IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MICHAEL TYRONE GRESHAM, Petitioner. STATE OF WASHINGTON, Respondent, v. ROGER ALAN SCHERNER, Petitioner.	)	No. 84148-9 (consolidated with No. 84150-1) En Banc Filed January 5, 2012

OWENS, J. -- Roger Scherner and Michael Gresham were separately charged with child molestation. At trial, relying on the recently enacted RCW 10.58.090, the State successfully introduced evidence that Scherner and Gresham had previously

committed sex offenses against other children. In Scherner's case, King County Superior Court ruled that evidence of his prior acts of molestation was also admissible for the purpose of demonstrating a common scheme or plan; in Gresham's case, Snohomish County Superior Court held that evidence of Gresham's prior conviction for second degree assault with sexual motivation was only admissible pursuant to RCW 10.58.090. We hold that the trial court in Scherner's case did not abuse its discretion in admitting the evidence for the purpose of showing a common scheme or plan and that its failure to give a limiting instruction, once requested, was harmless error. We therefore affirm Scherner's conviction. With respect to *State v. Gresham*, No. 84148-9, because RCW 10.58.090 irreconcilably conflicts with ER 404(b) and governs a procedural matter, we hold that its enactment violates the separation of powers doctrine and that the statute is, accordingly, unconstitutional.[1] We further hold that the admission of evidence of Gresham's prior conviction was not harmless error and reverse his conviction and remand for further proceedings.

FACTS

A. Scherner

In 2007, the State charged Scherner with first degree rape of a child and first degree child molestation. These charges, which were later amended to three charges

[1] Because we resolve the case on this basis, we do not address the remaining challenges to the constitutionality of RCW 10.58.090.

of first degree child molestation, arose out of a trip Scherner took with his wife and his granddaughter, M.S., from California, where all three lived, to Bellevue, Washington, in the summer of 2001 or 2002 to visit Scherner's sister, Susan Tillotsen. At the time, M.S. was either seven or eight years old.

While at Tillotsen's house, M.S. slept upstairs in a bedroom with her grandmother. Scherner slept downstairs on a pullout couch. The first night, after Tillotsen and M.S.'s grandmother had gone to bed, M.S. went downstairs to get a glass of water and go to the bathroom, not expecting Scherner to be awake. Scherner was awake, however, and invited M.S. to lie down next to him. When M.S. began to walk upstairs, Scherner again invited her to lie down with him, saying, "It's not going to take long." Scherner 4 Report of Proceedings (RP) at 482. "[N]ot wanting to cause a huge fuss," M.S. crawled under the covers he had pulled back. *Id*. Scherner pushed up her nightgown, placed his hand on her stomach, and then fondled her vagina. M.S. pulled away and ran upstairs. Several nights later, after a movie had ended and the other adults had gone to bed, Scherner again suggested M.S. lie down with him on his bed and again he fondled her genitals. A third incident occurred when M.S. went to use the bathroom downstairs; she walked out of the bathroom to find Scherner awake and sitting up. Scherner first asked if she wanted to lie down with him, and, when she said no, he insisted, telling her it would help him go to sleep faster. When M.S. lay

down next to him, he took off her nightgown and held her for around 10 minutes with one hand over her groin. This time he went further, grabbing her wrist and putting her hand on his penis.

Out of embarrassment and confusion, M.S. did not reveal Scherner's actions until May 2003. When M.S.'s mother found out, she immediately reached out to Child Protective Services, which led to a police investigation. In the course of the police investigation, evidence of prior instances of child molestation by Scherner came to light. At trial, the State sought to admit testimony of four prior victims: Jobbie Spillane and Shaun Oducado, Scherner's nieces; Suzanne Williamson, the child of close friends of the Scherners; and Naseema Kahn, Scherner's granddaughter. While Spillane was between the ages of 5 and 12 years old, she and her family regularly stayed at Scherner's home around holidays. Once, when Spillane was four or five years old, Scherner took her to the master bedroom and fondled her vagina and performed oral sex on her. For around 15 years, when Spillane stayed overnight at Scherner's home, he would come into her room and engage in similar acts of molestation. This abuse ended in 1987. Scherner's sexual abuse of Oducado occurred when she was 13 years old and consisted of Scherner entering her room at night while she was staying at Scherner's home and performing oral sex on her. Scherner's molestation of Williamson occurred around 1975, when she was around 13 years old,

on a trip to Lake Tahoe with several other families. One night after the other adults had gone to bed, Scherner approached Williamson, who was sleeping on the couch, began rubbing her back, and then rubbed her vagina. Kahn was sexually abused by Scherner around 1986 and 1987, between the ages of six and seven. Twice in hotel rooms on trips to Seattle and Disneyland, Scherner went to Kahn's bed at night while others slept and performed oral sex on her.

Prior to trial, the superior court determined that evidence of Scherner's prior sex offenses involving Spillane, Oducado, Williamson, and Kahn was admissible both under RCW 10.58.090 and, alternatively, to demonstrate the existence of a common scheme or plan.

At trial, in addition to the testimony of M.S. and Scherner's prior victims, the State introduced further evidence of Scherner's guilt. The State played an audio recording of a phone call that M.S. made to Scherner confronting him about the molestation. That audio recording included the following exchanges:

> M.: Um I just want you to tell me why you did this to me? Why did you touch me?
>
> S: Well, I'm afraid that there's two things that happened. Um, one I had too many drinks and I really didn't realize what was happening, and uh two, I just felt . . . very strongly for you I like you very much, love you and uh I guess I thought [I] was doing the right thing instead of the wrong thing.
>
> . . . .

> M: Why did you touch me in my vagina why did you squeeze me and touch me in places that I don't want to be touched? I[']m too young, I was too young for that.
>
> S: Well uh all I got to say, all we can do is, all I can do is say I am sorry I did it. I wish I hadn't and I though[t] I had explained to you why I probably did it. I really had way too much to drink and I wasn't myself.
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> M: I just need an answer, I was so confused there was everything going on left and right.
>
> S: Well you can . . . understand that I am sorry that it happened and I wish it didn't happen, but there is nothing that I can do to repair it, all I can do is say um understand that I made a mistake. And I am very very sorry that it happened. So try to think that over and I think it will make you feel better if you realize that I made a mistake and you didn't . . . .
>
> . . . .
>
> M: Okay I just don't want it happening to anymore people.
>
> S: It will not, don't you worry about that. I certainly had a wake up call when this all happened.
>
> . . . .
>
> M: It made my trip to Seattle really bad.
>
> S: Yes, I am sure, but you just have to understand that you have to go on with life and you're a great kid. And uh you don't have to feel, feel put down about it all because it's not your fault it[']s mine.

Scherner State's Ex. 33. Nowhere in the recording did Scherner express confusion or surprise at the allegations nor did he deny them. The State also presented the jury with evidence that Scherner had failed to appear for his originally scheduled trial on

February 28, 2008, and instead had absconded to Panama City, Florida, using a false name and carrying more than $14,000 in cash. Scherner was promptly discovered and apprehended on March 6, 2008. In addition to the State's evidence, the jury had the opportunity to assess Scherner's credibility when he testified in his defense.

The jury convicted Scherner of the three charged counts of first degree child molestation. The court sentenced Scherner to 130 months for each count to be served concurrently. The Court of Appeals affirmed Scherner's conviction. *State v. Scherner*, 153 Wn. App. 621, 225 P.3d 248 (2009). We granted review and consolidated Scherner's case with *State v. Gresham*, No. 84148-9. *State v. Scherner*, 168 Wn.2d 1036, 233 P.3d 888 (2010).

B. Gresham

In 2008, Gresham was charged with four counts of child molestation in the first degree. The conduct underlying these charges took place between December 1998 and September 2003 and involved a single victim• J.L. J.L. knew Gresham and his wife through her mother and considered Mrs. Gresham to be her godmother. The Greshams also had a daughter, K.G., who was five years younger than J.L., and J.L. would stay overnight at the Greshams' house approximately once a month. The jury was presented with a number of incidents of sexual contact. Three incidents of molestation occurred while J.L. was spending the night at the Greshams' home; on

each occasion Gresham approached J.L. while he believed she was asleep and fondled her. On other occasions, Gresham would wrestle with J.L., making contact of a sexual nature. The final incident occurred while Gresham was baby-sitting J.L. and her siblings in J.L.'s home; Gresham snuck into J.L.'s room while she appeared to be asleep and fondled her beneath the covers.

J.L. first revealed the molestation to her mother approximately one year after the final incident. Several years later, she reported the molestation to her counselor as part of a drug and alcohol analysis. Her counselor reported the information, leading to a criminal investigation.

Prior to Gresham's trial, the court held a hearing to determine the admissibility of evidence of his prior conviction. That conviction involved the molestation of a young girl, A.C., over a period of four years. In that case, Gresham was charged with first degree rape of a child and pleaded guilty to second degree assault with sexual motivation in 1998. Following the hearing, the trial court made detailed findings of fact and conclusions of law, including that the State had not proved the existence of a common scheme or plan and that ER 404(b) therefore barred admission of evidence of Gresham's prior crime. The court found, however, that the same evidence of Gresham's sexual abuse of A.C. was admissible under RCW 10.58.090.

The jury convicted Gresham of three counts of first degree child molestation

and one count of attempted first degree child molestation. For each count, the trial court sentenced Gresham to life in prison without the possibility of parole pursuant to RCW 9.94A.570 and former RCW 9.94A.030(37)(b) (2008). Gresham appealed the admission of evidence about his assault of A.C., arguing that RCW 10.58.090 violates the separation of powers and, as applied to him, is an ex post facto law. The Court of Appeals rejected both of Gresham's arguments and affirmed his conviction. *State v. Gresham*, 153 Wn. App. 659, 663, 223 P.3d 1194 (2009). We granted review and consolidated Gresham's case with *State v. Scherner*, No. 84150-1. *State v. Gresham*, 168 Wn.2d 1036, 233 P.3d 888 (2010).

ISSUES

1. Is evidence of prior sex offenses by Scherner admissible for the purpose of demonstrating a common scheme or plan?

2. Is RCW 10.58.090 constitutional?

ANALYSIS

A. Standard of Review

Issues of constitutional and statutory interpretation are questions of law, and we review questions of law de novo. *Optimer Int'l, Inc. v. RP Bellevue, LLC*, 170 Wn.2d 768, 771, 246 P.3d 785 (2011). Similarly, "[i]nterpretation of an evidentiary rule is a question of law, which we review de novo." *State v. Foxhoven*, 161 Wn.2d 168, 174,

163 P.3d 786 (2007). Provided the trial court has interpreted the rule correctly, we review the trial court's determination to admit or exclude evidence for an abuse of discretion. *Id*.

B. Alternative Admissibility of Scherner's Prior Sex Offenses

For Scherner, the admissibility of evidence of his prior sex offenses under the Washington Rules of Evidence is dispositive. We may affirm the trial court on any correct ground. *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986). Even absent RCW 10.58.090, the trial court ruled that evidence of Scherner's prior sex offenses was admissible for the proper purpose of showing a common scheme or plan. Scherner argues that the evidence of prior sex offenses is inadmissible under ER 404(b) and that the absence of a limiting instruction is reversible error. We find that the trial court did not abuse its discretion in admitting the evidence. We further hold that, while the trial court erred in refusing to give an appropriate limiting instruction upon Scherner's request, that error was harmless in the context of the case.

1. The Evidence Was Admissible

Addressing the admissibility of Scherner's prior sex offenses begins with a careful understanding of ER 404(b). ER 404(b) provides, in full:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The basic operation of the rule follows from its plain text: certain types of evidence (i.e., "[e]vidence of other crimes, wrongs, or acts") are not admissible for a particular

purpose (i.e., "to prove the character of a person in order to show action in conformity therewith"). *Id*. The same evidence *may*, however, be admissible for any other purpose, depending on its relevance and the balancing of its probative value and danger of unfair prejudice; the list of other purposes in the second sentence of ER 404(b) is merely illustrative. The burden of demonstrating a proper purpose is on the proponent of the evidence. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Where evidence is admissible for a proper purpose, the party against whom the evidence is admitted is entitled, upon request, to a limiting instruction informing the jury that the evidence is only to be used for the proper purpose and not for the purpose of proving the character of a person in order to show that the person acted in conformity with that character. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

Properly understood, then, ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character. *Id*. ("*In no case*, . . . regardless of its relevance or probativeness, may the evidence be admitted to prove the character of the accused in order to show that he acted in conformity therewith." (emphasis added)). Critically, there are no "exceptions" to this rule. 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice § 404.9, at 497 (5th ed. 2007). Instead, there is

one improper purpose and an undefined number of proper purposes. Though the other purposes are sometimes referred to as exceptions, this is simply legal shorthand for "other purposes." In most circumstances, this shorthand is of no consequence and creates little risk of misunderstanding. Only when the term "exception" is read out of context and the plain text of ER 404(b) is ignored does the possibility of confusion arise.

Washington courts have developed a thorough analytical structure for the admission of evidence of a person's prior crimes, wrongs, or acts. To admit evidence of a person's prior misconduct, "the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect." *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002) (citing *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995)). The third and fourth elements ensure that the evidence does not run afoul of ER 402 or ER 403, respectively. The party seeking to introduce evidence has the burden of establishing the first, second, and third elements. *DeVincentis*, 150 Wn.2d at 17; *Lough*, 125 Wn.2d at 853. It is because of this burden that evidence of prior misconduct is presumptively inadmissible. *DeVincentis*, 150 Wn.2d at 17.

One proper purpose for admission of evidence of prior misconduct is to show the existence of a common scheme or plan. *Id*. There are two instances in which evidence is admissible to prove a common scheme or plan: (1) "where several crimes constitute constituent parts of a plan in which each crime is but a piece of the larger plan" and (2) where "an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes." *Lough*, 125 Wn.2d at 854-55. Scherner's case involves the second category. Evidence of this second type of common scheme or plan is admissible because it is not an effort to prove the *character* of the defendant. Instead, it is offered to show that the defendant has developed a plan and has again put that particular plan into action. *Id*. at 861. In order to introduce evidence of the second type of common scheme or plan, the prior misconduct and the charged crime must demonstrate "such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which" the two are simply "individual manifestations." *Id*. at 860. Mere "similarity in results" is insufficient. *Id*. In *DeVincentis*, we clarified that while the prior act and charged crime must be markedly and substantially similar, the commonality need not be "a unique method of committing the crime." 150 Wn.2d at 19-21.

The trial court admitted evidence of Scherner's molestation of four other girls as evidence of a common scheme or plan after finding, by a preponderance of the

evidence, that the alleged prior sex offenses actually occurred and that they exhibited such markedly similar conduct that it was "abundantly clear that they show . . . an overarching plan." Scherner 1 RP at 119. The court also specifically found that the evidence was relevant and weighed the prejudice and probative value. Because the trial court correctly interpreted the rules of evidence, our review is for abuse of discretion. *Foxhoven*, 161 Wn.2d at 174. With respect to evidence of Scherner's abuse of Williamson and Kahn, the implementation of the crime was markedly similar to the charged crime: Scherner took a trip with young girls and at night, while the other adults were asleep, approached those girls and fondled their genitals. Though there are some differences (e.g., the presence of oral sex), these differences are not so great as to dissuade a reasonable mind from finding that the instances are naturally to be explained as "individual manifestations" of the same plan. *Lough*, 125 Wn.2d at 860. Though the abuse of Spillane and Oducado took place in Scherner's home, the remaining details share such a common occurrence of fact with the molestation of M.S. that we cannot say that the trial court abused its discretion in determining that these were merely individual manifestations of a common plan.

Finally, we are not inclined to retreat from our holding in *DeVincentis* that the relevant commonality need not be "a unique method of committing the crime." 150 Wn.2d at 20-21. Accordingly, we reject Scherner's argument that evidence of prior

misconduct admitted for the purpose of showing a common scheme or plan must be distinct from common means of committing the charged crime.

In sum, we hold that the trial court did not err in admitting evidence of Scherner's prior molestations of Williamson, Kahn, Spillane, and Oducado for the purpose of demonstrating that Scherner had developed a common plan or scheme, which he again put into action when he molested M.S.

2. The Trial Court Erred in Failing To Give a Limiting Instruction, but the Error Was Harmless

If evidence of a defendant's prior crimes, wrongs, or acts is admissible for a proper purpose, the defendant is entitled to a limiting instruction upon request.[2] *Foxhoven*, 161 Wn.2d at 175; *Saltarelli*, 98 Wn.2d at 362. An adequate ER 404(b) limiting instruction must, at a minimum, inform the jury of the purpose for which the evidence is admitted and that the evidence may not be used for the purpose of concluding that the defendant has a particular character and has acted in conformity with that character. *Cf. Lough*, 125 Wn.2d at 864.

Scherner requested a limiting instruction, but the specific instruction his lawyer proposed was flawed. The proposed instruction would have informed the jury that evidence admitted to demonstrate a common scheme or plan could not be considered

[2] We recently reaffirmed our long-standing rule that the trial court has no duty to give an ER 404(b) limiting instruction sua sponte. *State v. Russell*, 171 Wn.2d 118, 123-24, 249 P.3d 604 (2011).

"as evidence that the defendant's conduct in this case conformed with the conduct alleged in the prior allegation." Scherner Clerk's Papers at 272. This is an incorrect statement of the law. Showing conformity between the charged conduct and a common scheme or plan, as evidenced by prior conduct, is precisely what makes the evidence relevant. The State correctly argues that the general rule is that the trial court may properly refuse to give the requested instruction if it is incorrect. *Crossen v. Skagit County*, 100 Wn.2d 355, 360-61, 669 P.2d 1244 (1983). As such, the trial court properly refused to give the proposed erroneous instruction. This does not end the inquiry, however. While it was not error for the trial court to refuse to give an incorrect instruction, we hold that it was error, in this case, for the trial court to fail to give a correct instruction.

At least in the context of ER 404(b) limiting instructions, once a criminal defendant requests a limiting instruction, the trial court has a duty to correctly instruct the jury, notwithstanding defense counsel's failure to propose a correct instruction. This follows from our pronouncement in *State v. Goebel*, 36 Wn.2d 367, 379, 218 P.2d 300 (1950), that "the court should state to the jury whatever *it determines* is the purpose (or purposes) for which the evidence is admissible; and it should also be *the court's duty* to give the cautionary instruction that such evidence is to be considered for no other purpose or purposes." (Emphasis added.) This approach is also more

efficient and better prevents the possibility of unfair prejudice than does the alternative of holding that defense counsel's failure to craft a proper instruction is waiver of the request for a limiting instruction, thereby relegating the defendant to a personal restraint petition alleging ineffective assistance of counsel.

Nonetheless, failure to give an ER 404(b) limiting instruction may be harmless. *State v. Mason*, 160 Wn.2d 910, 935, 162 P.3d 396 (2007). The error is harmless "'unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986) (quoting *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)). Had a limiting instruction been given, and the jury had accordingly been prohibited from considering the evidence of Scherner's prior sex offenses for the purpose of showing his character and action in conformity with that character, the remaining overwhelming evidence of Scherner's guilt persuades us that the outcome of his trial would not have been materially affected. M.S.'s detailed testimony, evidence of Scherner's flight from prosecution, the jury's opportunity to assess Scherner's credibility, and, perhaps most damning, the recorded phone conversation in which Scherner all but admits his molestation of M.S. all, taken together, establish that there is no reasonable probability that the outcome would have been materially affected by the elimination of the impermissible inference.

In sum, we hold that evidence that Scherner had previously molested the four children was admissible for the purpose of demonstrating a common scheme or plan and the trial court's failure to give a limiting instruction was harmless error. This is dispositive of Scherner's appeal. Scherner's conviction is affirmed.

C. Constitutionality of RCW 10.58.090

1. Background Information on RCW 10.58.090

In 2008, the legislature enacted legislation designed "to ensure that juries receive the necessary evidence to reach a just and fair verdict" in cases in which the criminal defendant is accused of a sex offense. Laws of 2008, ch. 90, §§ 1, 2, *codified as* RCW 10.58.090.[3] The law provides that in any criminal prosecution for

[3] RCW 10.58.090 provides, in full:

> (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.
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> (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.
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> (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:
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> (a) Any offense defined as a sex offense by RCW 9.94A.030;
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> (b) Any violation under RCW 9A.44.096 (sexual misconduct with a minor in the second degree); and
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> (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;

commission of a sex offense "evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403." RCW 10.58.090(1). The law specifically allows for admission of prior uncharged sex offenses. RCW 10.58.090(5). Prior to admitting evidence of the defendant's commission of another sex offense, the trial court must consider whether the evidence is made inadmissible by ER 403, and the statute provides a nonexclusive list of considerations that trial courts must consider in making that determination. RCW 10.58.090(6). In a number of respects, RCW 10.58.090 resembles Federal Rules of Evidence 413 and 414, which apply to trials in which criminal defendants are charged with sexual assault and child molestation, respectively.

As the previous discussion of ER 404(b) makes clear, evidence of a criminal defendant's commission of other sex offenses was already admissible for proper purposes prior to the legislature's enactment of RCW 10.58.090. In this context, ER

(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.

404(b) only prohibits the admission of such evidence for the purpose of demonstrating the criminal defendant's character in order to show activity in conformity with that character. By enacting RCW 10.58.090, the legislature has declared that evidence of the defendant's commission of sex offenses is admissible "notwithstanding Evidence Rule 404(b)." RCW 10.58.090(1). Giving the term "notwithstanding" its plain and ordinary meaning (i.e., "without prevention or obstruction from or by" or "in spite of," Webster's Third New International Dictionary 1545 (2002)), as we must, *see State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010), and presuming the legislature did not intend to create a merely superfluous statute, *see id*. at 823, the plain purpose and effect of RCW 10.58.090(1) is to make admissible certain types of evidence that ER 404(b) makes inadmissible. That is, RCW 10.58.090 makes evidence of a defendant's commission of other sex offenses admissible for the purpose of proving the defendant's character (e.g., the defendant is the "child-molesting type") in order to show that the defendant has committed the charged offense in spite of ER 404(b)'s prohibition of admission for that purpose.

2. RCW 10.58.090 Violates the Separation of Powers Doctrine

Gresham argues that RCW 10.58.090 is unconstitutional because its enactment violates the separation of powers doctrine. The party asserting that a statute is unconstitutional bears a heavy burden, for we presume that legislative enactments are

constitutional. *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998). "[T]he Legislature speaks for the people and we are hesitant to strike a duly enacted statute unless fully convinced, after a searching legal analysis, that the statute violates the constitution." *Id*. Ultimately, however, it is for the judiciary to determine whether a given enactment violates the constitution. *Id*.

The separation of powers is implicit in our state constitution and arises from "the very division of our government into different branches." *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994). The branches are not "hermetically sealed," but instead "must remain partially intertwined." *Id*. At bottom, the separation of powers doctrine ensures "that the fundamental functions of each branch remain inviolate," *id*., and that the actions of one branch do not threaten "the independence or integrity or invade[] the prerogatives of another," *Zylstra v. Piva*, 85 Wn.2d 743, 750, 539 P.2d 823 (1975).

Our separation of powers jurisprudence relating to legislative enactments alleged to conflict with court rules is well developed. "[T]he power to prescribe rules for procedure and practice" is an inherent power of the judicial branch, *State v. Smith*, 84 Wn.2d 498, 501, 527 P.2d 674 (1974), and flows from article IV, section 1 of the Washington Constitution, *State v. Fields*, 85 Wn.2d 126, 129, 530 P.2d 284 (1975). The legislature recognized this power in RCW 2.04.190 and RCW 2.04.200. The

legislature may also adopt, by statute, rules governing court procedures. "If a statute appears to conflict with a court rule, this court will first attempt to harmonize them and give effect to both." *Putman v. Wenatchee Valley Med. Ctr., PS*, 166 Wn.2d 974, 980, 216 P.3d 374 (2009). If the statute and the rule "cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters." *Id*.

RCW 10.58.090 cannot be harmonized with ER 404(b). As discussed, ER 404(b) is a categorical bar to introduction of evidence of prior misconduct for the purpose of showing the defendant's character and action in conformity with that character. There are no exceptions to this rule. RCW 10.58.090(1) provides that evidence of sex offenses, which are undoubtedly "prior crimes, wrongs, or acts," is admissible "notwithstanding Evidence Rule 404(b)." That is, RCW 10.58.090 makes evidence of prior sex offenses admissible for the purpose of showing the defendant's character and action in conformity with that character. In other words, RCW 10.58.090 makes admissible evidence that ER 404(b) declares inadmissible. This is an irreconcilable conflict.

The State urges that RCW 10.58.090 can be reconciled with ER 404(b) for either of two reasons: (1) because it simply expands the list of exceptions to ER 404(b) or (2) because it leaves admission of evidence of prior sex offenses to the

discretion of the trial court. These arguments misunderstand ER 404(b). The first argument has already been addressed• there are no exceptions to ER 404(b). ER 404(b) only prohibits admission of evidence of a person's prior misconduct when it is offered for the purpose of demonstrating the person's character and action in conformity with that character. Even when evidence of a person's prior misconduct is admissible for a proper purpose under ER 404(b), it remains inadmissible for the purpose of demonstrating the person's character and action in conformity with that character. The other purposes for which evidence of prior misconduct are admitted are not, then, "exceptions."[4] RCW 10.58.090 would, however, be an exception to ER 404(b); the intent to create an exception is clear from its use of the term "notwithstanding." An exception is incompatible with a categorical rule.

The State's second proffered method of reconciling RCW 10.58.090 and ER 404(b) also fails. A statute that makes admissible evidence deemed inadmissible by a court rule creates no less of an irreconcilable conflict than does a statute mandating admission of evidence that a court rule provides is inadmissible. Our decision in *City of Fircrest v. Jensen*, 158 Wn.2d 384, 143 P.3d 776 (2006), is not inconsistent. In

[4] This includes the purpose of demonstrating the defendant's "lustful disposition" toward the victim. In that circumstance, the purpose of the evidence is not to demonstrate the defendant's character but to demonstrate the nature of the defendant's relationship with and feelings toward the victim. In that way, such evidence is probative of motive and intent and provides context to the crime. *State v. Cox*, 781 N.W.2d 757, 768 (Iowa 2010).

Jensen, the legislature enacted a law providing that challenges to a blood alcohol content test "'shall not preclude the admissibility of the test once the prosecution or department has made a prima facie showing'" of the requirements enumerated elsewhere. *Id*. at 395 (emphasis omitted) (quoting Substitute H.B. 3055, § 4(4)(c), 58th Leg., Reg. Sess. (Wash. 2004)). This court held that that law did not mandate admission of evidence; admission remained subject to all the rules of evidence. *Id*. at 399. Instead, the import of that case was that the law conflicted with a previous decision of this court, *City of Seattle v. Clark-Munoz*, 152 Wn.2d 39, 93 P.3d 141 (2004). *Clark-Munoz* held that evidence was inadmissible because it failed to comply with WAC regulations. *Id*. at 48. Unlike the case at bar, *Jensen* did not involve a statute that conflicted with any rule of evidence.

We cannot perceive of, nor has the State suggested, a narrowing construction of RCW 10.58.090 that would render the statute constitutional. The plain text of the statute itself establishes that it applies "notwithstanding Evidence Rule 404(b)." RCW 10.58.090(1). The irreconcilable conflict flows from the plain text of the statute.

Because RCW 10.58.090(1) and ER 404(b) cannot be reconciled, we must determine whether the admissibility of evidence in a criminal case is a substantive or procedural matter. There is not always a "clear line of demarcation" between that which is substantive and that which is procedural. *Smith*, 84 Wn.2d at 501. Instead,

we are left with the following "general guidelines":

> Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated.

Id.

The admission of evidence in a criminal trial is generally a procedural matter. Definition of the crime and its punishment are substantive matters; admission of evidence is simply the means by which that substantive law is effectuated. *See id*. Moreover, we long ago suggested that the admission of evidence is a procedural matter to be controlled by the courts in *State ex rel. Foster-Wyman Lumber Co. v. Superior Court*, 148 Wash. 1, 14, 267 P. 770 (1928), when we stated that "[i]t seems plain to us that the taking of depositions is an act in the procedure and practice before the courts. It involves the receiving of evidence before the courts, a matter for the courts to determine, and which in no wise trespasses upon the substantive rights of parties."

The legislature, in enacting RCW 10.58.090, expressed its understanding that evidentiary statutes are substantive law and take priority over conflicting court rules, citing to *State v. Pavelich*, 153 Wash. 379, 279 P. 1102 (1929). Laws of 2008, ch. 90, § 1. It is true that in *Pavelich*, this court stated that "[r]ules of evidence are substantive law." 153 Wash. at 382. However, that statement was plainly a dictum, as

the holding of that case was that rules relating to a trial court's responsibility to give jury instructions sua sponte are procedural. *Id*. at 385-86. Moreover, context makes the intended meaning of that statement questionable. Another statement the *Pavelich* court approved of was that "[p]rocedure . . . includes in its meaning whatever is embraced by the three technical terms, 'pleading,' 'evidence' and 'practice.'" *Id*. at 381-82 (citing *Kring v. Missouri*, 107 U.S. (17 Otto) 221, 231-32, 2 S. Ct. 443, 27 L. Ed. 506 (1883), *overruled on other grounds by Collins v. Youngblood*, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990)). *Pavelich* also recognizes that rules of evidence are "found in the common law, chiefly, and grow[] out of the reasoning, experience and common sense of lawyers and courts." *Id*. at 382. One contemporary commentary noted that *Pavelich* "contains puzzling passages characterizing rules of evidence as part of the substantive law." Edmund M. Morgan & John MacArthur Maguire, *Looking Backward and Forward at Evidence*, 50 Harv. L. Rev. 909, 934 n.65 (1937). The assertion in *Pavelich* that rules of evidence are, categorically, substantive matters is an unpersuasive dictum.

In sum, RCW 10.58.090 is an unconstitutional violation of the separation of powers doctrine because it irreconcilably conflicts with ER 404(b) regarding a procedural matter.

3. Admission of Gresham's Prior Sexual Misconduct Was Not Harmless Error

We must now determine whether the admission of evidence of Gresham's prior conviction was harmless error. A deceptively simple question confronts us at the outset: do we apply the constitutional harmless error standard or the nonconstitutional harmless error standard? It is true that the statute supporting admission is unconstitutional, but it does not necessarily follow that admission of the evidence is unconstitutional. Under our disposition of the case, RCW 10.58.090 is not unconstitutional because the constitution, state or federal, prohibits the admission of such evidence, but because the separation of powers doctrine prohibits the legislature from permitting admission in the face of a court rule barring admission. "Unlike many other constitutional violations, which directly damage rights retained by the people, the damage caused by a separation of powers violation accrues directly to the branch invaded." *Carrick*, 125 Wn.2d at 136. In this circumstance, the fact that evidence was admitted pursuant to an unconstitutional statute does not necessarily mean that we are to apply the constitutional harmless error doctrine.

When the support of RCW 10.58.090 is removed, we are simply left with evidence admitted in violation of ER 404(b). It is well settled that the erroneous admission of evidence in violation of ER 404(b) is analyzed under the lesser standard for nonconstitutional error. *Smith*, 106 Wn.2d at 780. The question, then, is whether, "'within reasonable probabilities, had the error not occurred, the outcome of the trial

would have been materially affected.'" *Id*. (quoting *Cunningham*, 93 Wn.2d at 831).

We cannot conclude that the erroneous admission of Gresham's prior conviction was harmless error. Much of the testimony at trial was predicated on the fact of Gresham's prior conviction, including all of A.C.'s testimony and much of J.L.'s parents' testimony. What would remain absent the erroneously admitted evidence would be J.L.'s testimony that Gresham had molested her and her parents' corroboration that Gresham had had the opportunity to do so, along with the investigating officer's testimony. There were no eyewitnesses to the alleged incidents of molestation. While this evidence is by no means insufficient for a jury to convict a defendant, there is a reasonable probability that absent this highly prejudicial evidence of Gresham's prior sex offense, *see Saltarelli*, 98 Wn.2d at 363 ("[I]n sex cases . . . the prejudice potential of prior acts is at its highest."), the jury's verdict would have been materially affected. Thus, we cannot say that the erroneous admission of the evidence of Gresham's prior conviction was harmless error.

CONCLUSION

Because RCW 10.58.090 violates the separation of powers doctrine and there was no other basis for admission of evidence of Gresham's prior crimes, we must reverse Gresham's conviction. We emphasize that the legislature has wide latitude in establishing rules for the courts, both procedural and substantive. In some instances,

the rules of evidence themselves invite legislative amendment. *See, e.g.*, ER 402 ("All relevant evidence is admissible, except . . . as otherwise provided by statute."); ER 802 ("Hearsay is not admissible except as provided . . . by statute."); *see also* RCW 9A.44.020 (codification of the "rape shield statute" making certain types of relevant evidence inadmissible in certain circumstances); RCW 9A.44.120 (making certain hearsay statements relating to sexual contact with a child admissible in certain circumstances). Only in those rare cases where a legislative enactment irreconcilably conflicts with a court rule and the rule is procedural in nature will we invalidate the enactment. This is one such circumstance. Because RCW 10.58.090 irreconcilably conflicts with ER 404(b), we hold that the statute violates the separation of powers doctrine and declare it unconstitutional. Admission of evidence of Gresham's prior sex offense was therefore error. Since we cannot determine that the erroneous admission of that evidence was harmless error, we reverse Gresham's conviction and remand for further proceedings.

As to Scherner, we hold that the evidence of his prior acts of child molestation was admissible for the purpose of demonstrating a common scheme or plan. Thus, even without RCW 10.58.090, the evidence was admissible in his trial. Admission therefore was not error. We accordingly affirm Scherner's conviction.

AUTHOR:

Justice Susan Owens

WE CONCUR:

Justice Charles W. Johnson	Justice Debra L. Stephens
Justice Tom Chambers	Justice Charles K. Wiggins
	Gerry L. Alexander, Justice Pro Tem.
Justice Mary E. Fairhurst	