No. 30940-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

WILLIAM D. HARGROVE, Appellant.

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# REPLY BRIEF OF APPELLANT

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I. The defense objected to Judge Sypolt's authority to enter findings and conclusions based on evidence from a hearing conducted and heard by another judge.

The State incorrectly asserts that Mr. Hargrove did not object to Judge Sypolt's entering ER 404(b) findings and conclusions based on evidence heard by another judge in a pretrial RCW 10.58.090 hearing. He did take exception and thus preserved the issue for appeal.

Judge Plese, who did not preside over the trial, heard testimony and admitted evidence of an uncharged sexual offense in 1995 against RL, then 10 years old, by Mr. Hargrove. (6/17/10 RP 1). An order was entered on August 30, 2010, allowing evidence of the RL incident under RCW 10.58.090 only. (CP 599-601). That statute was later found unconstitutional so Judge Sypolt, who presided at the trial, admitted the RL incident under ER 404(b). (1/9/12 RP 295-309; CP 1909-12).

Earlier, Judge Plese had found the incident involving RL was admissible under RCW 10.58.090, a statute since found unconstitutional in *State v. Gresham*, 173 Wn.2d 405, 269 P.3d 207 (2012). (6/17/10 RP 130-34; 1/6/12 RP 275; CP 599-601). As

noted by the *Gresham* court, RCW 10.58.090 irreconcilably conflicts with ER 404(b). 173 Wn.2d at 413, 430-31.

Just prior to trial after *Gresham* was decided, the State changed direction and moved to admit the evidence involving RL under ER 404(b) to show a common scheme or plan. (1/9/12 RP 301-09; CP 1909-12). Contrary to the State's assertion, Mr. Hargrove's counsel took exception to Judge Sypolt's authority to enter findings and conclusions because "[Judge Plese] was the one that heard the testimony and looked at the evidence and everything else, and so – I guess, people's credibility and those type of things and made that decision." (1/6/12 RP 287). The defense was correct on the law. *See State v. Bryant*, 65 Wn. App. 547, 549, 829 P.2d 209 (1992).

Over defense objection, Judge Sypolt nevertheless proceeded to make his own findings of fact and conclusions of law admitting the evidence under ER 404(b). (CP 1909-12). The State argues Mr. Hargrove failed to object to the trial court's use of the evidence presented to Judge Plese in the RCW 10.58.090 hearing. But he did object. (1/6/12 RP 287).

As further proof of a failure to object, the State also points to

Mr. Hargrove's stipulation allowing the trial court to consider evidence adduced at the hearing before Judge Plese in lieu of live witnesses at trial and to waive any right of confrontation. (1/10/12 RP 513-15). The State, however, is incorrect and mixes apples and oranges in an effort to support its assertion.

A successor judge lacks authority to enter findings of act on the basis of testimony heard by a predecessor judge. RCW 2.28.030; *In re Marriage of Crosetto*, 101 Wn. App. 89, 95, 1 P.3d 1180 (2000). Only the judge who has heard the evidence has the authority to find facts. *State v. Ward*, ___ Wn. App. ___, 330 P.3d 203, 208 (2014); *Bryant*, 65 Wn. App. at 550. The whole point is to preclude one judge from rendering a finding of fact based on evidence heard by another trier of fact. *Ward*, 330 P.3d at 209. The purpose of the rule has nothing to do with the right of confrontation.

Moreover, Judge Sypolt did not perform a mere ministerial act by entering findings of fact and conclusions of law allowing evidence under ER 404(b) on the basis of testimony heard by a predecessor judge on the admissibility of such evidence under RCW 10.58.090. Rather, the trial judge made a decision on his

own. The defense did not agree and took exception to that procedure. Mr. Hargrove's claim of error was thus preserved. *See Ward*, 330 P.3d at 209.

II. The trial court did not find Mr. Hargrove threatened G.H. with a kitchen knife so the State's recitation of that purported fact as supporting the trial court's determination of guilt is erroneous.

To show there was ample evidence supporting the court's findings of guilt, the State asserted "when [G.H.] was twelve years old, the defendant threatened her with a kitchen knife to force his sexual abuse on her." (Brief of Resp., p. 10). The court, however, found the State had "not met its burden of proof as to the use or threatened use of a deadly weapon as charged in Count VII of the Information." (CP 1921). The reference to the kitchen knife was made for inflammatory purposes only, was not a fact supporting guilt, and should be disregarded by this Court.

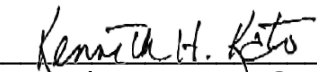
With respect to the other responses of the State, Mr. Hargrove rests on the facts, law, and argument in his opening brief.

III. Conclusion

Based on the foregoing, Mr. Hargrove respectfully urges this court to reverse his convictions and dismiss all charges or, in the

alternative, remand for new trial.

DATED this 25th day of September, 2014.



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CERTIFICATE OF SERVICE

I certify that on September 25, 2014, I served a copy of the reply brief of appellant by first class mail, postage prepaid, on William D. Hargrove, # 355412, PO Box 2049, Airway Heights, WA 99001; and by email, as agreed, on Mark E. Lindsey at SCPAappeals@spokanecounty.org.