

No. 45048-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

David Haviland,

Appellant.

Lewis County Superior Court Cause No. 12-1-00770-0

The Honorable Judge James Lawler

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The statute criminalizing second-degree rape of a child is unconstitutional because it was enacted in violation of Wash. Const. art. II, § 19.
2. The 1990 bill reenacting and amending RCW 9A.44.076 violated the single-subject rule.
3. The 1990 bill reenacting and amending RCW 9A.44.076 violated the subject-in-title rule.
4. The 1990 amendment elevating second-degree rape of a child to a class A felony is void.
5. Mr. Haviland was convicted under an unconstitutional statute.

ISSUE 1: Washington's constitution requires that bills enacted into law embrace a single subject. The 1990 bill reenacting and amending RCW 9A.44.076 (second-degree child rape) embraced more than one subject. Was Mr. Haviland convicted under a statute that was enacted in violation of Wash. Const. art. II, § 19?

ISSUE 2: Art. II, § 19 requires that the subject of a bill be expressed in its title. The bill reenacting and amending RCW 9A.44.076 (second-degree child rape) was captioned "AN ACT Relating to Criminal Offenders," but addressed non-criminal topics ranging from juvenile justice to civil commitment. Was the criminal attempt statute enacted as part of a bill that violated the subject-in-title rule because the title contained no reference to many of the different subjects contained in the bill?

6. Mr. Haviland's convictions were based in part on propensity evidence, in violation of his Fourteenth Amendment right to due process.
7. The trial court erred by admitting evidence of prior misconduct.
8. The trial court should have excluded evidence of uncharged misconduct, introduced by the state to show Mr. Haviland's propensity to commit sexual offenses.

9. The trial court misinterpreted ER 404(b).
10. The trial court failed to properly apply the four-step procedure required for admission of prior bad acts evidence under ER 404(b).
11. The trial court erred by adopting Finding of Fact No. 1.3 in its Findings of Fact and Conclusions of Law Regarding Admissibility of Certain Evidence.
12. The trial court erred by adopting Finding of Fact No. 1.4 in its Findings of Fact and Conclusions of Law Regarding Admissibility of Certain Evidence.
13. The trial court erred by adopting Finding of Fact No. 1.5 in its Findings of Fact and Conclusions of Law Regarding Admissibility of Certain Evidence.
14. The trial court erred by adopting Finding of Fact No. 1.6 in its Findings of Fact and Conclusions of Law Regarding Admissibility of Certain Evidence.
15. The trial court erred by adopting Finding of Fact No. 1.7 in its Findings of Fact and Conclusions of Law Regarding Admissibility of Certain Evidence.
16. The trial court erred by adopting Finding of Fact No. 1.8 in its Findings of Fact and Conclusions of Law Regarding Admissibility of Certain Evidence.
17. The trial court erred by adopting Conclusion of Law No. 2.3 in its Findings of Fact and Conclusions of Law Regarding Admissibility of Certain Evidence.
18. The trial court erred by adopting Conclusion of Law No. 2.4 in its Findings of Fact and Conclusions of Law Regarding Admissibility of Certain Evidence.
19. The trial court erred by adopting Conclusion of Law No. 2.5 in its Findings of Fact and Conclusions of Law Regarding Admissibility of Certain Evidence.

20. The trial court erred by adopting Conclusion of Law No. 2.6 in its Findings of Fact and Conclusions of Law Regarding Admissibility of Certain Evidence.
21. The trial court erred by adopting Conclusion of Law No. 2.7 in its Findings of Fact and Conclusions of Law Regarding Admissibility of Certain Evidence.

ISSUE 3: A criminal conviction may not be based on propensity evidence. In this case, the court found evidence that Mr. Haviland had masturbated in front of S.B. persuasive in establishing that he had raped his daughter. Did Mr. Haviland's conviction violate his Fourteenth Amendment right to due process because it was based in part on propensity evidence?

ISSUE 4: ER 403 and ER 404(b) prohibit introduction of evidence of uncharged misconduct, except in limited circumstances. Here, the court allowed the state to introduce evidence that Mr. Haviland had masturbated in front of S.B. Did the trial court err by admitting and considering evidence of prior misconduct?

22. Mr. Haviland's conviction was entered in violation of the state constitutional requirement that facts in a felony trial be determined by a jury.
23. The trial court erred by accepting Mr. Haviland's jury waiver without an affirmative showing that he understood all of his rights under Wash. Const. art. I, § 21 and § 22.

ISSUE 5: Under the state constitution, the parties to a felony prosecution may not infringe a jury's right to hear and decide factual issues. The conviction in this case was entered without a jury determination of the facts. Was the conviction entered in violation of the state constitution's requirement that felony cases be heard by a jury?

ISSUE 6: An accused person's state constitutional right to a jury trial is broader and more highly valued than the corresponding federal right. Here, the record does not affirmatively demonstrate that Mr. Haviland understood his right to a fair and impartial jury, his right to participate in the

selection of jurors, his right to a venire drawn from Lewis County, and his right to have the jury instructed on the presumption of innocence. In the absence of an affirmative showing that Mr. Haviland fully understood his state constitutional right to a jury trial, was his jury waiver inadequate under Wash. Const. art. I, § 21 and § 22?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

David Haviland is R.H.'s father and Billie Jo Haviland's husband. RP (5/6/13) 13; RP (5/6/13) 82. R.H. is sixteen years old. RP (5/6/13) 11. In spring of 2012, R.H. and Ms. Haviland accused Mr. Haviland of strangling and raping Ms. Haviland. RP (5/6/13) 55, 58-60, 106. Later, mother and daughter admitted that they had lied to the police and that Mr. Haviland had never strangled or raped Ms. Haviland. RP (5/6/13) 56, 106-08.

In late fall, Mr. Haviland withdrew \$40,925 from his retirement account to catch up on bills and mortgage payments. RP (5/6/13) 118; Ex. 9, p. 6. Two days later, Ms. Haviland and R.H. contacted the police and accused Mr. Haviland of raping R.H. RP (5/8/13) 259. At the request of an officer, Ms. Haviland lied and told Mr. Haviland that her car had broken down. RP (5/8/13) 259-60. The police arrested Mr. Haviland when he showed up to help her. RP (5/8/13) 259-60.

Several days after Mr. Haviland was arrested, Ms. Haviland forged his signature on the \$40,925 check and tried to cash it. RP (5/6/13) 121, RP (5/7/13) 193-94; Ex. 9, p. 5. She learned that she could not get that much cash at once and instead deposited the check and withdrew \$5,000.

RP (5/7/13) 194; Ex. 9, p. 7. The next day, she withdrew \$5,000 more in cash and got a cashier's check for \$20,873. RP (5/7/13) 195; Ex. 9, p. 8.

The state charged Mr. Haviland with two counts of second-degree child rape and two counts of third-degree child rape based on R.H. and Ms. Haviland's allegations. CP 4-8. Mr. Haviland decided to try the case before the court and signed a form to waive his right to a jury trial. Waiver of Jury Trial, Supp. CP. The court engaged him in a brief colloquy before accepting the waiver. RP (5/3/13) 25-27.

At trial, the state sought to introduce evidence from S.B., R.H.'s friend. RP (5/3/13) 6-11. S.B. said that she was present outside the shop where R.H. claimed that Mr. Haviland first raped her. RP (5/6/13) 72-73. S.B. said that, either before or after R.H. was in the shop, Mr. Haviland called S.B. in and masturbated in front of her. RP (5/6/13) 74-75. S.B. did not claim to have witnessed any sexual misconduct toward R.H. RP (5/6/13) 68-81. S.B. said that R.H. appeared normal when she came out of the shop. RP (5/6/13) 78. R.H. told S.B. that nothing had happened. RP (5/6/13) 78.

Mr. Haviland objected to S.B.'s testimony under ER 404(b). RP (5/3/13) 12-13. The court ruled that ER 404(b) did not apply because the state was not seeking to introduce evidence of a prior bad act. CP 2-3. The trial judge also admitted the evidence under ER 404(b) to show a

“common scheme or plan” and *res gestae*. CP 3. The judge found that the prejudicial effect of S.B.’s testimony was outweighed by its probative value. CP 3.

The court relied on S.B.’s testimony in finding Mr. Haviland guilty of the offenses against R.H. CP 27-28; RP 301, 304. In his oral ruling, the judge said that it found S.B.’s corroboration persuasive. RP 301. In the written findings, the court indicated that “the testimony of S.B. corroborates the allegations made by R.H. that she was raped by [Mr. Haviland.]” CP 28.

The judge convicted and sentenced Mr. Haviland on all four counts. CP 10-13. This timely appeal follows. CP 30.

ARGUMENT

I. MR. HAVILAND WAS CONVICTED UNDER A STATUTE ENACTED IN VIOLATION OF WASH. CONST. ART. II, § 19.

A. Standard of Review

Appellate courts review constitutional violations *de novo*. *State v. Lynch*, 87882-0, 2013 WL 5310164, --- Wn.2d --- (2013). A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009).

Courts presume that statutes are constitutional; the party challenging a statute’s constitutionality “bears the heavy burden of establishing its unconstitutionality beyond a reasonable doubt.” *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 205, 11 P.3d 762 (2000) *opinion corrected*, 27 P.3d 608 (2001). An appellant meets this standard when “argument and research show that there is no reasonable doubt that the statute violates the constitution.” *Id.*

B. The Washington Constitution requires that all bills embrace a single subject, which must be expressed in the bill’s title.

Under Wash. Const. art. II, § 19, “No bill shall embrace more than one subject, and that shall be expressed in the title.” The framers included this provision (a) to prevent “logrolling” (where a law is pushed through by attaching it to other legislation), and (b) “to notify members of the Legislature and the public of the subject matter of the measure.” *Amalgamated Transit Union*, 142 Wn.2d at 207.

1. The single-subject rule.

The legislature must “be given the opportunity to consider legislative subjects in separate bills, so that each subject may stand or fall upon its own merits or demerits.” *Washington Toll Bridge Auth. v. State*, 49 Wn.2d 520, 525, 304 P.2d 676 (1956). The relevant inquiry looks to whether “the body of the act contain[s] more than one general subject...”

Id., at 523. Part of the analysis turns on whether each subject is necessary to implement the others. *Amalgamated Transit Union*, 142 Wn.2d at 217. A statute passed in violation of the single subject rule is unconstitutional and void. *Id.* at 216; *Toll Bridge*, 49 Wn2d at 525.

For example, in *Toll Bridge*, the Supreme Court invalidated an act because it embraced two subjects: “(1) To provide legislation, permanent in character, empowering a state agency to establish and operate all toll roads, and (2) to provide for the construction of a specific toll road linking Tacoma, Seattle, and Everett.” *Toll Bridge*, 49 Wn.2d at 523. Similarly, in *Amalgamated Transit Union*, the court found that I-695 embraced two different purposes: “to specifically set license tab fees at \$30 and to provide a continuing method of approving all future tax increases.” *Amalgamated Transit Union*, 142 Wn.2d at 217.

2. Subject-in-title rule.

For purposes of the subject-in-title rule, courts consider only the substantive language describing the bill. A title’s “mere reference to a section... does not state a subject.” *Patrice v. Murphy*, 136 Wn.2d 845, 853, 966 P.2d 1271 (1998) (internal quotation marks and citations omitted). Numerical reference following words such as “amending,” “adding new sections to,” or “repealing” does not change the analysis.

Id.; see also *Fray v. Spokane Cnty.*, 134 Wn.2d 637, 651-555, 952 P.2d

601 (1998). Bare numeric references do not give adequate notice:

To say that mere reference to a numbered section embodies the idea of a theme, proposition, or discourse ... is not sustained by the ordinary understanding of those terms.

State v. Superior Court of King Cnty., 28 Wash. 317, 325, 68 P. 957

(1902).

The title of a bill may be general or restrictive. *Amalgamated Transit Union*, 142 Wn.2d at 207-208. A statute enacted under a general title is invalid unless there is “rational unity between the general subject and the incidental subjects.” *Id.* at 209. Examples of general titles include “An Act relating to violence prevention,” “An Act relating to tort actions.” *Id.* at 208 (providing examples).

C. The statute criminalizing rape of a child in the second degree was enacted in violation of the single-subject rule and the subject-in-title rule.

RCW 9A.44.076 criminalizes rape of a child in the second degree. The legislature amended the statute to its current version in 1990. Laws of 1990, ch. 3, § 903. The title of the bill begins “AN ACT Relating to criminal offenders...”¹ *Id.* The 1990 bill was enacted in violation of art. II, §19.²

¹ The entire title of the bill reads: “AN ACT Relating to criminal offenders; amending RCW 13.40.205, 10.77.163, 10.77.165, 10.77.210, 71.05.325, 71.05.390,

1. The bill violates the single-subject rule.

The 1990 bill addresses more than one subject. In addition to reenacting and amending the second-degree rape of a child statute, the bill covers a variety of other general topics. First, the bill amends certain sections of the Juvenile Justice Act, including those related to release of information and sentencing. Laws of 1990, ch. 3, §§ 102, 301.

Second, the bill adds sections to statutes that govern civil detention. Laws of 1990, ch. 3, § 109, 120. The new sections relate to release of information and notice of release from custody. *Id.*

Third, the bill amends several statutes relating to compensation for crime victims. Laws of 1990, ch. 3, § 501-04.

71.05.420, 71.05.440, 71.05.670, 9.94A.155, 13.50.050, 9.95.140, 10.97.030, 10.97.050, 70.48.100, 43.43.765, 9.92.151, 9.94A.150, 70.48.210, 13.40.020, 13.40.160, 13.40.110, 13.40.210, 43.43.745, 7.68.060, 7.68.070, 7.68.080, 7.68.085, 9.94A.390, 13.40.150, 9.94A.350, 9.94A.120, 9.94A.360, 9.95.009, 9A.44.050, 9A.44.083, 9A.44.076, and 9A.88.010; reenacting and amending RCW 9.94A.030, 9.94A.310, 9.94A.320, 9.94A.400, 18.130.040, 43.43.830, 43.43.832, 43.43.834, and 43.43.838; adding a new section to chapter 4.24 RCW; adding new sections to chapter 9.94A RCW; adding a new section to chapter 9.95 RCW; adding a new section to chapter 74.13 RCW; adding new sections to chapter 9A.44 RCW; adding a new section to chapter 10.01 RCW; adding new sections to chapter 10.77 RCW; adding new sections to chapter 13.40 RCW; adding a new section to chapter 43.43 RCW; adding a new section to chapter 46.20 RCW; adding a new section to chapter 70.48 RCW; adding new sections to chapter 71.05 RCW; adding a new section to chapter 71.06 RCW; adding new sections to chapter 72.09 RCW; adding a new chapter to Title 18 RCW; adding a new chapter to Title 71 RCW; adding a new section to chapter 43.06 RCW; adding a new chapter to Title 43 RCW; adding a new section to chapter 26.44 RCW; creating new sections; prescribing penalties; providing effective dates; and declaring an emergency.” Laws of 1990, ch. 3.

² Mr. Haviland did not raise this issue in the trial court. However, conviction under an unconstitutional statute is a manifest error affecting a constitutional right. His argument may thus be reviewed for the first time on appeal. RAP 2.5(a)(3).

Fourth, the bill adds a new chapter to RCW Title 18. These provisions create the statutory scheme for certifying sex offender treatment providers. Laws of 1990, ch. 3, § 801-11. Among other things, the new chapter establishes a sexual offender treatment provider advisory committee and provides tort immunity for its members. Laws of 1990, ch. 3, § 805.

Fifth, the bill adds a new chapter to RCW Title 71. The new chapter creates the statutory scheme for the civil commitment of sexually violent predators. Laws of 1990, ch. 3, §§ 1001-13. The new chapter sets up the complex procedural structure and review process for such commitments. *Id.*

Sixth, the bill amends several statutes relating to background check procedures for certain employees and volunteers. Laws of 1990, ch 3, §§ 1101-04. Some of the amended sections relate to background checks for civil adjudications and disciplinary board findings. *Id.*

Seventh, the bill adds numerous sections to the statutes regarding funding and grant criteria for community organizations providing services to crime victims. Laws of 1990, ch. 3, §§ 1201-10.

Finally, the bill addresses treatment and supervision of parents found to have abused children. Laws of 1990, ch. 3, § 1301.

The act reenacting and amending second-degree rape of a child “contains more than one general subject” in violation of the single-subject rule. *Washington Toll Bridge*, 49 Wn.2d at 525. Accordingly it is void under Wash. Const. art. II, § 19. *Amalgamated Transit Union*, 142 Wn.2d at 216; *Toll Bridge*, 49 Wn.2d at 525. It has not been resuscitated by reenactment or amendment since 1990. *See Morin v. Harrell*, 161 Wn.2d 226, 228, 164 P.3d 495 (2007) (a proper “amendment or reenactment cures the art. II, § 19 defect.”) Accordingly, the law is unconstitutional.

Mr. Haviland was convicted under an unconstitutional statute. His conviction must be vacated and the charge dismissed with prejudice.

Amalgamated Transit Union, 142 Wn.2d at 207.

2. The bill addresses subjects that are not encompassed by its title.

The most recent bill amending the second-degree rape of a child statute was titled “AN ACT Relating to criminal offenders...” Laws of 1990, ch. 3. As noted above, the bill embraced more than one subject. In addition, many of the subjects addressed by the bill do not all fall within its title.

The bill is invalid because there is no “rational unity” between the general subject and the subjects addressed in the bill. *Amalgamated Transit Union*, 142 Wn.2d at 207-208. The title of the bill purports to

address “criminal offenders” but also amends and enacts myriad statutes relating to juvenile offenders,³ civil commitment, treatment providers, employee background checks, funding for community organizations, and help for crime victims. Laws of 1990, ch. 3, §§ 103, 109, 120, 301, 501-04, 801-11, 1001-13, 1101-04.

The enumeration of each RCW section the bill amends does not cure the title’s constitutional deficiency. *Patrice*, 136 Wn.2d at 853. The mere listing of numerical sections does not state a subject of the bill. *Id.*

The second-degree rape of a child statute was amended as part of a bill that violates the subject-in-title rule. Accordingly, it is unconstitutional. *Amalgamated Transit Union*, 142 Wn.2d at 210. Because he was found guilty of violating an unconstitutional statute, Mr. Haviland’s conviction must be vacated and the charge dismissed with prejudice.

³ Juvenile offenders are not “criminal offenders.” Under RCW 13.04.240, “[a]n order of court adjudging a child a juvenile offender... under the provisions of this chapter shall in no case be deemed a conviction of crime.” This provision has been cited by the Supreme Court as one of the reasons juvenile offenders need not be afforded jury trials. *State v. Schaaf*, 109 Wn.2d 1, 8 n. 17, 743 P.2d 240 (1987).

II. THE TRIAL COURT MISINTERPRETED ER 404(B) AND VIOLATED MR. HAVILAND’S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY RELYING PROPENSITY EVIDENCE.⁴

A. Standard of Review.

The interpretation of an evidentiary rule presents a question of law, reviewed *de novo*. *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012). If the trial court interpreted the rule correctly, the appellate court reviews for an abuse of discretion. *Id.*

A trial court abuses its discretion when it makes a decision that is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wn.2d 842, 858, 204 P.3d 217 (2009). The improper admission of evidence requires reversal if there is a reasonable probability that it materially affected the outcome of the case. *State v. Fuller*, 169 Wn. App. 797, 831, 282 P.3d 126 (2012) *review denied*, 176 Wn.2d 1006, 297 P.3d 68 (2013).

When the trial court denies a motion *in limine*, the moving party maintains a standing objection to the challenged evidence, which preserves the issue for appeal. *State v. McDaniel*, 155 Wn. App. 829, 853, 230 P.3d 245 (2010).

⁴ Mr. Haviland did not argue a due process violation in the trial court. The argument may be raised for the first time on review, because Mr. Haviland asserts a manifest error affecting a constitutional right.

B. The court erred by relying on propensity evidence.

The use of propensity evidence to prove a crime may violate due process under the Fourteenth Amendment.⁵ U.S. Const. Amend. XIV; *Garceau v. Woodford*, 275 F.3d 769, 775 (9th Cir. 2001), *reversed on other grounds* at 538 U.S. 202, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003); *see also McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993).⁶ A conviction based in part on propensity evidence is not the result of a fair trial.⁷ *Garceau*, 275 F.3d at 776, 777-778; *see also Old Chief v. United States*, 519 U.S. 172, 182, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997).

In addition to constitutional limitations, the rules of evidence prohibit the introduction of propensity evidence.⁸ Under ER 404(b),

[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in

⁵ The U.S. Supreme Court has expressly reserved ruling on a similar issue. *Estelle v. McGuire*, 502 U.S. 62, 75 n. 5, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

⁶ Washington courts are not bound by decisions of the federal circuit courts. *In re Crace*, 157 Wn. App. 81, 98 n. 7, 236 P.3d 914, 925 (2010) *reversed on other grounds*, 174 Wn.2d 835, 280 P.3d 1102 (2012). However, decisions of the federal courts of appeal can provide guidance to Washington courts as they interpret the Fourteenth Amendment's due process clause.

⁷ A violation of due process that has practical and identifiable consequences is a manifest error affecting the accused person's constitutional right. RAP 2.5(a)(3). It may therefore be raised for the first time on review.

⁸ Evidentiary errors such as a misapplication of ER 403 and ER 404(b) are not themselves constitutional errors. *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986) (Smith I); *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). The Washington Supreme Court has not been asked to decide whether or not a conviction based on propensity evidence violates the accused person's Fourteenth Amendment right to due process. Neither *Smith* nor *Jackson* considered whether a conviction based on propensity evidence violates due process.

conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b) must be read in conjunction with ER 403, which requires that probative value be balanced against the danger of unfair prejudice.⁹ *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

A trial court must begin with the presumption that evidence of prior bad acts is inadmissible. *State v. McCreven*, 170 Wn. App. 444, 458, 284 P.3d 793 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013).

Before admitting misconduct evidence, the court must (1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose for which the evidence is offered, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect. *Fisher*, 165 Wn.2d at 745. The court must conduct this inquiry on the record. *McCreven*, 170 Wn. App. at 458. Doubtful cases are resolved in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); *State v. Wilson*, 144 Wn. App. 166, 176-178, 181 P.3d 887 (2008).

⁹ ER 403 provides that relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

Over Mr. Haviland's objection, the court permitted the state to introduce S.B.'s testimony that Mr. Haviland engaged in sexual misconduct with her on the day of the first alleged offense against R.H. RP (5/6/13) 70-75. The court found that the evidence did not implicate ER 404(b) because it was not a "prior bad act." CP 2. In the alternative, if ER 404(b) did apply, the court found that it was still admissible to show a common scheme or plan and because the misconduct was part of the *res gestae* of the charged offense. CP 3.

1. S.B.'s testimony implicates ER 404(b).

The court erred by finding that ER 404(b) did not apply to S.B.'s testimony. First, the language of the rule does not specify that "other crimes, wrongs, or acts" must take place prior to the alleged offense in order to be improper propensity evidence. ER 404(b). Second, the court's finding that S.B.'s testimony corroborated "sexual misconduct generally" presents the kind of character and propensity inference that ER 404(b) seeks to prohibit. ER 404(b); *McCreven*, 170 Wn. App. at 458.

The court's justification for admitting S.B.'s testimony indicates that the trial judge considered the evidence to prove Mr. Haviland's character. The court's findings indicate that it used the evidence infer that he had acted in conformity with that character regarding the allegations against R.H. CP 27-28. This is the scenario ER 404(b) proscribes.

2. S.B.'s testimony was not admissible to show a common scheme or plan.

Misconduct evidence is admissible to demonstrate a common scheme or plan where (1) "several crimes constitute constituent parts of a plan in which each crime is but a piece of the larger plan" or (2) "an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes." *Gresham*, 173 Wn.2d at 422.

S.B.'s testimony was not admissible under ER 404(b) to show a "common scheme or plan." In *Gresham*, the state introduced evidence of several instances in which the accused took a trip with a young girl, approached her while the other adults were sleeping, and engaged in sexual conduct. *Gresham*, 173 Wn.2d at 422. The court found those instances sufficiently similar to show an "overarching plan." *Id.*

Here, on the other hand, S.B.'s testimony did not establish an "overarching plan." The acts S.B. attributed to Mr. Haviland were completely unlike those R.H. alleged. RP (5/6/13) 15-31, 74-75. The two alleged acts demonstrated neither constituent parts of a larger plan nor separate but similar offenses. *Gresham*, 173 Wn.2d at 422. The court erred by finding that S.B.'s testimony was admissible to establish a common scheme or plan.

3. S.B.'s testimony was not admissible under a "*res gestae*" exception to ER 404(b).

Res gestae or “same transaction” evidence can be admissible to “complete the story of the crime.” *State v. Mutchler*, 53 Wn. App. 898, 901, 771 P.2d 1168 (1989). Such evidence must compose “inseparable parts of the whole deed or criminal scheme.” *Id.* *Res gestae* evidence involving other crimes or bad acts, however, must still meet the requirements of ER 404(b). *Id.* The evidence remains inadmissible to show that the accused has acted in conformity with his/her alleged bad character. *Id.*

S.B.’s testimony was not admissible as *res gestae*. It was not necessary to “complete the story” of the charges relating to R.H. *Id.* S.B. and R.H.’s allegations did not make up “inseparable parts” of a single deed or criminal scheme. S.B.’s testimony did not describe interactions between Mr. Haviland and R.H., who was the alleged victim in the case. Rather, the evidence introduced a completely separate allegation. Additionally, Mr. Haviland’s case was a bench trial, so there was no need to provide context for a jury.

Even if S.B.’s testimony were *res gestae* evidence, it would still be inadmissible under ER 404(b). *Mutchler*, 53 Wn. App. at 901. As argued

above, the evidence was introduced and relied upon for the type of propensity inference the rule prohibits.¹⁰

Finally, S.B.'s testimony was inadmissible under ER 403. The danger of unfair prejudice from S.B.'s testimony far outweighed any probative value. ER 403. The evidence presented a new allegation against Mr. Haviland involving a separate alleged victim. It was not relevant to prove any element of the alleged offenses against R.H. The court relied on the evidence to establish Mr. Haviland's character and to find that he had acted in conformity with that character. CP 27-28; RP 301, 304.

The trial court misinterpreted ER 404(b), abused its discretion, and infringed Mr. Haviland's Fourteenth Amendment right to due process by denying his motion to exclude propensity evidence. The court's decision admitting S.B.'s testimony was based on an erroneous interpretation of the law. The finding that ER 404(b) did not apply was incorrect. Insofar as ER 404(b) did apply, the court abused its discretion by admitting S.B.'s testimony, which was not relevant to show a common scheme or plan or to

¹⁰ This court's recent decision in *State v. Grier* is inapposite. *State v. Grier*, 168 Wn. App. 635, 278 P.3d 225 (2012). The *Grier* court admitted evidence of events leading up to the murder in that case. *Id.* at 647. The evidence in *Grier*, however, did not involve criminal misconduct. *Id.* Additionally, the probative value of the evidence in *Grier* outweighed the prejudice because the testimony also helped the accused argue her theory of self-defense. *Id.*

give the full story of the allegations against R.H. *Gresham*, 173 Wn.2d at 422; *Mutchler*, 53 Wn. App. at 901. The danger of unfair prejudice from the testimony outweighed any probative value. ER 403.

The court violated Mr. Haviland's right to due process and ER 404(b) by relying on propensity evidence in finding him guilty. *Garceau*, 275 F.3d at 776, 777-778. His convictions must be reversed. *Id.* at 778.

III. MR. HAVILAND'S CONVICTION WAS ENTERED IN VIOLATION OF THE STATE CONSTITUTION'S REQUIREMENT THAT FACTUAL ISSUES IN FELONY CASES BE TRIED BY A JURY.

A. Standard of Review.

Constitutional questions are reviewed *de novo*. *McDevitt v. Harbor View Med. Ctr.*, 85367-3, 2013 WL 6022156 (Wash. Nov. 14, 2013).

B. Wash. Const. art. I, § 21 and § 22 provide greater protection than does the Sixth Amendment.

Washington's constitutional jury trial right is broader than the federal right.¹¹ *City of Pasco v. Mace*, 98 Wn.2d 87, 97, 653 P.2d 618 (1982). Six nonexclusive factors govern analysis under the state constitution. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

¹¹ The Sixth Amendment to the U.S. Constitution (applicable to the states through the Fourteenth Amendment) guarantees a criminal defendant the right to a jury trial. U.S. Const. Amends. VI, XIV; *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

Gunwall analysis establishes that factual disputes in felony cases must be tried to a jury. An accused person may not waive this requirement.

C. In Washington, felony cases must be tried by a jury; the jury's right to try the facts in a felony case cannot be waived by a party.

1. In 1889, the framers understood the language of art. I, §§21 and 22 to require courts to submit facts in a felony trial to a jury.

Analysis of a constitutional provision begins and ends with the text. *Ventenbergs v. City of Seattle*, 163 Wn.2d 92, 118, 178 P.3d 960 (2008). This includes an examination of the words themselves, their grammatical relationship with one another, and their context. *State ex rel. Gallwey v. Grimm*, 146 Wn.2d 445, 459-460, 48 P.3d 274 (2002). The constitution must be construed as the framers understood it in 1889. *State v. Norman*, 145 Wn.2d 578, 592, 40 P.3d 1161 (2002).

Art. I, § 21 preserves the right of jury trials “inviolable.” This term “connotes deserving of the highest protection.” *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989). This language

indicates that the right must remain the essential component of our legal system that it has always been. For such a right to remain inviolate, it must not diminish over time and must be protected from all assaults to its essential guarantees.

Id. The strong, simple, direct, and mandatory language (“shall remain inviolate”) suggests that the present-day jury trial right must be identical

to the right as it existed in 1889. As discussed below, it was almost universally believed during that time period that the right could not be waived, and the framers elected not to continue an experiment undertaken by the territorial legislature in the years prior to 1889.

Furthermore, art. I, § 21 expressly grants the legislature authority to allow waivers in civil cases, but not in felony prosecutions. Under the maxim *Expressio unius est exclusio alterius*,¹² this express grant of authority in civil cases suggests an intent to prohibit waivers in criminal cases. *See, e.g., State ex rel. Washington State Convention & Trade Ctr. v. Evans*, 136 Wn.2d 811, 830, 966 P.2d 1252 (1998).

Similarly, art. I, § 22 provides strong protection to the jury system. The specific mention of juries in the context of “criminal prosecutions,” and the mandatory language employed by the provision (“shall have the right... to have a speedy public trial by an impartial jury”) demand that the jury tradition be afforded the highest respect.

Thus, the language of the two provisions weighs in favor of an independent application of the state constitution in this context.

2. The state constitutional requirement that facts be tried to a jury differs from the federal constitutional right to a jury trial.

¹² “The expression of one thing is the exclusion of another.” *Black’s Law Dictionary* (6th ed. 1990).

The second *Gunwall* factor requires analysis of the differences between the texts of parallel provisions of the federal and state constitutions. Art. I, § 21 has no federal counterpart. The Washington Supreme Court in *Mace* found this significant, and held that under the Washington constitution “no offense can be deemed so petty as to warrant denying a jury trial if it constitutes a crime.” *Mace*, 98 Wn.2d at 99-100. This is in contrast to the more limited protections available under the federal constitution. *Mace*, 98 Wn.2d at 99-100.

Thus, differences in the language between the state and federal constitutions favor an independent application of the state constitution. Even though waiver of the federal right may be found in appropriate cases, the Washington constitution prohibits jury waiver in felony prosecutions.

3. State constitutional and common law history demonstrate that drafters of the Washington constitution intended to require jury trials for all felony prosecutions.

Under the third *Gunwall* factor, this court must look to state constitutional and common law history. art. I, § 21, Washington “preserves the right as it existed at common law in the territory at the time of its adoption.” *Mace*, 98 Wn.2d at 96. *See also Schaaf*, 109 Wn.2d 1; *State v. Smith*, 150 Wn.2d 135, 151, 75 P.3d 934 (2003) (Smith II).

Although “little is known about what the drafters of art. I, § 22 intended in 1889,” the explicit enumeration of certain rights suggests “that

the drafters of this provision believed that these rights are of great importance.” *State v. Martin*, 171 Wn.2d 521, 531, 252 P.3d 872 (2011).

In 1889, when the state constitution was adopted, there was a nearly universal understanding, throughout the states and territories, that the right to a jury trial in felony cases could not be waived. *See e.g., State v. Lockwood*, 43 Wis. 403, 405 (1877) (“The right of trial by jury, upon information or indictment for crime, is secured by the constitution, upon a principle of public policy, and cannot be waived”); *State v. Larrigan*, 66 Iowa 426 (1885); *Cordway v. State*, 25 Tex. Ct. App. 405, 417 (1888) (A defendant “may waive any... right except that of trial by jury in a felony case”); *United States v. Taylor*, 11 F. 470, 471 (C.C.Kan. 1882) (Taylor I) (“This is a right which cannot be waived, and it has been frequently held that the trial of a criminal case before the court by the prisoner’s consent is erroneous”); *United States v. Smith*, 17 F. 510, 512 (C.C.Mass. 1883) (Smith III) (“The district judges in this district have thought that it goes even beyond the powers of congress in permitting the accused to waive a trial by jury, and have never consented to try the facts by the court...”)

This tradition was rooted in the common law:

There can be no question that, at common law, the only recognized tribunal for the trial of the guilt of the accused under an indictment for felony and a plea of not guilty, was a jury of twelve men. 4

Black. Com. 349; 1 Chitty's Crim. Law, 505; 2 Hale's Pleas of the Crown, 161; Bacon's Abridg. tit. Juries, A.; 2 Bennett & Heard's Lead. Cas. 327... The trial of an indictment for a felony by a judge without a jury was a proceeding wholly unknown to the common law. The fundamental principle of the system in its relation to such trials was, that all questions of fact should be determined by the jury, questions of law only being reserved for the court... A jury of twelve men being the only legally constituted tribunal for the trial of an indictment for a felony, it necessarily follows that the court or judge is not such tribunal, and that in the absence of a jury, he has by law no jurisdiction. There is no law which authorizes him to sit as a substitute for a jury and perform their functions in such cases, and if he attempts to do so, his act must be regarded as nugatory.

Harris v. People, 128 Ill. 585, 590-591 (Ill. 1889), *overruled in part by People ex rel. Swanson v. Fisher*, 340 Ill. 250 (1930).

The constitutional prohibition against waiver of the jury right was thought to be based in "the soundest conception of public policy." *State v. Carman*, 63 Iowa 130, 131 (1884). According to the Iowa Supreme Court:

Life and liberty are too sacred to be placed at the disposal of any one man, and always will be, so long as man is fallible. The innocent person, unduly influenced by his consciousness of innocence, and placing undue confidence in his evidence, would, when charged with crime, be the one most easily induced to waive his safe guards.

Carman, 63 Iowa at 131.

The prohibition against jury waivers was also viewed as a natural limitation on an accused person's power to shape the proceedings. For example, in *Territory v. Ah Wah*, 4 Mont. 149, 168-173 (1881), the

Montana Supreme Court considered the question of whether or not a defendant could waive a twelve-person jury:

By the consent of the court, prosecution and defendant, a criminal trial ought not to be converted into a mere arbitration... “[T]he prisoner’s consent cannot change the law. His right to be tried by a jury of twelve men is not a mere privilege; it is a positive requirement of the law...”

“...It is the duty of courts to see that the constitutional rights of a defendant in a criminal case shall not be violated, however negligent he may be in raising the objection. It is in such cases, emphatically, that consent should not be allowed to give jurisdiction.”

Ah Wah, 4 Mont. at 168-173 (citations omitted).

As these authorities show, judges throughout the nation believed that a felony charge could only be tried to a jury. Despite this prevailing view, the Washington territorial legislature enacted a statute in 1854 allowing “[t]he defendant and prosecuting attorney with the assent of the court [to] submit the trial to the court, except in capital cases.” Laws of Washington Territory, Chapter 23, Section 249 (1854-1862). However, this experiment did not survive the passage of the constitution.^{13, 14} The framers would have been aware of both the prevailing view (described

¹³ Instead, as noted above, they adopted language permitting the legislature to allow waiver only in civil cases.

¹⁴ The 1854 statute was implicitly repealed by the adoption of Wash. Const. art. I, § 21, because it was the statute was repugnant to that provision of the constitution: “All laws now in force in the Territory of Washington, which are not repugnant to this Constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature...” Wash. Const. art. XXVII, § 2.

above) and the territorial legislature's experiment. Because the framers did not explicitly permit the legislature to provide for waivers in felony cases, such permission cannot be read into the constitution.

The state constitutional and common law history shows that jury waivers are prohibited in felony cases. *Gunwall* factor three favors the interpretation of art. I, § 21 urged by Mr. Haviland.

4. Although pre-existing state statutes permit jury waivers in felony cases, the constitutionality of such laws has yet to be properly analyzed.

The fourth *Gunwall* factor “directs examination of preexisting state law, which ‘may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims.’” *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 809, 83 P.3d 419 (2004) (quoting *Gunwall*, 106 Wn.2d at 62).

As noted previously, the territorial legislature provided for jury waivers in noncapital criminal cases. Laws of Washington Territory, Chapter 23, Section 249 (1854-1862). This law did not survive adoption of the constitution. Wash. Const. art. XXVII, § 2. A similar statute (RCW 10.01.060) is in effect today, and is echoed in CrR 6.1. However, the constitutionality of these enactments has never been properly analyzed under Wash. Const. art. I, §§ 21 and 22.

Instead, Washington courts have come to accept jury waivers in felony cases on the basis of *dicta*, and on authority relating to the federal jury right. Furthermore, the cases examining the issue all predate *Gunwall*, and thus are no longer binding precedent. *See, e.g., State v. Brown*, 132 Wn.2d 529, 595 n. 169, 940 P.2d 546 (1997).

The first case addressing the issue in *dicta* was *State v. Ellis*, 22 Wash. 129, 132, 60 P. 136 (1900), *overruled in part by State v. Lane*, 40 Wn.2d 734, 246 P.2d 474 (1952). Although the opinion reversed a guilty verdict reached by fewer than 12 jurors, the court evidently believed the jury trial right could be waived:

It would seem to the writer of this opinion that the first clause of the section, viz., “that the right of trial by jury shall remain inviolate,” was simply intended as a limitation of the right of the legislature to take away the right of trial by jury, and that it did not intend to interfere with the right of the individual to waive such privilege.¹⁵

Ellis, 22 Wash. at 131, 134. From this brief *dicta*, the Washington Supreme Court eventually found constitutional authority for the legislature to authorize waiver of the jury trial right even in felony cases.

¹⁵ The Supreme Court expressly reserved its opinion on the effect of the second clause of art. I, § 21: “What construction might be placed upon the further provisions of the same section as indicating the intention of the members of the constitutional convention is not necessary to determine here, for the trouble with the case at bar is that the legislature has not attempted to provide any method by which the guilt or innocence of a defendant can be determined other than by a jury; and it must be conceded that, when the constitution speaks of a right of trial by jury, it refers to a common law jury of twelve men.” *Ellis*, 22 Wash. at 131-132.

First, however, the court in *State v. Karsunky*, 197 Wash. 87, 84 P.2d 390 (1938) held that waivers of the jury trial right were statutorily prohibited in felony cases. In *State v. McCaw*, 198 Wash. 345, 88 P.2d 444 (1939), the court held that this statutory prohibition also extended to misdemeanors.

In *Brandon v. Webb*, 23 Wn.2d 155, 160 P.2d 529 (1945), the court held that a defendant could waive the right to a jury trial by pleading guilty:

The purpose of [art. I, § 21] was to preserve to the accused the right to a trial by jury as it had theretofore existed; it was not the purpose of the fundamental enactment to render the intervention of a jury mandatory, in the face of the accused person's voluntary plea of guilty to the charge, where no issue of fact was left for submission to, or determination by, the jury.

Webb, 23 Wn.2d at 159.

In *Lane*, the court denied an appeal based on invited error, where the defendant had requested the trial court to allow an eleven person jury to reach a verdict. The court also suggested in *dicta* (which relied upon the above-quoted *dicta* in *Ellis*, as well as a U.S. Supreme Court decision analyzing the federal jury right) that a waiver of the right to a jury trial would be permitted under the state constitution. *Lane*, 40 Wn.2d at 739.

Finally, in 1966, relying on *Lane*, 40 Wn.2d at 739, the Supreme Court upheld a defendant's waiver of his right to a jury trial (based on a

1951 statute authorizing such waivers). *State v. Forza*, 70 Wn.2d 69, 70-71, 422 P.2d 475 (1966).

As these cases show, the current practice of allowing waivers in felony prosecutions rests on *dicta* and on cases allowing waiver of the federal right, rather than on sound analysis of the state constitution under *Gunwall*. Because it was decided “without benefit of *Gunwall* scrutiny,” *Forza* “lack[s] the precedential force which follows from this more thorough review.” *State v. Rivers*, 129 Wn.2d 697, 723, 921 P.2d 495 (1996) (Sanders, J., dissenting). Because of this, *Forza* and the preceding cases do not control the issue. *Brown*, 132 Wn.2d at 595 n. 169. Thus, even though the fourth *Gunwall* factor does not support Mr. Haviland’s position, this factor alone should not be dispositive.

5. Structural difference between the Sixth Amendment and the state constitution require an independent application of art. I, §§ 21 and 22.

The fifth *Gunwall* factor “will always point toward pursuing an independent state constitutional analysis because the federal constitution is a grant of power from the states, while the state constitution represents a limitation of the State’s power.” *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994). As in all contexts, this factor favors independent application of the state constitution. *Id.*

6. The jury trial requirement in felony cases is a matter of particular state interest or local concern.

The sixth *Gunwall* factor deals with whether the issue is a matter of particular state interest or local concern. The ability of an accused person prosecuted in state court to effectuate a waiver of rights guaranteed by the state constitution is purely a matter of state concern. *See Smith II*, 150 Wn.2d at 152. *Gunwall* factor number six thus also points to an independent application of the state constitutional provision in this case.

7. Conclusion: *Gunwall* analysis establishes that the parties may not dispense with the jury in a felony case.

Five of the six *Gunwall* factors indicate that the parties to a felony prosecution may not dispense with jury trials when there are issues of fact to be decided. Factor four (preexisting state law that is not of constitutional dimension) does not support Mr. Haviland's position; however, it should not be permitted to influence the outcome because the preexisting state law is not controlling and rests on unsound footing.

The waiver in this case violates art. I, § 21 and § 22. In the absence of a jury determination of the disputed facts, the court's guilty finding is a nullity. Accordingly, Mr. Haviland's conviction must be reversed and the case remanded to the trial court for a jury trial.

D. *Forza* does not control the outcome of this issue.

Although *Forza* was decided by the Supreme Court, it does not control Mr. Haviland's case for two reasons.

First, as noted above, the *Forza* court lacked the benefit of *Gunwall*'s analytical framework.¹⁶ Cases addressing the state constitution without benefit of *Gunwall* were implicitly overruled by *Gunwall*. *Brown*, 132 Wn.2d 529. In *Brown*, the Supreme Court addressed a capital defendant's argument that "death qualifying" a jury violates art. I, § 22. *Brown*, 132 Wn.2d at 593-600. Although the same issue had previously been decided prior to *Gunwall*, the court did not consider the pre-*Gunwall* holding to have continuing viability in the post-*Gunwall* era:

Hughes did not analyze the six factors in *State v. Gunwall* to conclude that death qualification is allowed under the Washington Constitution. Thus, in determining whether death qualification violates the Washington Constitution, *Hughes* and the cases following *do not control at this point*.

Brown, 132 Wn.2d at 595 n. 169 (emphasis added) (additional citations omitted).

¹⁶ This court recently held that *Gunwall* analysis is not applicable to whether the state right to a jury trial can be waived in felony cases because "*Gunwall* determines the scope, not the waiver, of a constitutional right." *State v. Benitez*, 175 Wn. App. 116, 126, 302 P.3d 877 (2013). The *Benitez* decision makes an artificial distinction between "scope" and "waiver." The state constitutional prohibition against waiver defines the scope of art. I, §§ 21 and 22. The state constitution *requires* a jury trial in felony cases; it does not provide a jury as an optional privilege. Moreover, as argued elsewhere in this brief, the Supreme Court and Divisions I and III have found that *Gunwall* does apply to waiver of a state constitutional right.

Similarly, the *Forza* decision failed to take into account matters that are essential to understanding of a state constitutional provision, and thus its result stems from a flawed understanding of art. I, § 21. It, and any subsequent cases, “do not control at this point.” *Id.*

Second, the *Forza* court considered only the issue of waiver under art. I, § 21. *See Forza*, 70 Wn.2d at 70 (“Appellant’s sole assignment of error is that RCW 10.01.060, providing for waiver of a jury trial by an accused in non-capital cases, is unconstitutional because it contravenes art. 1, § 21 of the Washington State Constitution.”) (footnotes omitted). The *Forza* court did not examine waivers under art. I, § 22, and did not consider whether the two provisions together protected the longstanding tradition of requiring parties to submit any issues of fact to a jury, when the accused person was charged with a felony.

Mr. Haviland, by contrast, brings his argument under both constitutional provisions, and makes the arguments that were not addressed in *Forza*. Accordingly, *Forza* does not control the outcome of Mr. Haviland’s case. Under the state constitution, his waiver was ineffective. The conviction is invalid, because it was achieved without involvement of a jury.

- E. Even if the jury may be dispensed with in a felony case, Mr. Haviland did not properly waive his right to a jury trial.
1. Where the state constitution provides broader protection than its federal counterpart, waiver of the state right requires greater safeguards.

Courts indulge every reasonable presumption against waiver of fundamental rights. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Waiver of a constitutional right must clearly consist of “an intentional relinquishment or abandonment of a known right or privilege.” *Zerbst*, 304 U.S. at 464. The “heavy burden” of proving a valid waiver of constitutional rights rests with the government. *Matter of James*, 96 Wn.2d 847, 851, 640 P.2d 18 (1982). A valid waiver is one that is “voluntary, knowing, and intelligent.” *State v. Hos*, 154 Wn. App. 238, 250, 225 P.3d 389 (2010).

As noted in the preceding sections, the right to a jury trial under the state constitution is broader than the corresponding federal right. *See, e.g., Mace*, 98 Wn.2d at 99-100. The state constitutional right to a jury trial “is a valuable right, jealously guarded by the courts.” *Watkins v. Siler Logging Co.*, 9 Wn.2d 703, 710, 116 P.2d 315 (1941). Any waiver under the state constitution “should be narrowly construed in favor of preserving the right.” *Wilson v. Horsley*, 137 Wn.2d 500, 509, 974 P.2d 316 (1999).

Because the state constitutional right to a jury trial is broad and highly valued, a waiver of the state constitutional right must be examined carefully.¹⁷ In order to meet its heavy burden of proving an intentional relinquishment or abandonment of a known right or privilege, the state must show that any waiver was executed with a thorough understanding of the right. If the accused person lacked a thorough understanding of the right, the waiver cannot be “voluntary, knowing, and intelligent.” *Hos*, 154 Wn. App. at 250.

Accordingly, in order to sustain a waiver, a reviewing court must find in the record affirmative proof that the defendant fully understood the right under the state constitution—including the right to a local jury (from the county where the offense occurred), the right to participate in selecting jurors, the right to a jury of twelve, the right to a fair and impartial jury, the right to be presumed innocent by the jury unless proven guilty by proof beyond a reasonable doubt, and the right to a unanimous verdict.¹⁸

¹⁷ Waiver of the federal jury trial right must be made knowingly, intelligently and voluntarily; the waiver must either be in writing, or done orally on the record. *State v. Treat*, 109 Wn. App. 419, 427-428, 35 P.3d 1192 (2001). The federal constitutional right to a jury trial is one of the most fundamental of constitutional rights, one which an attorney “cannot waive without the fully informed and publicly acknowledged consent of the client...” *Taylor v. Illinois*, 484 U.S. 400, 418 n. 24, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988) (Taylor II). In the absence of a valid waiver of the federal right, a criminal defendant’s conviction following a bench trial must be reversed. *Treat*, 109 Wn. App. 419.

¹⁸ The requirement of a record establishing a knowing, intelligent, and voluntary waiver is illustrated in other circumstances. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) (waiver of the right to remain silent and the right to counsel in the context of custodial interrogation; *Faretta v. California*, 422 U.S. 806, 95

Here, the record does not affirmatively establish that Mr. Haviland waived his state constitutional right to a jury trial with a full understanding of the right. His written waiver does not establish that he understood he was entitled to a fair and impartial jury, that he could participate in the selection of jurors, that the venire would be drawn from within the county, and that the jury would be instructed on the presumption of innocence.¹⁹

S.Ct. 2525, 45 L.Ed.2d 562 (1975) (waiver of the right to counsel at trial); *State v. Robinson*, 172 Wn.2d 783, 263 P.3d 1233 (2011) (waiver of trial rights attendant upon a plea of guilty).

¹⁹ Although an accused person does not give up the right to a fair and impartial fact-finder or the right to the presumption of innocence by waiving jury, the decision to proceed with a bench trial can only be described as fully informed if the person knows these rights attach to a jury trial. Otherwise, a defendant contemplating his options might believe he will face outraged community members who have already decided his guilt, and might prefer a bench trial because of a mistaken belief that jurors, unlike judges, are permitted to approach a case with all their biases intact.

The average criminal defendant most likely believes that trial will proceed on the appointed day, even if the entire venire is prejudiced. Under such circumstances, the advantage of proceeding with a judicial officer—a professional adjudicator sworn to uphold the law—would seem overwhelming. Thus, even though the right to an impartial jury and the right to the presumption of innocence remain intact when a person waives jury, such a waiver cannot be knowing, intelligent, and voluntary if the person erroneously believes the process will lack integrity unless the waiver is entered.

Division II has reached the opposite conclusion on this point. See *State v. Pierce*, 134 Wn. App. 763, 772-773, 142 P.3d 610 (2006) (“Pierce never waived his right to be presumed innocent until proven guilty beyond a reasonable doubt or his right to an impartial trier of fact because these rights are inherent in all trials... The only right unique to jury trials that the court did not specifically explain to Pierce was his right to participate in juror selection.”) This reasoning should be reconsidered. A person who does not understand that jurors—like judges— (1) must be impartial, (2) must presume the defendant innocent, and (3) must not convict except upon proof beyond a reasonable doubt, cannot appropriately value the right to a jury trial. A waiver premised on ignorance of what the right encompasses cannot be knowing, intelligent, and voluntary. A person who waives jury under the mistaken belief that judges must be impartial (as a function of their office) but that jurors need not (because they are average citizens) has lost a valued and cherished right due to a misunderstanding, rather than as a result of a reasoned examination of the costs and benefits.

Waiver of Jury Trial, Supp. CP. His brief colloquy with the judge did not cover these topics either. RP (5/3/13) 25-27.

Understanding of these rights is critical to a knowing, intelligent and voluntary waiver of the state constitutional right to a jury trial. In the absence of an affirmative showing that Mr. Haviland fully understood his state constitutional right to a jury trial, his waiver is invalid and his conviction was entered in violation of Wash. Const. art. I, § 21 and § 22. The case must be remanded to the trial court for a new trial.

2. *Pierce* and *Benitez* should be reconsidered in light of controlling Supreme Court precedent.

Just as *Gunwall* analysis controls the interpretation of a state constitutional right, *Gunwall* also applies to determine the validity of a waiver of a state constitutional right. For example, *Gunwall* applies to determine the validity of a capital defendant's waiver of his state constitutional right to appeal²⁰ and the validity of a waiver of the right to counsel under Const. art. I, § 22.²¹ Courts have relied on a party's failure to adequately brief *Gunwall* in refusing to review a waiver of the state constitutional right to testify,²² have found *Gunwall* analysis of a waiver unnecessary where the state constitutional right has already been

²⁰ *State v. Dodd*, 120 Wn.2d 1, 20-21, 838 P.2d 86 (1992).

²¹ *State v. Medlock*, 86 Wn. App. 89, 98-99, 935 P.2d 693 (1997).

determined to be coextensive with the federal right,²³ and have specifically dispensed with a *Gunwall* analysis prior to examining a waiver by assuming that the state constitution provides greater protection.²⁴

Thus the Supreme Court, Division I, and Division III have all recognized that *Gunwall* applies when determining how a state constitutional right may be waived. *Thomas*, 128 Wn.2d at 562; *Dodd*, 120 Wn.2d at 20-21; *Earls*, 116 Wn.2d at 374-378; *Medlock*, 86 Wn. App. at 98-99; *Russ*, 93 Wn. App. at 245-247.

Despite this, Division II has held that *Gunwall* does not apply to waiver of state constitutional rights:

Gunwall addresses the extent of a right and not how the right in question may be waived.... The issue here is waiver. Although Washington's constitutional right to a jury trial is more expansive than the federal right, it does not automatically follow that additional safeguards are required before a more expansive right may be waived.

Pierce, 134 Wn. App. 770-773 (citations omitted).

This court recently declined to reconsider *Pierce*. *Benitez*, 175 Wn. App. at 127-28. The *Benitez* court found unpersuasive the Supreme Court cases applying *Gunwall* to determine the validity of waiver of a

²² *State v. Thomas*, 128 Wn.2d 553, 562, 910 P.2d 475 (1996).

²³ *State v. Earls*, 116 Wn.2d 364, 374-378, 805 P.2d 211 (1991).

²⁴ *State v. Russ*, 93 Wn. App. 241, 245-47, 969 P.2d 106 (1998).

state constitutional right. The *Benitez* court reasoned that these cases did not specifically address waiver of the right to a jury trial. *Id.* The fact that the Supreme Court has not yet had the opportunity to apply *Gunwall* to the specific issue Mr. Haviland's case presents, however, does not mean that *Gunwall* doesn't apply.

The Supreme Court applies *Gunwall* to determine the validity of waiver of a state right when such a question is presented. *Thomas*, 128 Wn.2d at 562; *Dodd*, 120 Wn.2d at 20-21; *Earls*, 116 Wn.2d at 374-378; *Medlock*, 86 Wn. App. at 98-99; *Russ*, 93 Wn. App. at 245-247. *Pierce* and *Benitez* fail articulate *any* test for determining the requisites of a valid waiver under the state constitution. Rather, those cases simply rely on the test for waiving the federal right. *Pierce* and *Benitez* were wrongly decided.

This court should reconsider *Pierce* and *Benitez*. *Gunwall* provides the appropriate framework for determining what safeguards are required for waiver of a right under the state constitution. *Dodd*, 120 Wn.2d at 20-21. Because *Pierce* fails to outline any test for determining the validity of a state constitutional right, it should be abandoned.

Mr. Haviland did not knowingly and voluntarily waive his state constitutional right to a jury trial. Accordingly, his conviction must be reversed and the case remanded for a new trial.

CONCLUSION

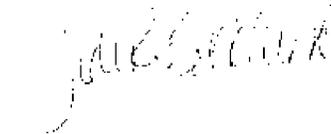
The court denied Mr. Haviland due process by basing its decision in part on propensity evidence. The court erred by finding that the propensity evidence was did not implicate ER 404(b). Insofar as ER 404(b) applies, the court abused its discretion by admitting evidence of a separate allegation against Mr. Haviland.

The state constitutional right to a jury trial cannot be waived in felony cases. In the alternative, Mr. Haviland's jury waiver was not knowing and voluntary.

Mr. Haviland's convictions must be reversed.

Respectfully submitted on November 15, 2013,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

David Haviland, DOC #366171
Washington Corrections Center
PO Box 900
Shelton, WA 98584

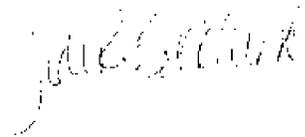
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Lewis County Prosecuting Attorney
appeals@lewiscountywa.gov

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 15, 2013.



Jodi R. Backlund, WSBA No. 22917
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BACKLUND & MISTRY

November 15, 2013 - 1:26 PM

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