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STATE OF WASHINGTON
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No. 102588-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

BROGAN BARTCH,

Respondent.

BRIEF OF *AMICI CURIAE*

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I. STATEMENT OF INTEREST OF *AMICI CURIAE*

The Sexual Violence Law Center (“SVLC”) is a non-profit law firm that represents survivors of sexual assault throughout the state of Washington. SVLC is the only legal aid program of its kind in Washington, providing holistic legal assistance and representation exclusively to survivors of sexual violence, assault, abuse, harassment and stalking. SVLC seeks to address all the survivor’s legal needs resulting from sexual violence.

Hagens Berman Sobol Shapiro, LLP represents survivors of sexual assault in civil actions against attackers, abusers, and those who enable them. Hagens Berman’s attorneys are committed to protecting and empowering survivors of abuse. Hagens Berman represented S.P., the victim in this case.

II. STATEMENT OF THE CASE

Amici curiae generally adopt the Statement of the Case presented by the State of Washington.

III. ARGUMENT

Amici curiae SVLC and Hagens Berman respectfully submit that this Court should review the published opinion filed in *State v. Brogan Bartch*, No. 83386-3-I (Wa. Ct. App. Div. I, filed October 30, 2023). Appendix A to the State of Washington’s Petition for Review.

Bartch presents this Court with an opportunity to refine *State v. Crossguns*’ guidance to lower courts on the admissibility of evidence of an assailant’s sexual desire or inclination toward the victim of sex assault.

199 Wn.2d 282 (2022). *Bartch* furthermore presents an opportunity to clarify RCW 9A.44.020(2)'s prohibition on admitting collateral inconsistent statements as credibility evidence.

A. *Crossguns* abrogated a harmful label used to describe otherwise admissible ER 404(b) evidence.

State v. Crossguns correctly stated that the term *lustful disposition* “perpetuates outdated rape myths that sexual assault . . . results from an uncontrollable urge or a sexual need that is not met.” 199 Wn.2d at 290. *Crossguns* so stated in recognition of the fact that “sexual violence is a crime of violence that uses unwanted sexual contact as the weapon.” *Id.* (emphasis in original).

This Court further explained that there is no meaningful difference between evidence previously admitted under the label *lustful disposition* on one hand and evidence that satisfies the permissible purposes articulated by ER 404(b) on the other:

“[L]ustful disposition,” ***properly understood***, is not a distinct purpose for admitting evidence, but a label used to refer to permissible ER 404(b) purposes in the specific context of sex crimes.

Id. at 294 (emphasis added); *see also id.* at 296 (“we abandon the ***term*** ‘lustful disposition’”) (emphasis added). ER 404(b)'s permissible purposes are thus, as this Court explained, subsumed under the label *lustful disposition* in the specific context of sex assault. *See id.* at 294. In other words, the concern articulated by *Crossguns* was the label, not the evidence.

For example, although *Crossguns* abrogated the use of the phrase *lustful inclination* in *State v. Thorne*, 43 Wn. 2d 47, 61 (1953), it nevertheless endorsed *Thorne*'s reasoning that longstanding sexual desire towards the victim is evidence of motive, a permissible ER 404(b) purpose. 199 Wn.2d at 293–294. Likewise, *Crossguns* endorsed the reasoning in *State v. Leohner*, 69 Wn.2d 131, 135 (1966) that “previous unpermitted liberties” with the victim tended to show a common scheme or plan as well as the absence of mistake. 199 Wn.2d at 293–294.

Crossguns furthermore did not abrogate any statutory requirement that the State prove sexual desire of an assailant, nor could it. RCW 9A.44.010(13) defines “sexual contact” as “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.” Prior acts can be relevant to proof that an act was sexually motivated. *State v. Vars*, 157 Wn. App. 482, 497 (2010). And nothing in *Crossguns* prohibits such a consideration. To the contrary, the *Crossguns* court expressly stated that evidence of prior contacts between the defendant and the victim was relevant and admissible under ER 404(b) to prove motive. 199 Wn.2d at 293–94.

B. Lower appellate courts are now reversing jury verdicts for the mere use of the term *lustful disposition* in an evidentiary ruling.

Despite this Court's clear reasoning that *lustful disposition* is simply an outdated term for an otherwise permissible showing of intent, motive, opportunity, plan, and other ER 404(b) purposes, lower courts are now misinterpreting *Crossguns* and reversing jury verdicts for mere use of

that label to admit permissible ER 404(b) evidence. *See State v. Bartch*, 537 P.3d 1091, 1096 (Wash. Ct. App. 2023); *see also, State v. Wilson*, 25 Wn. App. 2d 1045 (2023).

The *Bartch* court incorrectly expanded *Crossguns*' holding, treating *lustful disposition* as a separate basis for the admission of evidence rather than a label that subsumes ER 404(b)'s permissible purposes in sex assault cases. *See State v. Bartch*, 537 P.3d 1091, 1096–97 (Wash. Ct. App. 2023). In so holding, the *Bartch* court failed to consider *Crossguns*' endorsement of *Thorne*'s and *Leohner*'s reasoning that longstanding sexual desire for the victim is evidence of a plan, motive, and absence of mistake. *See id.*, *see also, State v. Wilson*, 25 Wn. App. 2d 1045 (2023).

For the consistent administration of justice, it is critical that this Court provide guidance to lower courts about the admissibility of evidence of sexual desire for the victim, notwithstanding its abrogation of the label *lustful disposition*.

C. *Bartch* misreads the history and purpose of Washington's rape-shield statute, RCW 9A.44.020(2).

Almost 50 years ago, the legislature enacted Washington's rape-shield statute, which is currently encoded at RCW 9A.44.020(2). This statute prohibits cross examination of a sex crime victim as to the victim's past sexual behavior on the issue of credibility. *Id.* This prohibition recognizes that prior sexual activity is "usually of little or no probative

value in predicting the victim’s consent to sexual conduct on the occasion in question.” *State v. Hudlow*, 99 Wn. 2d 1, 9 (1983).

Likewise here, as articulated in Judge Díaz’s *Bartch* dissent, the victim’s inconsistent statements about her sex life on a collateral issue are indistinguishable from general credibility, which “is ruled out altogether as the basis for introducing past sexual conduct.” *Hudlow*, 99 Wn. 2d at 8. Judge Díaz’s dissent was correct that:

Whether S.P. was faithful to her boyfriends or not again had no independent relevancy (i.e., it was collateral); and the impeachment is offered *only* to undermine S.P.’s credibility using facts about her sexual practices.

Bartch, 537 P.3d 1091, 1110–11 (Wash. Ct. App. 2023) (Díaz, J. dissenting). Allowing “an irrelevant stray inconsistency” to put the entirety of an alleged victim’s sexual history on trial would “swallow the statute whole.” *Id.* That result should be reviewed.

IV. CONCLUSION

The *Bartch* court impermissibly expanded this Court’s holding in *Crossguns*. What was meant as a repudiation of offensive and outdated language is quickly becoming a basis for overturning jury verdicts that rely on permissible ER 404(b) evidence. *Bartch* furthermore risks creating an exception for collateral credibility evidence to Washington’s rape-shield statute that would render it substantially less protective of victims than the legislature intended. Amici curiae respectfully request that this Court review *Bartch* for the reasons articulated herein as well as those proffered by the State of Washington.

DATED: January 29, 2024

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on January 29, 2024, the forgoing document was electronically filed with the Washington State's Appellate Court Portal, which will send notification of such filing to all attorneys of record.

Dated at Seattle, Washington this 29th day of January, 2024.

/s Riddhi Mukhopadhyay_____

SEXUAL VIOLENCE LAW CENTER

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