to as not being considered in my decision on the motion for a continuance.” Id. at 56. This could only have referred to the court’s ruling that it would not consider information in the presentence report concerning allegations by others. 4/29/10RP 11.

Then, the judge again told the prosecutor to thank Husby, for giving testimony “that was so helpful to the jury.” 4/29/10RP 56-57.

The court told Ross he was “a vicious predator” and it would impose the maximum possible standard range sentence, of 102 months to life in prison. 4/29/10RP 59. It also noted that “from the information which the Court has received that it can take into account” it doubted Ross would be amenable to treatment. 4/29.10RP 58.

The only possible way the court have determined Ross was a predator was by relying on unproven allegations. Ross was 50 years old and had a criminal history score of “0.” He had never been convicted of, or charged with, a felony offense. His conviction in the case at bar was for a single incident and involved a single count.

Thus, it was only by relying on unproven allegations that the court could conclude Ross was a “predator” and should therefore receive the maximum possible sentence. Even Husby’s claim at trial of that Ross had sexually assaulted her one time years before was not “proved” at trial as required by RCW 9.94A.530(2). It was admitted only for the limited purpose of bearing on the

complainant's credibility or showing a common scheme. Husby's trial testimony could not be used to mark Ross a predator, and nor could Armstrong or Jones's allegations, neither of which were offered or proved at trial.

Generally, RCW 9.94A.585 bars a party from appealing the imposition of a standard range sentence. However, this limitation does not prevent a defendant from appealing a sentence where he contends the court applied the incorrect legal standard or abused its discretion. State v. Kinneman, 155 Wn.2d 272, 283, 119 P.3d 350 (2005) (appellate review exists for correction of legal errors and abuses of discretion in determining which sentence applies).

Here, the court refused to abide by the plain terms of RCW 9.94A.530(2), which explicitly allows that court to consider information at sentencing only if it was proven at trial or otherwise acknowledged. Ross objected to this information and the only allegation proved at trial was the single offense of conviction.

Although "victims" are offered the opportunity to speak at sentencing, RCW 9.94A.500(1), the SRA specifically defines victim as a person injured as a direct result of the crime charged. RCW 9.94A.030(52). Notwithstanding the court's discretion to permit people to speak at sentencing, it lacks discretion to consider and

weigh uncharged allegations in determining the appropriate sentence. Here, the court heard emotional “testimony,” as the court called it, from several people who felt themselves to have been wronged by Ross and it specifically thanked Husby for helping the jury when her testimony was not admitted as substantive proof. The SRA requires that a sentence be imposed base on proven facts, not uncharged allegations. The court imposed a high sentence upon Ross based on uncharged accusations and thus, the court’s sentence did not comport with the strict requirements of the SRA.

The remedy for the court’s reliance on so many uncharged allegations in violation of the terms of RCW 9.94A.530(2) is to afford Ross a new sentencing hearing before a different judge. See State v. Aguilar-Rivera, 83 Wn.App, 199, 203, 920 P.2d 623 (1996) (when trial court inadvertently omits allocution until after intended sentence announced “the remedy is to send the defendant before a different judge for a new sentencing hearing.”). Ross should receive a new sentencing hearing and the improperly offered allegations regarding uncharged offenses should be stricken.

3. THE CONDITIONS OF COMMUNITY CUSTODY RESTRICTING INTERNET USE, ALCOHOL PROXIMITY AND DRUG PARAPHERNALIA ARE NOT CRIME-RELATED OR REASONABLY RELATED TO HIS REHABILITATION

There was no evidence presented at trial or sentencing that demonstrated that internet access or alcohol and drug use contributed to Ross's involvement in his offenses or required treatment. The trial court nonetheless entered special conditions of community custody forbidding Ross from accessing the internet absent DOC approval, or from possessing or consuming alcohol, entering establishments where alcohol was the primary commodity for sale, and possessing drug paraphernalia. These conditions are not authorized by the sentencing statutes because they are not crime-related.

a. The SRA authorizes the sentencing court to require an offender to comply with sentencing conditions that are crime-related. When a person is convicted of a felony, the sentencing court must impose punishment as authorized by the Sentencing Reform Act (SRA). Former RCW 9.94A.505 (effective until August 1, 2009); In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007) (court has sentencing

authority only as provided by Legislature). The sentencing court must look to the statutes in effect at the time the defendant committed the crime. RCW 9.94A.345; State v. Varga, 151 Wn.2d 179, 191, 86 P.3d 139 (2004). Ross was convicted of one offense, occurring on April 12, 2009. CP 223.

In this case, former RCW 9.94A.505 directed the sentencing court to impose a standard range sentence and community custody. Former RCW 9.94A.505(2)(a)(i), (ii) (effective until August 1, 2009) (2008); Former RCW 9.94A.505(2)(a)(i), (iii) (2008). Because Ross was convicted of an offense classified as sex offenses, he was subject to a term of community custody under the conditions authorized in RCW 9.94A.700(4), (5). Former RCW 9.94A.030(42) (effective until July 1, 2007), (2008); Former RCW 9.94A.710 (effective until August 1, 2009); Former RCW 9.94A.715 (2007).

Former RCW 9.94A.700(4) sets forth the mandatory standard conditions of community custody, such as reporting to the Department of Corrections (DOC). In addition, the court may order special discretionary conditions set forth at RCW 9.94A.700(5), such as having no contact with the crime victim or a class of individuals, participating in crime-related treatment or counseling,

not consuming alcohol, or other “crime-related prohibitions.”<sup>9</sup> Bahl, 164 Wn.2d at 744. In addition, former RCW 9.94A.505(8) authorizes the sentencing court to impose “crime-related prohibitions and affirmative conditions as provided in this chapter.” A “crime-related prohibition” is “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” Former RCW 9.94A.030(13) (2008).

Logically, the burden is on the State to demonstrate the condition of community supervision is statutorily authorized. See State v. McCorkle, 137 Wn.2d 490, 495-96, 973 P.2d 461 (1999) (SRA clearly places mandatory burden on State to prove nature and existence of out-of-state conviction necessary to establish offender score and standard sentence range); State v. Ford, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999) (accord); United States v. Weber, 451 F.3d 552, 558-59 (9<sup>th</sup> Cir. 2006) (placing burden on government to demonstrate discretionary supervised release condition is appropriate in a given case).

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<sup>9</sup> Former RCW 9.94A.715(2)(a) permits the court to require the defendant, as a condition of community custody, to participate in rehabilitative programs or other affirmative conduct “reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.”

Here, several of the conditions of community custody imposed by the sentencing court are not crime-related and should be stricken. Erroneous sentences may be challenged for the first time on appeal, so Ross may challenge conditions of community custody even if he did not pose an objection in the trial court. Bahl, 164 Wn.2d at 744-45; Ford, 137 Wn.2d at 477.

b. The court lacked authority to prohibit Ross from accessing the internet. When use of the internet does not contribute to a crime, the court may not restrict internet access as a sentencing condition. State v. O’Cain, 144 Wn.App. 772, 775, 184 P.3d 1262 (2008). In O’Cain, the defendant was convicted of rape, but that offense bore no direct relationship to the defendant’s use of the internet. Id. This Court struck the sentencing court’s imposition of a community custody condition prohibiting unapproved use of the internet because it was not crime-related, and the controlling statute permits the court to impose only crime-related prohibitions. Id. (citing Former RCW 9.94A.700(5)(e)).

O’Cain dictates the same result here. Like O’Cain, the record contains no allegations that Ross used the internet for any purpose to commit or in relation to committing the charged crimes. 144 Wn.App.at 775. The trial court made no finding that the

internet contributed to the crime. Id. The prohibition on accessing the internet without preapproval is not crime-related, is not limited to restrictions required as part of treatment, and it exceeds the court's sentencing authority. Id. It should be stricken.

c. The sentencing court lacked authority to enter orders forbidding Ross from possessing, consuming or acquiring alcohol, from entering an establishment where alcohol is the primary commodity sold. The court ordered Ross to (1) not purchase, possess, or consume alcohol, and (2) not enter any business where alcohol is the primary commodity for sale. The court did not find and the State did not find any support for the recommendation.

There was no evidence produced at trial to show the offenses were committed when Ross was under the influence of alcohol or drugs. Although Shaffer testified that Ross offered her wine, and a police officer saw empty wine bottles in his home, no one testified Ross was intoxicated during the incident. Sandi and Ryan Johnson spent over one hour speaking with Ross before the incident, and the police interviewed him afterward. No one said Ross appeared under the influence of alcohol and it contributed to the offense.

A similar issue was before the federal appellate court in United States v. Betts, 511 F.3d 872 (9<sup>th</sup> Cir. 2007). There, a defendant sentenced for conspiracy was ordered to abstain from illicit drugs and alcohol as a condition of supervised release. Id. at 874, 877. There was, however, nothing in the record to suggest alcohol played any role in the defendant's crime or that he had any past problems with alcohol. Id. at 878. The trial court did not believe the defendant had an alcohol problem, but imposed the condition as part of his routine, finding the defendant had the burden of convincing the court that the discretionary condition was not required. Id. at 880.

The Betts Court found the condition was improper because the government did not meet its burden of demonstrating prohibiting the defendant from consuming alcohol was appropriate in his individual case, as the condition did not meet the statutory goals of rehabilitation, protection of the public, or deterrence of future criminal behavior. Betts, 511 F.3d at 878, 880.

Moderate consumption of alcohol does not rise to the dignity of our sacred liberties, such as freedom of speech, but the freedom to drink a beer while sitting in a recliner and watching a football game is nevertheless a liberty people have, and it is probable exercised by more people than the liberty to publish a political opinion. Liberties can be taken away during

supervised release to deter crime, protect the public, and provide correctional treatment, but that is not why it was taken away in this case.

Id.

The SRA provides even more limited power to the sentencing court to prohibit conduct as a condition of community custody than does the federal statute at issue in Betts. In Washington, prohibitions must be crime-related, although affirmative conduct may be imposed as needed for rehabilitation or community protection. Former RCW 9.94A.715(2)(a). There is no indication that alcohol played a part in Ross's actions on April 12, 2009, and thus conditions of community custody forbidding him from obtaining, possessing or consuming alcohol or even entering a bar are not authorized by the SRA.

d. The sentencing court lacked authority to prohibit Ross from possessing drug paraphernalia as a condition of community custody. The trial court also entered a community custody condition forbidding Ross from possessing "drug paraphernalia." CP 17. The SRA requires the court to prohibit an offender from possessing controlled substances without a

prescription, but the same is not true for drug paraphernalia.

Former RCW 9.94A.700(4)(c).

A broadly stated condition prohibiting the possession of drug paraphernalia is unconstitutionally vague. State v. Valencia, \_\_ Wn.2d \_\_, 239 P.3d 1059 (2010). As a matter of due process, a person sentenced to community custody must be given fair warning of proscribed conduct. Id. at 1063. Drug paraphernalia is a broad term, that may be construed to include tools used innocuously in everyday life, and the restriction imposed is not limited to possession of such materials with the “intent” to use drugs. Id. at 1064. As the Valencia Court instructed,

“an inventive probation officer could envision any common place item as possible for use as drug paraphernalia,” such as sandwich bags or paper. Supp'l Br. of Appellant at 10. Another probation officer might not arrest for the same “violation,” i.e. possession of a sandwich bag. A condition that leaves so much to the discretion of individual community corrections officers is unconstitutionally vague. Accordingly, we hold that the condition at issue is void for vagueness.

Id. at 1065.

Furthermore, Ross’s crime bore no relationship to drug use and therefore he should not be barred from possessing such “paraphernalia.” This condition is not crime-related, in addition to

being too ambiguous to provide a valid, authorized condition of community custody.

e. This Court should strike the unauthorized conditions of community custody. The conditions of community custody prohibiting Ross from internet access, consuming or possessing alcohol, going to a bar, or possessing drug paraphernalia are not reasonably related to his offense of conviction. This Court should vacate the portions of the Judgment and Sentence requiring Ross to comply with these unauthorized conditions of community custody that he (1) not purchase or possess any alcohol, (2) not go to an establishment where alcohol is the main commodity for sale, and (3) not possess drug paraphernalia. State v. Riles, 135 Wn.2d 326, 353-53, 957 P.2d 655 (1998) (striking condition of community placement not reasonably related to offense and therefore not authorized by statute); O'Cain, 144 Wn.App. at 775 (same).

4. THE CONDITIONS OF COMMUNITY CUSTODY PROHIBITING ROSS FROM POSSESSING PORNOGRAPHIC MATERIALS AND FROM SPEAKING WITH WOMEN ARE UNCONSTITUTIONALLY VAGUE AND NOT CRIME-RELATED

The due process clauses of the federal and state constitutions require that citizens be provided with fair warning of what conduct is illegal. U.S. Const. amend. 14; Const. art. I, § 3; Bahl, 164 Wn.2d at 752. As a result, a condition of community custody must be sufficiently definite that ordinary people understand what conduct is illegal and the condition must provide ascertainable standards to protect against arbitrary enforcement. Id. at 752-53. Additionally, even offenders on community custody retain a constitutional right to free expression. See Procunier v. Martinez, 416 U.S. 396, 408-09, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974) (inmates retain First Amendment right of free expression through use of the mail). When a condition of community custody addresses material protected by the First Amendment, a vague standard may have a chilling effect on the exercise of First Amendment rights. Bahl, 164 Wn.2d at 752. An even stricter standard of definiteness therefore applies when community custody condition prohibits access to material protected by the First

Amendment or implicates a right otherwise protected by the First Amendment. Id.

a. The court impermissibly barred Ross from accessing pornography. The trial court ordered Ross “not possess or access pornographic or sexually explicit material” as directed by DOC. CP 17. Adult pornography is constitutionally protected speech. Bahl, 164 Wn.2d at 757; U.S. amend. 1; Wash. Const. art. I, § 5. And the term “pornography” is unconstitutionally vague. Id. at 757-58; State v. Sansone, 127 Wn.App. 630, 639, 111 P.3d 1251 (2005). Thus, a condition of community placement prohibiting an offender from “possess[ing] or access[ing] pornographic materials, as directed by the supervising Community Corrections Officer” is unconstitutionally vague. State v. Bahl, 164 Wn.2d 739, 744, 758, 193 P.3d 678 (2008); accord Sansone, 127 Wn.App. at 634, 639-41. Likewise, here too the condition prohibiting Ross from possessing pornography is unconstitutionally vague and must be stricken.

Furthermore, Ross was not accused of possessing sexually explicit materials and there was no finding that this is a crime-related prohibition. The court lacks authority to order non-crime-related prohibitions and this restriction should be stricken.

b. The court's restriction on speaking to women is unconstitutionally vague and denies Ross his right to freedom of association without just cause. Separate and apart from the condition that Ross inform DOC of any dating or romantic relationships, the court broadly prohibited Ross from contact with women. The court ordered that Ross may not “approach women in parking lots or other settings with the intent to exchange personal information or form romantic relationships.” CP 17 (emphasis added).

While a court may bar contact with the victim of a crime, as the court did here, or even with a specified class of individuals, it may not sweepingly and confusingly prohibit a person from navigating through life without just cause and subject to arbitrary enforcement. See Valencia, 239 P.3d at 1065 (“A condition that leaves so much to the discretion of individual community corrections officers is unconstitutionally vague”). The court’s prohibition applies to contact in “any setting” and bars the exchange of “personal information.” CP 17. An “inventive” community custody officer could bar Ross from telling a female sales clerk what size shoes he wears, or from saying “how are you”

to a woman at church, while another officer may not. See Valencia, 239 P.3d at 1064.

The court's intent may have been to keep Ross from starting romantic relationships by way of chance meetings, but it did not phrase the restriction with this limitation. It leaves Ross uncertain of exactly what behavior is permitted, since it does not expressly bar contact with all women but forbids him from intending to exchange personal information with any women. This leaves unbridled discretion with DOC to forbid Ross from a myriad of contact with women beyond the possibility of romantic relationships. On the other hand, the court did not bar Ross from having a romantic relationship, as long as he disclosed his criminal history. CP 17 (requiring disclosure of any dating or romantic relationship to the community corrections officer). This restriction is at odds with the prohibition on any exchange of personal information with any woman, since it would be impossible to form a romantic relationship without exchanging some personal information.

This sweeping regulation barring contact with a woman in "any setting that involves the exchange of personal information should be stricken. The court has already authorized DOC to

monitor Ross's relationships and ordered him to disclose his criminal history to potential mates, and these restrictions should suffice to address concern that Ross would commit a similar offense again. Valencia, 239 P.3d at 1065. The unauthorized conditions of community custody should be stricken.

F. CONCLUSION.

For the foregoing reasons, Mr. Ross respectfully requests this Court find he was denied a fair trial as well as a fair sentencing hearing due to the allegations of uncharged conduct, and order his cases remanded for further proceedings.

DATED this 31<sup>st</sup> day of January 2011.

Respectfully submitted,



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## **APPENDIX A**

RCW 10.58.090 provides:

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

(2) In a case in which the state intends to offer evidence under this rule, the attorney for the state shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(3) This section shall not be construed to limit the admission or consideration of evidence under any other evidence rule.

(4) For purposes of this section, "sex offense" means:

(a) Any offense defined as a sex offense by RCW 9.94A.030;

(b) Any violation under RCW 9A.44.096 (sexual misconduct with a minor in the second degree); and

(c) Any violation under RCW 9.68.090 (communication with a minor for immoral purposes).

(5) For purposes of this section, uncharged conduct is included in the definition of "sex offense."

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

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

(b) The closeness in time of the prior acts to the acts charged;

(c) The frequency of the prior acts;

(d) The presence or lack of intervening circumstances;

(e) The necessity of the evidence beyond the testimonies already offered at trial;

(f) Whether the prior act was a criminal conviction;

(g) Whether the probative value is substantially outweighed 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.

## **APPENDIX B**

Iowa Code § 701.11(1):

In a criminal prosecution in which a defendant has been charged with sexual abuse, evidence of the defendant's commission of another sexual abuse is admissible and may be considered for any matter for which the evidence is relevant. This evidence, though relevant, may be excluded if the probative value of the evidence 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. This evidence is not admissible unless the state presents clear proof of the commission of the prior act of sexual abuse.

## **APPENDIX C**

Iowa Code § 701.11(1):

In a criminal prosecution in which a defendant has been charged with sexual abuse, evidence of the defendant's commission of another sexual abuse is admissible and may be considered for any matter for which the evidence is relevant. This evidence, though relevant, may be excluded if the probative value of the evidence 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. This evidence is not admissible unless the state presents clear proof of the commission of the prior act of sexual abuse.

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 65455-1-I
v.	)	
	)	
BRYAN ROSS,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31<sup>ST</sup> DAY OF JANUARY, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED IN THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> BRYAN ROSS 339149 COYOTE RIDGE CORRECTIONS CENTER PO BOX 796 CNNELL, WA 99326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY

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DIVISION ONE  
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SEATTLE, WA

**SIGNED** IN SEATTLE, WASHINGTON THIS 31<sup>ST</sup> DAY OF JANUARY, 2011.

X \_\_\_\_\_ 

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