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NO. 66214-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

FRANK BORDERS,

Appellant.

REC'D  
APR 22 2011  
King County Prosecutor  
Appellate Unit

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

The Honorable Palmer Robinson, Judge  
The Honorable Helen Halpert, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it admitted evidence of prior offenses under RCW 10.58.090 to prove appellant committed the current offenses.

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

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

4. RCW 10.58.090 violates state constitutional fair trial guarantees.

5. The court erred in denying appellant's right to present evidence in his defense and to rebut the State's evidence.

6. The prosecutor committed flagrant prosecutorial misconduct by misstating the evidence in closing argument.

Issues Pertaining to Assignments of Error

1. A retrospective law violates the ex post facto doctrine if it is substantive and disadvantages the person affected by it. The Legislature intended RCW 10.58.090 to substantively change the law and to have the change applied retroactively. At the time of the appellant's offenses, 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, which authorizes this forbidden inference, unconstitutional?

2. 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?

3. 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 RCW 10.58.090 is a procedural rule that expands the admission of evidence, did the Legislature unconstitutionally usurp the judiciary's constitutional function by enacting the change?

4. The belief 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 the appellant's

right to a fair trial under Article I, sections 21 and 22 of Washington's Constitution?

5. The State presented multiple witnesses who testified complaining witness S.C. felt suicidal following the alleged rape, then argued in closing that S.C.'s desire to take her own life following the incident enhanced the credibility of her accusations. Did the trial court's exclusion of rebuttal evidence that S.C. suffered from pre-existing conditions making her more prone to suicidal feelings deny the appellant his constitutional right to present a defense?

6. Did the State commit flagrant, prejudicial misconduct denying the appellant's a fair trial when it misstated the evidence in closing argument?

B. STATEMENT OF THE CASE<sup>1</sup>

1. Procedural facts

The King County prosecutor charged Frank Borders with the second degree rape of S.C. and J.P. for separate incidents occurring in

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<sup>1</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – 1/20, 1/21, and 1/25/10; 2RP – 1/26/10; 3RP – 1/27, 1/28, and 2/2/10; 4RP – 2/1, 2/12, and 10/29/10 (sentencing); 5RP – 2/3/10; 6RP – 2/8/10; 7RP – 2/9/10; 8RP – 2/10, 2/11, and 3/10/10; 9RP – 7/27/10; 10RP – 8/11, 8/12, 8/25, and 8/26/10; 11RP – 8/30/10; 12RP – 8/31/10; 13RP – 9/1 and 9/2/10; 14RP – 9/7/10; and 15RP – 9/8 and 9/13/10. This brief does not reference the 6/24/10 report the court reporter mistakenly filed as the 7/27/10 report.

2007. CP 1-3, 83-84. Borders's first trial ended with jury deadlock, and the court declared a mistrial. CP 127-28, 131-32; 4RP 28-34. Following a second trial, the jury convicted him as charged. CP 233-34.

The court sentenced Borders to life in prison without possibility of parole as a persistent offender under "two-strikes" and "three-strikes" provisions. Former RCW 9.94A.030(33) (2006); CP 244; 4RP 36-48.

2. First trial: Pertinent rulings

Before Borders's first trial, the State moved to admit evidence of three rapes Borders allegedly committed in the early 1980s against C.D., M.H., and S.G.<sup>2</sup> under RCW 10.58.090.<sup>3</sup> The defense objected. Supp. CP \_\_\_ (sub no. 86, Motion to Prohibit Use of 1980 and 1983 Convictions); CP 40, 65-82. The State later withdrew the request to admit evidence regarding C.D. because she was deceased. 2RP 92-93. As for M.H. and S.G., the court ruled that the evidence relating to sexual misconduct with M.H. and S.G. was more prejudicial than probative. 3RP 100-03, 113. The court ruled, however, that the evidence regarding the alleged rapes of J.P. and S.C. were cross-admissible under the statute. 3RP 112. In

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<sup>2</sup> Although originally charged with the second degree rape of S.G., Borders pled guilty to second degree assault. Supp. CP \_\_\_ (sub no. 86, Motion to Prohibit Use of 1980 and 1983 Convictions, at 2-3); 10RP 109.

<sup>3</sup> The statute is attached as an Appendix.

closing, the State argued similarities between the incidents demonstrated Borders's guilt. 8RP 111-12.

The State moved to preclude testimony regarding S.C.'s mental health history, particularly a prior suicide attempt and hospitalization occurring years before the charged incident. 3RP 14-22. The defense contended that a limited inquiry into S.C.'s mental health history would be needed if the State chose to elicit S.C.'s post-incident emergency room statements that she felt like killing herself. 3RP 18. The court ruled that prior suicide attempts were excluded, but stated it would hear a motion to admit such evidence if defense counsel believed the door was open. 3RP 19-20. The court also ruled that it *might* permit the defense to admit evidence of S.C.'s long-term cocaine dependence (in addition to the admissible evidence of her "two-day [cocaine] bender" immediately preceding the incident) if the defense could demonstrate its relevance. 3RP 22.

At trial, Harborview social worker William Bodick testified S.C. reported to ER staff that she wanted to kill herself. 7RP 49. He also testified, without objection, that S.C. suffered from "polysubstance" abuse and substance-induced mood disorder, and that S.C.'s report she slept only 3-4 hours a night was consistent with cocaine dependence as well as

depression. 7RP 65, 71-73. He did not mention any prior suicide attempts.

In closing, the State argued that after the incident S.C. “expressed [to social workers] she feels shame, . . . so much shame, in fact that she feels like killing herself.” 8RP 106. Borders was, nonetheless, acquitted of both counts.

3. Second trial: Evidentiary rulings revisited

Borders’s second trial began six months after the court declared a mistrial in the first. The State sought reconsideration of the ruling excluding evidence of sexual misconduct with M.H. and S.G., and also sought to introduce evidence that Borders raped L.M., his girlfriend at the time, in 2004. Supp. CP \_\_\_ (sub no. 157, Reply to State’s Motion for Reconsideration Under RCW 10.58.090); CP 159-60.

After hearing testimony from M.H., L.M., and S.G., the trial court found by a preponderance of the evidence that Borders committed the misconduct. 10RP 2-61, 107. Balancing the factors under RCW 10.58.090(6)(a)-(g), the court found the evidence regarding S.G. was admissible, thus reversing its prior ruling. 10RP 110. The court stated that, having heard the testimony of the complainants as to the two charged crimes, it now understood the necessity of such evidence under factor (6)(e). Reversing course from the first trial, the court found that S.G.’s

physical disability was not overly prejudicial given that her testimony showed her to be “strong-willed and competent.” 10RP 110.<sup>4</sup> The court found the incident regarding L.M. so dissimilar as to have little probative value, and found M.H.’s testimony would be too prejudicial.<sup>5</sup> 10RP 107.

The State moved to preclude social worker Bodick from testifying as he did in the first trial that S.C. had been diagnosed with substance-induced mood disorder and drug dependence. 13RP 77, 79, 83-84. The State argued the evidence should be excluded because “it’s not outside the . . . understanding of this jury that someone who has been sexually assaulted feels shame and oftentimes that shame manifests itself in different ways as it did with [S.C.]. 13RP 83. Moreover, the Bodick evidence was “merely . . . character evidence severely damaging [S.C.’s] character and credibility before the jury on unrelated matters.” 13RP 82-83.

Defense counsel argued the door would therefore be open to substance abuse and limited mental health evidence because the State

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<sup>4</sup> The State did not present testimony from the proposed RCW 10.58.090 witnesses before the first trial.

<sup>5</sup> M.H. was mentally disabled and, like S.G., wheelchair bound, due to an automobile accident occurring 20 years after the alleged rape. 10RP 11, 18, 110-11.

would again use S.C.'s expressed desire to kill herself to make its case. 13RP 79, 91.

The court said it previously ruled that such evidence was inadmissible because, unlike cocaine use during the two days before the incident, her mental health diagnoses would not affect S.C.'s ability to perceive and recall the incident with Borders. 13RP 84-85; CP 203-08. The court agreed to hear an offer of proof to determine whether long-term cocaine abuse and substance-induced mood disorder could explain S.C.'s behavior in the emergency room. 13RP 85.

By way of an offer of proof, Bodick testified he reviewed S.C.'s mental health history to evaluate her suicide risk. 13RP 86-89. He said substance-induced mood disorder often manifests as depression. Bodick also testified a history of polysubstance abuse is a risk factor for suicidal feelings. 13RP 90.

The court stated the evidence was not excludable as hearsay because Bodick was entitled to base his opinion on medical records that would themselves be inadmissible hearsay. 13RP 91-92. But the court excluded the evidence because

this isn't a case about whether [S.C.] should be involuntarily committed. . . . It's a case where the State is required to prove beyond a reasonable doubt that [S.C.] was raped by Mr. Borders and some of that, of course, goes to her . . . credibility.

Certainly testimony that she had used drugs within the recent few days is highly relevant to her credibility. The fact that she has a history of drug use is not related to her credibility, at least according to anything that's been presented to this court.

. . . . I don't think the State was trying to argue that the reason she was feeling suicidal particularly was necessarily the rape. I think the State . . . introduced this testimony only to explain why there was a mental health referral.

13RP 92-93.

4. Second trial: Trial testimony

a. Complainant S.C.

Seattle police were dispatched to the Borders family residence near 19<sup>th</sup> Avenue and Yesler Street at 10:17 a.m. on December 8, 2007. 11RP 41. S.C. was inside the house. 11RP 45. She reported she had been choked and sexually assaulted. 11RP 75-76. S.C. was distraught but did not appear injured. 11RP 45, 67-68. Police nonetheless called the fire department to provide medical aid, and S.C. was taken to Harborview Medical Center. 11RP 76.

S.C. told a fire department emergency medical technician (EMT) that she had been sexually assaulted, choked, and struck in the face. 11RP 100, 118. Like the responding police officer, the EMT did not notice any visible injuries. 11RP 118.

S.C. made similar complaints to another EMT from the ambulance company that transported S.C. to Harborview. 12RP 11. That EMT noticed S.C. appeared to be under the influence and had a “shifty, apparently panicked gaze.” 12RP 19. S.C. reported her neck hurt, but, like the other responders, the second EMT noticed no injuries to S.C.’s face or neck. 12RP 22, 26-27.

Harborview emergency room (ER) physician Steven Mitchell treated S.C. shortly after noon that day. S.C. reported that her friend’s brother choked, slapped, and beat her, forcing her to put his penis in her mouth. 13RP 48. Despite her denial of crack use at trial, S.C. reported using cocaine during the two days prior to the assault.<sup>6</sup> 13RP 70. S.C. complained her “nerves were shot” and her neck was sore. 13RP 49. She had no visible injuries, but complained of pain in her mid-back. 13RP 51, 64-65, 67-68. X-rays revealed no identifiable injury to that area. 13RP 57.

According to Dr. Mitchell, S.C. expressed a desire to harm herself and was therefore referred to Psychiatric Emergency Services (PES) within the emergency department. 13RP 62. S.C. was likewise referred to a sexual assault nurse examiner, per ER protocol. 13RP 61. Like Dr.

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<sup>6</sup> S.C. repeated this admission to a Seattle Mental Health social worker who met with her in the ER. 14RP 113-15.

Mitchell, the nurse examiner noted no visible injuries, despite extensive training in bruise and wound recognition. 14RP 139-47.

S.C. provided a somewhat different version of the assault to ER social worker Kenna Heginbottom. S.C. said her friend's brother offered her crack. When she declined, he struck her head with his fist and made her blow cocaine smoke on his penis, then forced her to perform oral sex. 14RP 79, 91. The brother then hit and choked her some more. 14RP 79. S.C. told Heginbottom she felt "shame due to the assault." 14RP 79. When discussing her future plans, S.C. told Heginbottom she was homeless, did not have a support system, and felt like killing herself. 14RP 80.

Harborview PES social worker Bodick met with S.C. after her sexual assault exam. 13RP 99. S.C. again reported feeling depressed and suicidal and said she planned to "cut [her] wrists and get it over with." 13RP 99. When Bodick's meeting with S.C. ended, however, she reported she no longer felt suicidal. 13RP 104. Bodick nonetheless referred S.C. to a Sound Mental Health (SMH) social worker for a follow-up consultation. 13RP 103. The SMH social worker noted S.C. provided her a different version of events from that provided to Harborview personnel. 14RP 113, 116.

S.C. testified she and her friend Arthur, Borders's brother, spent a few days together in December 2007. 13RP 118. The morning Borders assaulted her, S.C. and Arthur traveled by bus to her daughter's house in Skyway and spent an hour there. 13RP 127. S.C. acknowledged drinking with Arthur, but, contrary to Arthur's testimony and her own prior testimony, S.C. denied smoking crack. 13RP 128, 180-81.

S.C. claimed she and Arthur returned to Seattle at around 10 a.m. and went to Arthur's mother's house. 13RP 120, 169. Arthur's siblings, including Borders, were at the house, but everyone had to be quiet because the mother was sleeping. 13RP 121. S.C. denied spending the previous night at the Borders house. 13RP 184-85.

At one point, S.C. decided to go to a nearby convenience store to buy beer and cigarettes. On the way, S.C. met Borders on the street near Pratt Park. 13RP 119. Borders asked if S.C. had a crack pipe. 13RP 137. S.C. said she didn't have one, but Borders said, "Come here." 13RP 137. S.C. approached Borders and said, "[W]hat is it?" 13RP 140-41.

Borders then grabbed S.C. by the neck and dragged her to the men's park restroom. 13RP 140-41. Borders made S.C. sit on the toilet seat, and when S.C. tried to push Borders away, he put his hand around her throat. 13RP 142-44. When S.C. told Borders to let her go, he slapped her head and face, then forced his penis into her mouth. 13RP

148-49. When Borders dropped his crack, however, S.C. ran back to the Borders's home, where she and Arthur called 911. 13RP 152, 154. S.C. testified she left her purse in the restroom when she fled, but police recovered it for her. 13RP 153, 179.

S.C. testified it felt "shameful" to tell people what had occurred and she "wouldn't doubt" she told Harborview staff she felt like killing herself. 13RP 159. S.C. reiterated she did not smoke crack cocaine with Arthur or Borders. According to S.C., she tried crack cocaine once and it made her feel ill. 13RP 161. S.C. likewise denied telling a Harborview social worker she used crack for the two days prior to the assault. 13RP 181. Despite denying crack use, S.C.'s testimony demonstrated she was familiar with crack pipes, which were typically made from the broken-off stem of a glass marijuana pipe. 13RP 178-80.

S.C.'s adult daughter, Flaime Reynolds, recalled her mother visited her Skyway home one time accompanied by a gentleman who appeared somewhat "grimy." 13RP 10-11. The visit occurred at a time when S.C. was homeless. 13RP 12. S.C. obtained money from Reynolds, and S.C. and the man left by bus. 13RP 15-16, 23-24.

Arthur testified he and S.C. spent the night before the reported assault at his mother's house. He had to sneak S.C. into the house because

they had been smoking crack together.<sup>7</sup> 14RP 22-25. While Arthur recalled traveling to Skyway with S.C. at some point, the visit did not occur early that morning. 14RP 27-28, 40.

Borders came to the house to ask his mother for money. While Borders and the mother were talking, Arthur snuck S.C. onto the porch. 14RP 29-30. After Borders left, having obtained money, Arthur went to look for S.C., but she too was gone. 14RP 31. Arthur assumed Borders had left with S.C.<sup>8</sup> 14RP 39. Arthur next saw S.C. when she approached the house yelling that Borders had assaulted her. 14RP 32.

Police arrested Borders near Pratt Park at 10:27 a.m., 10 minutes after the initial 911 call. 11RP 41, 134-35; 14RP 47. Borders was cooperative. 12RP 151, 153. Police officers noticed a small amount of blood on Borders's hands.<sup>9</sup> 14RP 50; Ex. 57, 58. They found no

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<sup>7</sup> Arthur testified, however, he and S.C. each had their own crack pipes. 14RP 36.

<sup>8</sup> Arthur doubted S.C. went to the store to buy cigarettes and beer; she had no money left because she had spent it on crack. 14RP 31.

<sup>9</sup> Arthur testified that in order to smoke crack from a pipe, the user would insert a piece of scouring pad into the glass tube with a piece of wire and then place the cocaine rock into the pipe. 14RP 38. A fire department paramedic who examined Borders's hands testified the injuries appeared to be minor puncture wounds and were consistent with pokes from a piece of wire. 14RP 163. Defense argued that either the wire or the broken-glass edge of a crack pipe (as described by S.C.) could cause the wounds police noticed on Borders's hands. 15RP 111.

contraband or money on Borders's person. 12RP 152. Despite S.C.'s claim the police returned her purse, police found no purse, money, or drugs in the Pratt Park restrooms. 14RP 63-64.

Three days after Borders's arrest, Detective Kevin Grossman was assigned to the case, but he could not find S.C. until 10 months after the incident. 14RP 172, 177-80, 184.

b. Complainant J.P.

In March of 2009, after locating S.C., Detective Grossman created a flyer bearing a picture of Borders, his name, and the question: "HAVE YOU BEEN VICTIMIZED BY THIS PERSON?" 15RP 13; Ex. 19. The flyer directed those with information to call SPD's Sexual Assault and Child Abuse Unit. Ex. 19. The flyer was distributed to various locations including Angeline's, a women's shelter in downtown Seattle. 15RP 14.

Grossman first received a call from a woman named Nicole Simper, but he ruled her out as a potential victim because Borders was incarcerated at the time of the alleged assault and Simper had a history of false reporting. 15RP 17-19, 32. Grossman then received a call from J.P., who said she was assaulted during a timeframe in which Borders was not incarcerated and described an incident bearing some similarity to the S.C. incident. 15RP 20.

In June of 2009, prosecuting attorney Christine Keating<sup>10</sup> met with J.P. to introduce herself and explain how the criminal justice system functioned. 12RP 36-37. At the time, the State had filed charges related to S.C., but not J.P. 12RP 37. Keating told J.P. there were other sexual assault charges pending against Borders. 12RP 45.

J.P.'s identification of Borders came up during the meeting. 12RP 38-39; Ex. 19. J.P. told Keating that, unlike the picture in the flyer, her assailant had "significant sideburns." 12RP 53, 61, 66. Keating decided to show J.P. two additional booking photos of Borders, and J.P. said "that's him," 12RP 39, 43-44, 62. According to Keating's contemporaneous notes, however, J.P. only told Keating she felt "relatively confident" it was the same person. 12RP 62-63.

Keating quickly decided that showing J.P. additional photos might be a bad idea and quickly ended the meeting.<sup>11</sup> Keating did not tell anyone she showed J.P. the photos until Grossman interviewed her four months later. 12RP 59-60; 15RP 30-31.

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<sup>10</sup> The case was eventually transferred to a different attorney.

<sup>11</sup> Borders moved to suppress J.P.'s identification, arguing it resulted from suggestive procedures, including use of the flyer and additional photos of a single suspect. The court agreed that Keating's procedure was suggestive but found the identification nonetheless reliable under the factors set forth in Manson v. Brathwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). CP 148-49.

J.P. testified she was sexually assaulted during the summer of 2007, a time during which she was homeless and regularly using crack cocaine. 12RP 80-81. One evening, J.P. was at the corner of Eighth Avenue and Dearborn near the band of woods running parallel to Interstate-5 known as “the Jungle.” 12RP 82-84. J.P. was seeking acquaintances with whom she could smoke crack. 12RP 84.

A man, whom J.P. identified at trial as Borders, approached her and introduced himself as “Frank.” 12RP 89-90. The man asked if she wanted to smoke crack with him, and the two walked up a hill to a wooded area within the Jungle. 12RP 92. When they reached a clearing, the man mentioned a woman had recently been killed in that area. 12RP 93. J.P. knew of the incident, but found it odd the man mentioned it. 12RP 93-94.

The man then told J.P. to remove her clothes. Shocked, J.P. said she was only there for drugs. 12RP 95. But the man suddenly put his hands around J.P.’s throat, and J.P., fearful, told the man she would do what he wanted. 12RP 95, 97. The man unzipped his pants and told J.P. to “give him a blow job.” 12RP 99. J.P. allowed the man to put his penis in her mouth, but he was unable to achieve an erection. J.P. therefore suggested they leave. 12RP 100. The man complied, and the two walked out of the woods, parting ways once they reached the street. 12RP 101-02.

J.P. did not report the incident because she thought authorities would not follow up because she was homeless. 12RP 103-05. In March of 2009, almost two years later, J.P. saw the flier at Angeline's and recognized Borders as the man who assaulted her. 12RP 105. J.P. contacted Detective Grossman and eventually met with Keating. 12RP 116. J.P. did not recall mentioning anything about sideburns to Keating. Instead, she recalled saying Borders's complexion appeared darker in the flyer than did the skin tone of her assailant. 12RP 118, 135-36. J.P. confirmed Keating told her the prosecutor's office was pursuing sexual assault charges against Borders in another case. 12RP 129.

c. S.G.'s RCW 10.58.090 Testimony

S.G. was confined to a wheelchair when she testified in Border's trial. She had also been wheelchair-bound in 1983 but had been more able to walk short distances. 15RP 62. S.G. knew Borders in 1983 because they frequented the same restaurant. 15RP 65. One night, S.G. and Borders were playing dominoes at S.G.'s house. 15RP 66. At one point, Borders lifted S.G. from her wheelchair and placed her on the bed. 15RP 66. When S.G. yelled for Borders to stop, he put his hands around her neck with enough force to leave thumbprints. 15RP 67. Borders then raped S.G. vaginally before falling asleep. 15RP 69. S.G. was able to reach a phone and call the police. 15RP 69-70.

After S.G. testified, the court gave the following instruction:

In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant. However, evidence of a prior offense on its own is not sufficient to prove the defendant guilty of the crimes charge[d] in the information.

Bear in mind as you consider this evidence at all times the State has the burden of proving that the defendant committed each of the elements of the offenses charged in counts one and two of the information. I remind you that the defendant is not on trial for any conduct, act, or offense not charged in the current case.

15RP 74-75.

D. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT ADMITTED EVIDENCE OF PRIOR SEXUAL MISCONDUCT UNDER RCW 10.58.090.<sup>12</sup>

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.

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<sup>12</sup> 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 granted review of these decisions, Borders respectfully asserts that their continuing validity is in doubt. The Supreme Court heard oral argument on Scherner and Gresham on March 17, 2011.

RCW 10.58.090(1). The statute also lists factors that trial courts should consider in deciding whether the evidence is admissible under ER 403. RCW 10.58.090(6). For the reasons discussed below, the trial court erred when it admitted evidence relating to S.G. 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 S.G.’s testimony most certainly had this impact. The prosecution was faced with challenging circumstances, including a variety of inconsistent statements by S.C. and a suggestive identification procedure that cast doubt on J.P.’s identification of Borders. The challenge of proving the case with only the two witnesses is also apparent in that the jury deadlocked when the State was not permitted to introduce evidence of other misconduct under statute or the preexisting evidence rules.

The problems with the State's case, however, were dramatically overshadowed by S.G.'s inherently prejudicial testimony as to the 1983 rape. The evidence became even more influential because jurors were informed they could consider similarities between S.G.'s allegations and those of J.P. and S.C., and the prosecutor focused on the similarities during closing argument to argue Borders was guilty of the charged crimes. CP 226 (Instruction 9); 15RP 74-75 (court’s oral instruction); 15RP 77, 96-99, 134

(State's closing argument and rebuttal).

- a. 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 I, § 23 of the Washington Constitution 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, 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 it meets each of these elements. Additionally, the statute dramatically expands the availability of prejudicial evidence in favor of the prosecution.

- i. *RCW 10.58.090 violates the ex post facto clause because it is substantive, retrospective, and disadvantages Borders.*

As the Legislature made clear, RCW 10.58.090, as an evidentiary rule, 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). The statute is substantive in nature, however, 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 expands the bounds of relevancy for sex offenses. The Legislature thus appropriately recognized the substantive reach of the statute.

Next, the statute unquestionably 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. The charged acts occurred in 2007, before the June 12, 2008 effective date of the statute. The statute therefore applies retrospectively.

Finally, RCW 10.58.090 substantially disadvantages Borders. RCW 10.58.090 allows evidence that is not admissible for a more limited purpose under ER 404(b) to be admitted for any purpose whatsoever (or as the court instructed, the evidence "may be considered for its bearing on any matter to which it is relevant." 15 RP 74-75). The State asked the jurors to use the evidence as propensity evidence, expressly using S.G.'s testimony to convince jurors that Borders raped S.C. and J.P. 15RP 77, 96-99.

Washington courts have long excluded this class of evidence precisely because that sort of conclusory logic was deemed incompetent, irrelevant, and greatly prejudicial. 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 S.C. and J.P., each of whom presented serious drawbacks for the State in making its case. Under the test enunciated in Hennings, application of the statute to offenses committed prior to its enactment violates ex post facto provisions.

- 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 that previously required 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.

In 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

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 Borders's guilt based solely on evidence relevant to the incidents 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. See CP 226 (Instruction 9); 15RP 74-75 (oral instruction); 15RP 96, 98-99 (closing argument).

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. Ludvigsen, 162 Wn.2d at 671. 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. In contrast, rules that reduce the amount of evidence necessary for a conviction “inherently disadvantage the defendant.” Id. Put another way, making it easier for the State to present evidence of prior sexual misconduct is never beneficial to the defendant. 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.

- b. Even if application of RCW 10.58.090 to Borders'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 United States 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, 3 U.S. at 390-91.

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.

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 with Or. Const. Art. I, § 21 and 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,<sup>13</sup> 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

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<sup>13</sup> 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.

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 to both the defense and the prosecution. Id.

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

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

Id. at 211 (quoting Strong v. The State, 1 Blackf. 193, 196 (1822)). Because that interpretation of Indiana's Constitution was available to the framers of the Oregon Constitution when they chose to adopt the language of Indiana's ex post facto clause, the Oregon court interpreted the Oregon provisions as "forbid[ding] ex post facto laws of the kind that fall within the fourth category in Strong and Calder, viz., laws that alter the rules of evidence in a one-sided way that makes conviction of the defendant more likely." Fugate, 332 Or. at 213.

That interpretation of the Indiana Constitution also was available to the framers of the Washington Constitution in 1889. Rather than simply adopt the language of federal 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); see 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

[easier].” 2 Wash. at 560. Lybarger applied precisely the analysis that the Oregon Supreme Court applied in Fugate.

Aside from the textual differences and differences in the common-law and constitutional history, the United States Constitution is a grant of limited power to the federal government, whereas the Washington Constitution imposes limitations on the otherwise plenary power of the state. Gunwall, 106 Wn.2d at 61. That fundamental difference generally favors a more protective interpretation of the Washington provision. Id. So too does the fact that regulation of criminal trials is a matter of particular state concern. State v. Smith, 150 Wn.2d 135, 152, 75 P.3d 935 (2003), 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 before 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.

- c. 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 Borders's convictions because the statute is an unconstitutional intrusion upon the Court's rule-making authority by the Legislature. The statute changes the very nature of a trial for a defendant charged with a sex offense by allowing the State to generate otherwise inadmissible evidence of prior sex offenses. This amounts to a violation of the Court's inherent authority to govern court procedures.

- 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 to derive from the tripartite system of government established in both constitutions. See, e.g., Const. Arts. II, and IV (establishing the legislative department, the executive, and judiciary);

U.S. Const. Arts. I, 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]hen there is an irreconcilable conflict between a court rule and a statute concerning a matter related to the court’s inherent power, the court rule will prevail.” Id.

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

- 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)). In 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, Borders 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.”). Borders therefore requests this Court reverse his convictions.

- d. RCW 10.58.090 is an unconstitutional violation of the Washington constitution’s fair trial guaranty.

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 violating this fundamental aspect of a constitutionally guaranteed fair trial, RCW 10.58.090 violates Borders’s state constitutional fair trial protections.

2. THE TRIAL COURT DENIED BORDERS THE RIGHT TO PRESENT A DEFENSE WHEN IT EXCLUDED EVIDENCE NEEDED TO REBUT THE STATE’S CLAIM THAT S.C.’S EXPRESSED DESIRE TO COMMIT SUICIDE ENHANCED HER CREDIBILITY.

The court erred in excluding evidence necessary to rebut the State’s claims that S.C.’s suicidal thoughts following the alleged assault enhanced her credibility. Because the exclusion of the evidence affected the jury’s verdicts as to both counts, this Court should reverse both convictions.

- a. The trial court erroneously excluded evidence of S.C.'s mental health diagnoses that could have provided an alternative explanation for S.C.'s expressed desire to kill herself.

The Sixth and Fourteenth Amendments and article I, § 21 of the Washington Constitution guarantee an accused the right to defend against the State's allegations. This is a fundamental element of due process. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); Washington v. Texas, 338 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976); State v. Austin, 59 Wn. App. 186, 194, 796 P.2d 746 (1990).

Additionally, under the Rules of Evidence, an accused also has the right to present relevant evidence tending to establish or rebut the State's proof of a material fact. ER 401. Courts afford the accused wide latitude to explore "fundamental elements" such as the credibility of the State's key witnesses. State v. Fankhouser, 133 Wn. App. 689, 694, 138 P.3d 140 (2006) (citing State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002)).

The constitutional right to present evidence is subject only to the following limitations: (1) the evidence sought to be admitted must be relevant; and (2) the accused's right to introduce relevant evidence must be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process.

Washington, 388 U.S. at 16; State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983); State v. Gallegos, 65 Wn. App. 230, 236-37, 828 P.2d 37, review denied, 119 Wn.2d 1024 (1992).

In other words, a court must permit an accused to present even minimally relevant evidence unless the State demonstrates a compelling reason for exclusion. But no State interest is compelling enough to preclude evidence with high probative value. Darden, 145 Wn.2d at 621; Hudlow, 99 Wn.2d at 16; State v. Reed, 101 Wn. App. 704, 715, 6 P.3d 43 (2000).

The “open door doctrine” also permits a party to conduct normally improper cross-examination and to introduce normally inadmissible evidence to explain or contradict the initial evidence. State v. Avendano-Lopez, 79 Wn. App. 706, 714, 904 P.2d 324 (1995) (citing Karl B. Tegland, 5 Wash. Prac. 41 (3rd Ed. 1989)), review denied, 129 Wn.2d 1007 (1996). The doctrine is rooted in fairness. ““It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it.”” Avendano-Lopez, 79 Wn. App at 714 (quoting State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)).

Here, the State presented evidence that S.C. told different ER providers that she felt like killing herself after her run-in with Borders. As

it did in the first trial, the State used this evidence to argue S.C.'s feelings of shame and a desire for self-harm gave her often-contradictory testimony a "ring of truth." 15RP 85-86. Defense counsel knew the State planned to use this tactic in the second trial and told the court as much. 13RP 79, 91. But the trial court, apparently fixated on one limited aspect of S.C.'s credibility – her ability to perceive and remember a few events– prohibited counsel from admitting that which would have otherwise tended to explain S.C.'s emotional state. 13RP 92-93. In doing so, the court inexplicably turned a blind eye to a significant reason the State was seeking to introduce the evidence. 13RP 84-85, 92-93.

It is well established that a trial court should permit the accused wide latitude to explore the credibility of complaining witnesses. Fankhouser, 133 Wn. App. at 684. It is likewise well established that an accused must be permitted to rebut the State's evidence with relevant evidence and to present the full story to avoid misleading the jury. Gefeller, 76 Wn.2d at 455. As the Gefeller Court stated,

Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths.

Id. The court's ruling denied Borders the right to present relevant evidence material to his defense and left the jury with only part of the

story regarding the cause of the suicidal feelings S.C. expressed to treatment providers.

- b. The exclusion of Bodick's testimony was not harmless beyond a reasonable doubt.

The exclusion of evidence material to Borders's defense violated his due process right to present a defense. State v. Austin, 59 Wn. App. 186, 194, 796 P.2d 746 (1990). Constitutional error is presumed prejudicial, and the State bears the burden of proving that the error was harmless beyond a reasonable doubt. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

The trial court prevented Borders from presenting evidence S.C. had a documented history of depression and abuse of multiple substances, both of which Bodick considered risk factors for suicidal ideation. 13RP 86. S.C.'s diagnoses, which the jury had the opportunity to consider at the first trial, would have better explained S.C.'s emotional state at the ER and rebutted the State's claims that, despite the glaring inconsistencies in her testimony, S.C.'s despair demonstrated that at least the rape allegation was true. As a result, the State cannot prove beyond a reasonable doubt that the jury would have rendered a guilty verdict had Borders been permitted to rebut the State's claims. Guloy, 104 Wn.2d at 425. Even under a non-constitutional harmless error standard, there is a reasonable likelihood that

such evidence could have led to a different result as to the charge naming S.C. as complainant. Fankhouser, 133 Wn. App. at 695.

The exclusion of the evidence also affected the jury's verdict as to the charge naming J.P. The court ruled evidence of each incident was cross admissible as to the other, and the State informed the jury it was free to consider the "striking" similarities between the two cases to evaluate Borders's guilt. 15RP 96, 98-99, 134. Assuming the jury concluded S.C.'s story was true because she felt suicidal shortly after the assault, jurors could have then compared the similarities between the crimes and relied on the same evidence to conclude that J.P.'s identification was correct.

Significantly, Bodick's testimony regarding S.C.'s mental health was admitted at the first trial, and the jury deadlocked on both counts. Because the exclusion of the evidence likely affected the verdicts on both charged crimes, this Court should reverse on both counts.

3. THE PROSECUTOR'S MISSTATEMENT OF KEY EVIDENCE IN CLOSING ARGUMENT WAS FLAGRANT, PREJUDICIAL MISCONDUCT THAT DENIED BORDERS A FAIR TRIAL.

The Sixth and Fourteenth Amendments and Wash. Const. art. I, § 22 guarantee an accused the right to a fair and impartial trial. State v. Finch, 137 Wn.2d 792, 843, 975 P.2d 967, cert. denied, 528 U.S. 922

(1999). The prosecuting attorney, as a representative of the State, has the duty to ensure due process in a criminal case. "The prosecuting attorney is a quasi-judicial officer, and it is his duty to see that one accused of a public offense is given a fair trial." State v. Carr, 160 Wash. 83, 90, 294 Pac. 1016 (1930). Thus, when the prosecuting attorney engages in misconduct, the accused may be denied his constitutional right to due process and a fair trial.

In closing, the State acknowledged S.C. appeared to remember little of her time at Harborview, but argued that the feeling of "shame" and "despair" S.C. reported gave her testimony a "ring of truth." The prosecutor continued with that theme as follows:

When you think back at the emotions that she expressed about the feeling of despair, it naturally flows from the act of violence that was committed against her in that bathroom. . . . I submit to you . . . you can find a ring of truth.

15RP 85-86.

Defense counsel, hamstrung by the court's exclusion of evidence regarding S.C.'s mental health diagnoses, argued that Bodick testified S.C. was feeling depressed. Thus, counsel argued, the jury could conclude S.C. was feeling suicidal because she suffered depression.<sup>14</sup> 15RP 116-17.

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<sup>14</sup> Bodick testified that his report stated, "Patient reports that she's feeling depressed and suicidal with a plan to cut her wrists." 13RP 99.

In rebuttal, the State argued that there was no evidence to show S.C. was feeling suicidal for any other reason than that she was raped.

15RP 130. The prosecutor argued

[S.C.] told the social worker Heginbottom in the context of a sexual assault examination, I feel so much shame; I feel like killing myself. Because of what happened to her. She drew that nexus.

15RP 130.

In fact, S.C. told Heginbottom (who was not, in fact, present at the sexual assault examination) that she felt “shame due to the assault.” 14RP 79. When discussing her plan following discharge, S.C. told Heginbottom she was homeless, did not have a support system, and felt like killing herself. 14RP 80. Contrary to the State’s argument, however, neither S.C. nor Heginbottom ever explicitly linked any suicidal feelings to the assault.

Although defense counsel did not object, reversal is required where “the misconduct was so flagrant and ill intentioned that a curative instruction could not have obviated the resulting prejudice.” State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). In other words, if the misconduct cannot be remedied and is material to the outcome of the trial, the defendant has been denied his due process right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762-63, 675 P.2d 1213 (1984).

The prosecutor's ill intention is apparent from the argument. The State assured the trial court it did not plan to use S.C.'s statements about wanting to kill herself to prove its case, but merely to explain why she talked to so many mental health providers. Yet knowing the defense had been prevented from presenting evidence to rebut such a claim, the prosecutor not only made the argument – at a time when the defense could not rebut it – but also misstated the evidence to make its argument. Moreover, the prosecutor's argument on such a critical subject, S.C.'s credibility, would have left an indelible impression the jury.

"[T]rained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case." State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997). The prosecutor apparently felt so here. The prosecutor's misstatement of the evidence in closing entitles Borders to a new trial.

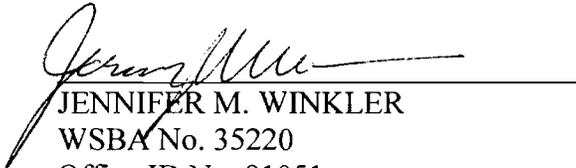
D. CONCLUSION

RCW 10.58.090 is unconstitutional. The admission of evidence that Borders raped S.G. 24 years before the events in question denied Borders a fair trial and requires reversal of both convictions. In addition, the exclusion of evidence relevant to rebut the State's theory of the case denied Borders his constitutional right to present a defense, requiring reversal of both convictions. Finally, prosecutorial misconduct denied Borders a fair trial on both counts.

DATED this 21<sup>ST</sup> day of April, 2011.

Respectfully submitted,

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# **APPENDIX**

RCW 10.58.090  
Sex Offenses — Admissibility.

(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 9.68A.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.

[2008 c 90 § 2.]

Notes:

**Purpose – Exception to evidence rule – 2008 c 90:** "In Washington, the legislature and the courts share the responsibility for enacting rules of evidence. The court's authority for enacting rules of evidence arises from a statutory delegation of that responsibility to the court and from Article IV, section 1 of the state Constitution. *State v. Fields*, 85 Wn.2d 126, 129, 530 P.2d 284 (1975).

The legislature's authority for enacting rules of evidence arises from the Washington supreme court's prior classification of such rules as substantive law. See *State v. Sears*, 4 Wn.2d 200, 215, 103 P.2d 337 (1940) (the legislature has the power to enact laws which create rules of evidence); *State v. Pavelich*, 153 Wash. 379, 279 P. 1102 (1929) ("rules of evidence are substantive law").

The legislature adopts this exception to Evidence Rule 404(b) to ensure that juries receive the necessary evidence to reach a just and fair verdict." [2008 c 90 § 1.]

**Application – 2008 c 90 § 2:** "Section 2 of this act applies to any case that is tried on or after its adoption." [2008 c 90 § 3.]

**Reviser's note:** Section 2, chapter 90, Laws of 2008 was approved by the legislature on March 20, 2008, with an effective date of June 12, 2008.

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 66214-7-I
	)	
FRANK BORDERS,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

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

THAT ON THE 22<sup>ND</sup> DAY OF APRIL, 2011, 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] FRANK BORDERS  
DOC NO. 254642  
WASHINGTON STATE PENITENTIARY  
1313 N. 13<sup>TH</sup> AVENUE  
WALLA WALLA, WA 99362

**SIGNED** IN SEATTLE WASHINGTON, THIS 22<sup>ND</sup> DAY OF APRIL, 2011.

x. *Patrick Mayovsky*