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No. 64416-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL DEGALVEZ WILLIAMSON,

Appellant.

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

The Honorable Catherine Shaffer

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in calculating the seriousness level and standard range for the crime of indecent exposure with a prior sex offense. RCW 9A.88.010(c).

2. The trial court failed to correctly calculate the standard range for the current offense before imposing an exceptional sentence.

3. The trial court also erred in imposing an exceptional sentence where the jury instructions regarding the aggravating factor of “sexual motivation” erroneously instructed the jury that a unanimous decision was required to reject the aggravating factor.

4. The trial court admitted prior act evidence under RCW 10.58.090, which statute violates the separation of powers doctrine.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A trial court’s authority in felony sentencing is solely that conferred by the Legislature in the SRA. The Legislature has assigned seriousness levels to certain, specified offenses, and has indicated that any crimes not so ranked carry a standard range of 0-12 months confinement. Where the class C felony of indecent exposure with a prior conviction for a sex offense is not ranked

within the SRA, did the trial court err in concluding the offense had a seriousness level of four?

2. Did the trial court fail to correctly calculate the standard range before imposing an exceptional sentence?

3. Did the trial court also err in imposing an exceptional sentence where the jury instructions regarding the aggravating factor of “sexual motivation” erroneously instructed the jury that a unanimous decision was required to reject the aggravating factor?

4. Does RCW 10.58.090 violate the separation of powers doctrine?

C. STATEMENT OF THE CASE

Michael Williamson allegedly intentionally exposed his penis to complainant Laurie Rowell from behind a newspaper in his lap while masturbating on a King County Metro bus in Seattle, on January 28, 2009. CP 2; 9/9/09RP at 29, 33-35. Based on this claim, the King County Prosecuting Attorney charged Williamson with indecent exposure under RCW 9A.88.101, alleging the offense was a felony because Williamson had previously been convicted of indecent exposure, a sex offense as defined by RCW 9.94A.030,

and further alleging that Williamson committed the offense for the purpose of sexual gratification. CP 1.

At jury trial, Mr. Williamson testified that he did not expose his penis as Ms. Rowell had testified, but he was forced to cover his groin area because he had accidentally urinated and had also caught his penis in his pants zipper. 9/9/09RP at 76-78. Pursuant to RCW 10.58.090 and ER 404(b) ("common scheme" and "intent") analyses, the trial court also admitted testimony from Amy Phan, who stated that Mr. Williamson had exposed his penis to her on the bus in January of 2007. 9/9/09RP at 59-62; see 9/2/09RP at 55-56. The court admitted the evidence of the occurrence but excluded the fact that it resulted in a conviction. 9/2/09RP at 67-68.

The jury was also read a stipulation that Mr. Williamson had previously been convicted of a qualifying offense, but was not told that this conviction arose out of the Amy Phan incident. 9/2/09RP at 62; CP 25 (jury instruction no. 10). However, during his testimony in the defense case, the defendant stated he had never seen Ms. Pham before, and on this basis the State was allowed to elicit that he had suffered a conviction on the basis of that incident. 9/9/09RP at 79-80. 100-01.

At sentencing on the current offense, the court and the state indicated some confusion, but appeared to believe that Williamson's crime was ranked at a seriousness level of four, resulting in a standard range of 43-57 months with a maximum term of 60 months. 10/23/09RP at 4-5. However, the defense questioned whether the current offense was a sex offense, noting that if it was not, the standard range should be 15-20 months. 10/23/09RP at 6.

The court concluded that it could impose a sentence of 60 months in prison, equivalent to the statutory maximum punishment, either because the top of the standard range was 57 months and the sexual motivation jury finding permitted the addition of 12 months as an enhancement, or even if it was 20 months, based on its authority to find substantial and compelling reasons for an exceptional sentence totaling 60 months given the jury's sexual motivation finding as an aggravating factor. 10/23/09RP at 11, 18-19; CP 50.

Mr. Williamson appeals. CP 61.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN DETERMINING THE SERIOUSNESS LEVEL FOR WILLIAMSON'S CRIME TO BE FOUR INSTEAD OF CONCLUDING THE CRIME WAS AN UNRANKED FELONY.

a. A trial court may not exceed its authority in imposing sentence beyond that which is expressly conferred by the Legislature. The fixing of punishments for criminal offenses is solely a legislative function. State v. Ammons, 105 Wn.2d 175, 180, 718 P.2d 796 (1986). In enacting the SRA, the Legislature created a structured sentencing scheme which requires sentences be imposed within specified guidelines. RCW 9.94A.010.

When a trial court exceeds the authority in imposing sentence beyond that which is expressly conferred by the Legislature, the sentence is invalid and resentencing is required. In re Personal Restraint of Goodwin, 146 Wn.2d 861, 866, 50 P.3d 618 (2002). Although Mr. Williamson's defense counsel appeared to agree that the crime was a level four offense, 10/23/09RP at 4-5, "in the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal." State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008)

(quoting State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)).

Mr. Williamson may offer his argument regarding his illegal sentence.

b. The trial court erroneously concluded Williamson's conviction for indecent exposure carried a seriousness level of four, where the crime in fact is an unranked felony. The Legislature has created seriousness levels for certain enumerated offenses. RCW 9.94A.515. Standard sentence ranges for these offenses are set forth in a grid which correlates the length of a potential sentence to the seriousness level of a crime based on the offender's criminal history. RCW 9.94A.510; RCW 9.94A.525. The standard range is "a legislative determination of the applicable punishment range for the crime as ordinarily committed." State v. Parker, 132 Wn.2d 182, 186-87, 937 P.2d 575 (1997).

Crimes not assigned a seriousness level are considered unranked felonies, and the Legislature has provided these offenses should be sentenced as follows:

If a standard sentence range has not been established for the offender's crime, the court shall impose a determinate sentence which may include not more than one year of confinement; community restitution work; ... and ... a term of community custody not to exceed one year[.]

RCW 9.94A.505(2)(b).

With regard to Mr. Williamson's current offense of indecent exposure, according to statute,

A person is guilty of indecent exposure if he or she intentionally makes any open and obscene exposure of his or her person or the person of another knowing that such conduct is likely to cause reasonable affront or alarm.

RCW 9A.88.010(1). Indecent exposure is ordinarily a simple misdemeanor. RCW 9A.88.010(2)(a). However, indecent exposure is elevated to a gross misdemeanor if the person exposes himself or herself to a person under fourteen years of age. RCW 9A.88.010(2)(b). Indecent exposure is a class C felony if the person has previously been convicted of a sex offense as defined in 9.94A.030. RCW 9A.88.010(c).

But indecent exposure with a prior conviction for a sex offense is not assigned a seriousness level within the SRA. Instead, the Legislature has only assigned a seriousness level to a subcategory of this offense. RCW 9.94A.515. The statute specifies a seriousness level of four for "Indecent Exposure to Person Under Age Fourteen (subsequent sex offense)." Id.

Because no standard sentence range has been provided for Williamson's crime (felony indecent exposure not involving a person under the age of fourteen), Williamson's offense is an unranked felony and the standard sentence range is 0-12 months confinement. RCW 9.94A.505(2)(b). In order for "Indecent Exposure to Person Under Age Fourteen (subsequent sex offense)" under RCW 9.94A.515 to apply both when the present crime is a class C felony and the victim is under 14 years of age, or when the present crime is a class C felony because the defendant has a prior sex offense, regardless of the victim's age, the language cited above would have to be interpreted to read "Indecent Exposure to Person Under Age Fourteen" and "(subsequent sex offense)" independently. State v. Steen, 155 Wn. App. 243, 228 P.3d 1285 (Div. 2 February 4, 2010) (No. 38679-8-II).

c. **The conclusion that Williamson's crime of indecent exposure, which did not involve persons under the age of 14, is an unranked felony is consistent with settled principles of statutory construction.** If a statute's meaning is plain on its face, then the court must give effect to that plain meaning. State v. J.M., 144 Wn.2d 472, 480, 28 P.3d 720 (2001). The reviewing court

assumes from the outset “that the Legislature meant what it said in the plain language of the statute.” State v. Tran, 117 Wn. App. 126, 131, 69 P.3d 884 (2003). “Courts will not ascribe to the Legislature a vain act, and a statute should, if possible, be construed that no clause, sentence, or word shall be superfluous, void, or insignificant.” State v. Zornes, 78 Wn.2d 9, 13, 475 P.2d 109 (1970).

In presuming that Mr. Williamson’s offense carried a seriousness level of four, the trial court effectively deleted statutory language indicative of the Legislature’s intent. The Legislature specified that persons who previously have been convicted of a sex offense who expose themselves to children under the age of fourteen should be punished according to the same seriousness level as individuals convicted of violent offenses such as second-degree assault, second-degree arson, and vehicular assault while under the influence of an intoxicating liquor. But the Legislature did not convey this intent with respect to persons with a prior history of sex offenses who do not involve children in their commission of indecent exposure.

This construction of the Legislature's intent makes sense when the various statutory provisions are considered in conjunction with one another.

Under the "plain meaning" rule, examination of the statute in which the provision at issue is found, as well as related statutes or other provisions of the same act in which the provision is found, is appropriate as part of the determination whether a plain meaning can be ascertained.

State Dep't. of Ecology, v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 10, 43 P.3d 4 (2002).

As noted, indecent exposure is normally a simple misdemeanor carrying a maximum penalty of 90 days in jail. RCW 9A.88.010(2)(a). Even when persons under the age of 14 are involved, the crime is only elevated to a gross misdemeanor. RCW 9A.88.010(2)(b). It would not make sense for the Legislature to make the punishment for indecent exposure commensurate to that imposed following convictions for Class B felony offenses simply because the person committing the crime has previously been convicted of a sex offense. Rather, it is the conjunction of this circumstance with the commission of the crime against a child which the Legislature sought to punish harshly. RCW 9.94A.515.

Thus in State v. Jacobs, 154 Wn.2d 596, 115 P.3d 281 (2005), the Court considered whether 24-month sentence enhancements for specified drug offenses had to be served consecutively. 154 Wn.2d at 601-02. The Court noted that with respect to certain firearm and deadly weapon enhancements, the Legislature specifically required consecutive sentences. Id. at 603 (citing RCW 9.94A.589). The Court noted, “[T]he legislature clearly knows how to require consecutive application of sentence enhancements and chose to do so only for firearms and other deadly weapons.” 154 Wn.2d at 603. Although it resolved the question in the defendant’s favor under the rule of lenity, the Court observed that the use of specific language in one instance and not in another weighed in favor of an intent for concurrent sentences.

Similarly, RCW 9.94A.515 is replete with examples of the Legislature differentiating between various subsections of criminal statutes and allocating varying punishments accordingly. For example, the Legislature has assigned Assault in the Third Degree a seriousness level of three except where the assault is committed with a stun gun against a peace officer, in which case the crime carries a seriousness level of four. RCW 9.94A.515 (citing RCW

9A.36.031(1)(h)). The Legislature has assigned differing seriousness levels to the crime of indecent liberties with forcible compulsion versus without forcible compulsion. RCW 9.94A.515 (assigning a seriousness level of ten for violations of RCW 9A.44.100(1)(a) and a seriousness level of seven for violations of RCW 9A.44.100(1)(b) and (c)).

According to the “plain meaning” rule of statutory construction, this Court should rule in accord with Steen, supra, that the crime of indecent exposure set forth in RCW 9A.88.010(2)(c) is an unranked felony. The trial court erred in finding the seriousness level for Williamson’s offense was four. Williamson must be resentenced within a standard range of 0-12 months confinement.

d. To the extent the statute may be ambiguous, the rule of lenity requires this Court construe it in Williamson’s favor.

Although the “plain meaning” rule of statutory construction compels the result advocated here, Williamson is entitled to the same remedy even if this Court concludes the statute is ambiguous.

When a statute is ambiguous, the rule of lenity requires the court to interpret the statute in favor of the defendant unless the Legislature expressly indicates a contrary intent. Jacobs, 154 Wn.2d at 601; In

re Post-Sentence Review of Charles, 135 Wn.2d 239, 249, 955 P.2d 798 (1998).

In Jacobs, despite an expressly-stated intent for consecutive sentences with respect to sentence enhancements for weapons, the Supreme Court disagreed that the Legislature's silence regarding drug sentence enhancements denoted a similar intent. Instead, the Court concluded the Legislature's silence was ambiguous, and, applying the rule of lenity, remanded for resentencing. 154 Wn.2d at 603-04. Here, similarly, if this Court does not agree that the statute's meaning is plain on its face, this Court must apply the rule of lenity and remand so Williamson can be sentenced within the range for unranked felonies. See State v. Steen, supra, 155 Wn. App. 243.

2. THE TRIAL COURT ERRED IN IMPOSING AN EXCEPTIONAL SENTENCE WHERE THE JURY WAS ERRONEOUSLY INSTRUCTED THAT A UNANIMOUS DECISION WAS REQUIRED TO FIND THE AGGRAVATING FACTOR.

a. Exceptional terms above the standard range imposed pursuant to RCW 9.94A.535 must be supported by properly obtained jury findings. RCW 9.94A.535, entitled "Departures from the guidelines," provides in pertinent part as follows:

Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

RCW 9.94A.535. The particular aggravating factor of “sexual motivation” is among those factors which must be found to exist by a jury pursuant to subsection .535(3) and RCW 9.94A.537.

However, the special verdict form in Mr. Williamson’s prosecution was faulty under State v. Bashaw, Supreme Court No. 81633-6, decided July 1, 2010. The exceptional sentence must be reversed because the jury was erroneously informed that it had to be unanimous as to a “no” answer on the special verdict form.

b. The jury instructions regarding the special allegation were erroneous and require reversal of the sentence. In Bashaw the Supreme Court made clear that a non-unanimous negative jury decision on a special finding of an aggravating factor indicates that the State has not proved that factor beyond a reasonable doubt, and concerns for finality require a non-unanimous jury decision rejecting the factor be treated as a final determination that the State has failed to prove the presence of a special finding increasing the defendant's sentence. State v. Bashaw, Supreme Court No. 81633-6, at pp. 12-14.

Here, the jury instructions regarding the special verdict stated that all 12 jurors must unanimously agree that the additional fact was proved, but also stated, "If you unanimously have a reasonable doubt as to this question, you must answer 'no'." CP 25 (Jury instructions, no. 12) (attachment 1). There was also no contravention, for purposes of the "special" verdict, of the general rule given to the jury that "each of you must agree for you to return a verdict." CP 25 (Jury instructions, no. 14) (attachment 2); CP 50 (special verdict) (attachment 3).

Although unanimity is required to find the presence of a special finding of an aggravating factor, see Bashaw, unanimity of agreement amongst the jury members is not required to reject such a special finding. The instructions in the present case, however, erroneously stated that unanimity was required for either determination. See also State v. Goldberg, 149 Wn.2d 888, 893-94, 72 P.3d 1083 (2003). As a whole, therefore, the instructions failed to make the applicable legal standard apparent. See State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417 (2007). That was error, also violating the defendant's right have charges resolved by a particular tribunal. State v. Wright, 165 Wn.2d 783, 792-93, 203

P.3d 1027 (2009); Arizona v. Washington, 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978).

As in Bashaw, the constitutional error cannot be concluded to be harmless beyond a reasonable doubt under State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002), because it is impossible to speculate what a jury in an aggravating factor case might have done where mere disagreement by a sole juror is a circumstance that would defeat the finding, had the jury had been properly instructed per the procedure dictated by the Court. State v. Bashaw, at pp. 15-17. Reversal is therefore mandated.

3. THE TRIAL COURT ERRED BY IMPOSING AN EXCEPTIONAL SENTENCE BEFORE CORRECTLY DETERMINING THE STANDARD RANGE.

Whatever its conclusion as to the standard range in the present case, the rule is that a sentencing court must correctly determine a defendant's standard sentencing range before imposing an exceptional sentence. State v. Parker, 132 Wn.2d 182, 188, 937 P.2d 575 (1997); see also State v. Jackson, 129 Wn. App. 95, 109, 117 P.3d 1182 (2005), review denied, 156 Wn.2d 1029, 133 P.3d 474 (2006) (ordinarily the imposition of an exceptional sentence requires a correct determination of the standard range, and remand is necessary when the offender score

has been miscalculated unless the record makes clear that the trial court would impose the same sentence).

Here, the court erroneously failed to conclude that the prescribed punishment was 0-12 months, and also decided to impose an exceptional sentence equaling 60 months regardless whether the high end of the standard range was a maximum of 57 months, or whether it was 20 months based on the defense contention that the current crime was not a sex offense. See 10/23/09RP at 6, 11, 18-19.

This procedure was reversible error. The Supreme Court stated in Parker that, because the sentencing court must correctly calculate the standard range before imposing an exceptional sentence, a trial court's failure to do so is legal error subject to review. Parker, 132 Wn.2d at 189. The Court stated, "We are hesitant to affirm an exceptional sentence where the standard range has been incorrectly calculated because of the great likelihood that the judge relied, at least in part, on the incorrect standard ranges in his calculus." Parker, 132 Wn.2d at 190 (cited in State v. Ford, 137 Wn.2d 472, 485, 973 P.2d 452 (1999)). When the sentencing court imposes an exceptional sentence without correctly determining a defendant's standard range, the

reviewing court will remand for resentencing unless it is clear the court would have imposed the same sentence anyway. Parker, 132 Wn.2d at 189.

In these circumstances, were an exceptional sentence appropriate, it cannot reasonably be said that the trial court would have deemed a 60 month sentence to be appropriate if the standard range were as little as 0-12 months incarceration. As the Court in Parker aptly stated, "Given the fact that a correct standard range is intended as the departure point, we cannot imagine many instances where it could be shown that the resulting exceptional sentence would be the same regardless of the length of the standard range." Parker, 132 Wn.2d at 192 n. 15.

4. RCW 10.58.090 VIOLATES THE SEPARATION OF POWERS DOCTRINE, BECAUSE IT PERMITS THE ADMISSION OF EVIDENCE THAT THE RULES OF EVIDENCE CATEGORICALLY EXCLUDE.

The trial court's authority to admit evidence at trial of the defendant Mr. Williamson's prior act of indecent exposure was based on a statute that fails under several analyses. RCW 10.58.090 permits the court to admit, 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 . . .

notwithstanding Evidence Rule 404(b)." RCW 10.58.090(1). By its express terms, the statute conflicts with ER 404(b), which categorically bars the admission of prior misconduct evidence for the purpose of "prov[ing] the character of a person in order to show action in conformity therewith." ER 404(b). Because RCW 10.58.090 and ER 404(b) cannot both be given effect, the statute violates the separation of powers doctrine.

The Supreme Court's authority to govern the admission of evidence in criminal trials is superior to the Legislature's. The doctrine of separation of powers stems from the constitutional distribution of the government's authority into three coequal branches: executive, legislative, and judicial. Waples v. Yi, ___ Wn.2d ___, 2010 WL 2615576 (No. 82142-9, July 1, 2010) (citing City of Fircrest v. Jensen, 158 Wn.2d 384, 393-94, 143 P.3d 776 (2006)). "If "the activity of one branch threatens the independence or integrity or invades the prerogatives of another," it violates the separation of powers." Waples, 2010 WL 2615576, at *2 (quoting Jensen, 158 Wn.2d at 394).

The Supreme Court has inherent power to govern court procedures, stemming from article 4 of the state constitution. Jensen, 158 Wn.2d at 394; State v. Fields, 85

Wn.2d 126, 129, 530 P.2d 284 (1975); Wash. Const. art. 4, §

1. The Court's authority over matters of procedure contrasts with the Legislature's authority over matters of substance.

Fields, 85 Wn.2d at 129; State v. Smith, 84 Wn.2d 498, 501, 527 P.2d 674 (1974); Jensen, 158 Wn.2d at 394 (quoting Smith, 84 Wn.2d at 501).

Rules of evidence are rules of procedure that fall under the Court's inherent authority.¹ Rules of evidence "strike at the very heart of a court's exercise of judicial power," in that they govern "the powers to hear facts, to decide the issues of fact made by the pleadings, and to decide the questions of law involved." State v. Mallard, 40 S.W.3d 473, 483 (Tenn. 2001). In criminal cases,

while [t]he legislature has the power to declare what acts are criminal and to establish the punishment for those acts as part of the substantive law[,] . . . the court regulates the method by which the guilt or innocence of one who is accused of violating a criminal statute is determined.

State v. Losh, 721 N.W.2d 886, 891 (Minn. 2006).

"Since the promulgation of rules of procedure is an inherent attribute of the Supreme Court and an integral part of the judicial process, such rules cannot be abridged or modified by the

¹The Court also has authority delegated by the Legislature to enact rules of evidence. RCW 2.04.190 (supreme court has power to prescribe procedures for "taking and obtaining evidence").

legislature." Smith, 84 Wn.2d at 502. "If a statute appears to conflict with a court rule, this court will first attempt to harmonize them and give effect to both, but if they cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters." Waples, 2010 WL 2615576, at *3; see also Jensen, 158 Wn.2d at 394 ("Whenever there is an irreconcilable conflict between a court rule and a statute concerning a matter related to the court's inherent power, the court rule will prevail.").

An evidentiary statute violates the separation of powers doctrine if it conflicts with the Rules of Evidence. The Court's authority to govern the admissibility of evidence in Washington trials is embodied in those Rules of Evidence. ER 101 makes clear that in the event of an irreconcilable conflict between a rule and a statute, the rule will govern. ER 101 ("These rules govern proceedings in the courts of the state of Washington"). The very fact of the Court's adoption of the Rules of Evidence "is conclusive of its determination that at least these rules as adopted are procedural." Ammerman v. Hubbard Broad., Inc., 89 N.M. 307, 310 (N.M. 1976).

Generally in Washington, evidence rules may be promulgated by both the legislative and judicial branches. Jensen, 158 Wn.2d at 394. The Rules of Evidence expressly defer to most statutes addressing admissibility of evidence, thus leaving the statutes intact. See, e.g., ER 402 (deferring to all statutes rendering otherwise relevant evidence inadmissible); ER 601 (deferring to all statutes governing competency of witnesses).

Thus in State v. Ryan, this Court held the child hearsay statute did not violate the separation of powers doctrine, because "[l]egislative enactment of hearsay exceptions is specifically contemplated by the Rules of Evidence." Ryan, 103 Wn.2d 165, 178-79, 691 P.2d 197 (1984) (citing ER 802, which provides, "[h]earsay is not admissible except as provided by these rules, by other court rules, or by statute") (emphasis added).

But where the Rules of Evidence do not contemplate a particular statutory exception, an evidence statute that conflicts with the Rules violates the separation of powers doctrine. For example, in State v. Saldano, 36 Wn. App. 344, 675 P.2d 1231, review denied, 102 Wn.2d 1018 (1984), the Court of Appeals held that a statute allowing admission of an accused's prior convictions to attack his credibility *whenever* he testified conflicted with and was

superseded by ER 609, which permits admission of prior convictions to attack a defendant's credibility only if certain requirements are met.

RCW 10.58.090 violates the separation of powers doctrine because it conflicts with the Rules of Evidence. In determining whether a procedural statute conflicts with a court rule, the question is whether both can be given effect. Waples, 2010 WL 2615576, at *3. RCW 10.58.090 permits the court to admit, 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 . . . notwithstanding Evidence Rule 404(b)." The statute permits courts to admit evidence of prior offenses for *any* purpose, including for the purpose of proving the defendant's character and propensity to commit the crime, which ER 404(b) categorically forbids. The statute therefore conflicts with the Rules of Evidence and violates the separation of powers doctrine.

Unlike the child hearsay statute examined in Ryan, RCW 10.58.090 does not fall under any legislative exception specifically contemplated by the Evidence Rules. Although ER 402 defers to statutes rendering relevant evidence *inadmissible*, no Evidence Rule specifically contemplates a statute that allows *admission* of

evidence that the Rules of Evidence deem irrelevant or overly prejudicial, such as character and propensity evidence.

In a decision upholding the statute, the Court of Appeals recognized the "apparent" conflict posed by the statutory language permitting admission of prior sex offense evidence "notwithstanding Evidence Rule 404(b)." State v. Gresham, 153 Wn. App. 659, 667, 223 P.3d 1194 (2009), review granted, (Wash. Jun 01, 2010, No. 84148-9). But the Court held there was no real conflict between the statute and the Rules of Evidence, because the statute permits admission of the evidence only "*if the evidence is not inadmissible pursuant to Evidence Rule 403.*" Gresham, at 669-70 (quoting RCW 10.58.090(1)) (emphasis in Gresham). The Court relied on Jensen, where this Court upheld a statute that permitted admission of evidence in DUI prosecutions that the Court had previously held, in a 2004 case, was inadmissible. Gresham, 153 Wn. App. at 668-70 (citing Jensen, 158 Wn.2d at 397-98 (citing City of Seattle v. Clark-Munoz, 152 Wn.2d 39, 93 P.3d 141 (2004))). Jensen explained the statute at issue did not violate the separation of powers doctrine, although it conflicted with the Clark-Munoz decision, because it did *not* conflict with the Rules of Evidence. Jensen, 158 Wn.2d at 399. Instead, the evidence was subject to

the ordinary admissibility requirements of the Rules of Evidence.

Id.

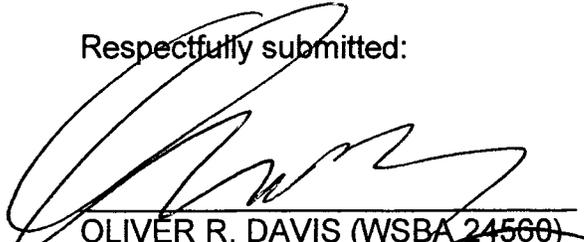
Jensen thus supports Mr. Williamson's argument. The statute at issue in Jensen did not conflict with the Rules of Evidence but only with a court decision issued just months earlier. Under those circumstances, the Legislature was "not invading the prerogative of the courts," nor "threatening judicial independence." Jensen, 158 Wn.2d at 399. But the same cannot be said where a statute directly conflicts with ER 404(b) and overturns centuries of common law, which RCW 10.58.090 does.

E. CONCLUSION

For the foregoing reasons, this Court should reverse Michael Williamson's. If this Court does not reverse Williamson's conviction, this Court should conclude that Indecent Exposure is an unranked felony, and that the court erred in imposing an exceptional term, and reverse his sentence.

DATED this 28 day of July, 2010.

Respectfully submitted:



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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 64416-5-I
v.)	
)	
MICHAEL WILLIAMSON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF JULY, 2010, I CAUSED THE ORIGINAL **OPENING 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:

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STATE OF WASHINGTON
DIV. #1

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