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No. 62669-8

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

RICKY HORNE,

Appellant.

---

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

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SUPPLEMENTAL BRIEF OF APPELLANT

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APPELLS DIV I  
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STATE OF WASHINGTON  
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A. ARGUMENT

A jury was unable to agree on a verdict as to whether Ricky Horne was guilty of second degree rape, and the trial court declared a mistrial. Following that mistrial, and relying on the then newly enacted RCW 10.58.090, the trial court admitted, as propensity evidence, evidence that Mr. Horne had committed a rape in 1980. Based upon this propensity evidence the jury convicted Mr. Horne of second degree rape. Mr. Horne received a sentence of life without the possibility of parole.

Mr. Horne appealed arguing RCW 10.58.090 violated the separation of powers doctrine and *ex post facto* provisions of the federal and state constitutions.

Based entirely upon its opinions in State v. Scherner, 153 Wn.App. 621, 225 P.3d 248 (2009) and State v. Gresham, 153 Wn.App. 659, 223 P.3d 1194 (2009), this Court affirmed Mr. Horne's conviction.

The Supreme Court, however, reversed those rulings holding that RCW 10.58.090 does indeed violate the Separation of Powers doctrine and is unconstitutional. State v. Gresham,

173 Wn.2d 405, 269 P.3d 207 (2012).<sup>1</sup> That Court granted Mr. Horne's petition for review and remanded the matter to this Court.

Because the trial court refused to admit the evidence under ER 404(b), and instead relied only sole only on RCW 10.58.090, which Gresham in turn invalidated, the sole issue before this Court is whether the Mr. Horne's convictions must be reversed.

After finding the statute unconstitutional, Gresham determined that the proper standard for determining whether reversal was required was the standard employed for nonconstitutional errors. 173 Wn.2d at 433. Under that standard, reversal is required if the court can conclude that "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been different." Id. (citations omitted).

In determining whether reversal is required, this Court need only look at the divergent outcomes of Mr. Horne's two

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<sup>1</sup> Because it struck down the statute on that basis, the Court did not address the remaining challenges to the statute's constitutionality. Gresham, 173 Wn.2d at 413, fn 1.

trials. Prior to the first trial, the State proffered evidence that more than 25 years earlier, Mr. Horne had committed two rapes, one of which resulted in a 1981 conviction. The trial court refused to admit the evidence concluding it was not admissible for any relevant nonpropensity purpose under ER 404(b). 5/20/08 RP 64-65. A jury was unable to reach a verdict and the court declared a mistrial. 5/30/08 RP 604-08.

Before a second trial could begin, the Legislature enacted RCW 10.58.090 permitting the admission of prior sex offenses as propensity evidence in prosecutions for sex offenses. Finding again, the prior acts were not admissible under ER 404, 9/25/08 RP 63, the trial court found that RCW 10.58.090 allowed the State to offer evidence of the 1980 rape that led to the 1981 conviction. 9/25/08 RP 72-77.

Pursuant to the court's ruling, J.R. testified that in January 1980 she was 17 and had left a teen alcohol treatment facility in Seattle with the intention of hitchhiking to her parents' home in Pierce County. 10/14/08 RP 74-77. A car in which a twenty-year old Mr. Horne was the passenger stopped. CP 139; 10/14/08 RP 77-78. After J.R. got in, the men drove her

to a house in Seattle where each of them raped J.R.. 10/14/08  
RP 85-89.

In closing argument the state pointed to J.R.'s testimony and argued "history repeats itself." 10/16/08 RP 88. The deputy prosecutor pointed to J.R.'s testimony as corroboration that Ms. Mason did not consent in this case. 10/16/08 RP 96-97. The State concluded its argument again pointing the jury to the events of "28 years ago" as corroboration of Ms. Mason's allegations. 10/16/08 RP 101. Hearing this propensity evidence, the jury convicted Mr. Horne as charged. CP 108.

The different outcomes of the two trials establish a "reasonable probability" that the admission of the evidence materially affected the outcome. Gresham, 173 Wn.2d at 433-34. And, further examination of the record bears that out, as it is readily apparent that the erroneous admission of propensity evidence had a material effect on the outcome of trial. This Court must reverse Mr. Horne's conviction.

B. CONCLUSION

For the reasons above this Court must reverse Mr.  
Horne's conviction and sentence.

Respectfully submitted this 1<sup>st</sup> day of May, 2012.

  
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DIVISION ONE**

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	)	
RICKY HORNE,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 1<sup>ST</sup> DAY OF MAY, 2012, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<p>[X] BRIAN MCDONALD, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104</p>	<p>(X) ( ) ( )</p>	<p>U.S. MAIL HAND DELIVERY _____</p>
<p>[X] RICKY HORNE 252847 WASHINGTON STATE PENITENTIARY 1313 N 13<sup>TH</sup> AVE WALLA WALLA, WA 99362</p>	<p>(X) ( ) ( )</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

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**SIGNED** IN SEATTLE, WASHINGTON THIS 1<sup>ST</sup> DAY OF MAY, 2012.

X \_\_\_\_\_ 

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