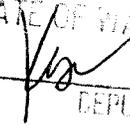


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY:  DEPUTY

NO. 39404-9-II

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

STATE OF WASHINGTON,
Respondent,

v.

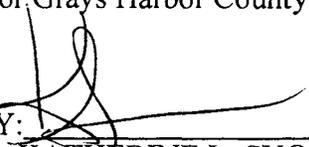
NOEL WALKER,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE F. MARK MCCAULEY, JUDGE

BRIEF OF RESPONDENT

H. STEWARD MENEFEE
Prosecuting Attorney
for Grays Harbor County

BY: 

KATHERINE L. SVOBODA
Sr. Deputy Prosecuting Attorney
WSBA #34097

OFFICE AND POST OFFICE ADDRESS
County Courthouse
102 W. Broadway, Rm. 102
Montesano, Washington 98563
Telephone: (360) 249-3951

pm 3-18-10

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COUNTER STATEMENT OF THE CASE

Procedural History

The defendant was charged by Information on September 19, 2008 with one count of Child Molestation in the Second Degree, as to victim H.L.L., contrary to RCW 9A.44.086. (CP 1-2). On January 26, 2009, the State filed notice that it sought to introduce evidence on an additional sex offense committed by the defendant, pursuant to RCW 10.58.090. (CP 24-39). The State offered the testimony of the additional victim, L.G. at an evidentiary hearing on April 8, 2009, and the court ruled the evidence admissible under RCW 10.58.090 or under ER 404(b) to prove intent, lack of accident or mistake. (CP 3-22, 30, 34).

The defendant was found guilty as charged on April 15, 2009. (CP 8-19). The defendant was given a standard range sentence on June 8, 2009. (CP 8-19).

Factual Background

H.L.L. is a minor female with a date of birth of July 19, 1994. (4/14/09 RP 56-57). H.L.L. met the defendant when her younger brother and the defendant's son became friends. (4/14/09 RP 58). H.L.L. and the defendant's daughter, K.W., became friends. (4/14/09 RP 58-59). H.L.L. first slept over with K.W. at the defendant's house in December of 2007. (4/14/09 RP 63). H.L.L. and K.W. went to bed around 10:00 and slept together in K.W.'s bed. (4/14/09 RP 65-66).

H.L.L. woke up sometime later and was told that K.W. was sick in the bathroom. (4/14/09 RP 66). H.L.L. stayed in bed, feeling uncomfortable because she feels “kind of nauseous when people are sick around [her].” (4/14/09 RP 67). After some time, the defendant came in and laid down on the bed with H.L.L. (4/14/09 RP 68).

The defendant began talking to H.L.L. about school and other “random questions.” (4/14/09 RP 69). Then he began to ask H.L.L. “if [she has] a boyfriend, [has she] ever kissed a guy, and if [she’d] started [her] period.” (4/14/09 RP 70). The defendant also began touching H.L.L.’s chest with two fingers. (4/14/09 RP 70). This touching was on top of her clothes and on the top of her breast. (4/14/09 RP 70-71). H.L.L. told the defendant that she didn’t feel good and that she wanted to go home, but the defendant told her to “tough it out.” (4/14/09 RP 72). The defendant then kissed H.L.L. on the lips, and the kiss lasted a couple of seconds. (4/14/09 RP 72).

The defendant kissed H.L.L. a second time that lasted a bit longer. (4/14/09 RP 73). Over the course of the night, the defendant kissed her two or three times, on one occasion using his tongue. (4/14/09 RP 78). The defendant also rubbed H.L.L.’s back underneath her clothing, and then told her “now for your butt.” (4/14/09 RP 74). H.L.L. told the defendant “no” and turned away from him. (4/14/09 RP 74). The defendant told H.L.L. not to tell about what happened because it would ruin her

friendship with K.W. and the two families' relationship. (4/14/09 RP 76). The defendant also told H.L.L. that he "wasn't a perv." (4/14/09 RP 76).

H.L.L. did not disclose to her parents, or anyone else, what had happened. She testified that she "wanted to really bad, but [] figured that it would ruin [her] friendship [with K.W.]" (4/14/09 RP 78). H.L.L. did continue to spend time with K.W., and stayed over on a few occasions, but said she would make excuses not to go over to the defendant's house because she was "scared to go over there." (4/14/09 RP 79).

In July 2008, H.L.L. spent the night with K.W. at the defendant's house. (4/14/09 RP 80). As H.L.L. was alone changing clothes, she saw the defendant put his head around the corner trying to peek at her. (4/14/09 RP 82-83). The defendant looked into the window and saw H.L.L., then a few seconds later, the defendant peeked his head around again. (4/14/09 RP 84).

The next morning, the defendant spoke to H.L.L. while K.W. was in the shower. (4/14/09 RP 86-87). The defendant told H.L.L. "that he thought [they] could have something, that he thought [H.L.L.] was special and that [they] could have gone on and had wild sex." (4/14/09 RP 87). The defendant also told H.L.L. that he'd had dreams about the incident. (4/14/09 RP 87). The defendant also admitted to peeking at H.L.L. while she was dressing because "he wanted to finish what he was doing," but that if H.L.L. told anyone he would claim he was just walking by. (4/14/09 RP 88).

H.L.L. knows L.G. by sight from school, but had never discussed the incidents regarding the defendant with her. (4/14/09 RP 90-91).

L.G. is a minor female with a date of birth of October 1, 1994. (4/14/09 RP 139). L.G. has known K.G. since approximately 2005. (4/14/09 RP 140). L.G. testified to a night she spent with K.G. when she was in the sixth grade going into the seventh.¹ (4/14/09 RP 142).

During the day, the defendant asked L.G. questions that made her uncomfortable, such as whether or not her sister was a virgin. (4/14/09 RP 148). The defendant also told her that she had changed and that she was beautiful. (4/14/09 RP 149).

That night, L.G. slept on the couch and K.G. slept in the bedroom she shared with her younger brother. (4/14/09 RP 145). Later, L.G. woke up and the defendant commented on her sunburn and wanted to put lotion on her legs. (4/14/09 RP 146). L.G. described that the defendant rubbed lotion on her legs, up to her thighs. (4/14/09 RP 146-147). The defendant tried to touch in L.G.'s pants, but she was able to stop him. (4/14/09 RP 147). L.G. then went and slept in the room with K.G. (4/14/09 RP 148). This testimony was consistent with the testimony L.G. gave at the April 8, 2009 evidentiary hearing.

¹ This presumably occurred in 2006 as L.G. was in the eighth grade during her 2008 testimony. (4/14/09 RP 139-140).

RESPONSE TO ASSIGNMENTS OF ERROR

The defendant challenges the admission of evidence of his prior conviction pursuant to RCW 10.58.090 on the basis that it is unconstitutional for two reasons. First he asserts the statute violates the *Ex Post Facto* Clause of both the federal and state constitutions. Second he argues the statute violates the Separation of Powers doctrine.

A reviewing court presumes the statute is constitutional. *State v. Stevenson*, 128 Wn. App. 179, 189, 114 P.3d 699 (2005). The party challenging the constitutionality of the statute bears the burden to prove the statute is unconstitutional beyond a reasonable doubt. *State v. Ramos*, 149 Wn. App. 266, 270, 202 P.3d 383 (2009).

The reason for this high standard is based on our respect for the legislative branch of government as a co-equal branch of government, which, like the court, is sworn to uphold the constitution. We assume the legislature considered the constitutionality of its enactment and afford some deference to that judgment. Additionally, the 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.

Island County v. State, 135 Wn.2d 141, 147, 955 P.2d 377 (1998).

The defendant fails to sustain his burden to prove RCW 10.58.090 is unconstitutional on either bases relied upon. Further, a virtually identical case has recently been decided in Division I, *State v. Gresham*, 153 Wash.App. 659, 223 P.3d 1194 (2009). The Court in that case held that RCW 10.58.090 did not violate either the separation of powers doctrine nor the *ex post facto* clauses of the state and federal constitutions,

and the conviction was affirmed. *State v. Gresham*, 153 Wash.App.

_____. The Court decided using the analysis argued by the State below, and the State asks this Court to adopt the decision of the *Gresham* court.

A. TESTIMONY ADMITTED PURSUANT TO RCW 10.58.090 DOES NOT VIOLATE THE *EX POST FACTO* CLAUSE OF EITHER THE FEDERAL OR STATE CONSTITUTIONS.

1. The Statute Does Not Affect the Quantity Of Evidence Necessary To Convict testimony admitted pursuant to RCW 10.58.090 does not violate the *ex post facto* clause of either the federal or state constitutions.

Both the federal and state constitutions have provisions which prohibit *ex post facto* laws. Art. 1, § 10§§ (No State shall...pass any Bill of Attainder, *ex post facto* law,...), Washington Constitution, Art. 1, § 23§§ (No bill of attainder, *ex post facto* law, or law impairing the obligations of contracts shall ever be passed.) The defendant contends RCW 10.58.090 violates both of these provisions.

"The *ex post facto* clauses prohibit states from enacting any law that (1) punishes an act that was not punishable at the time the act was committed, (2) aggravates a crime or makes the crime greater than it was when committed, (3) increases the punishment for an act after the act was committed, and (4) changes the rules of evidence to receive less or different testimony than required at the time the act was committed in

order to convict the offender." *State v. Angehrn*, 90 Wn. App. 339, 342-43, 952 P.2d 195 (1998) (citing *Collins v. Youngblood*, 497 U.S. 37, 42, 110 S. Ct. 2715, 2719, 111L. Ed. 2d 30 (1990)). The defendant asserts the statute falls into the fourth category.

Washington courts have held that a new rule of evidence that allows for admission of previously prohibited witness testimony does not violate the *ex post facto* clause. *State v. Clevenger*, 69 Wn.2d 136, 141, 417 P.2d 626 (1966). In *Clevenger* the defendant was charged with committing incest and indecent liberties. Between the date of offense and trial date RCW 5.60.060 was amended to permit his wife to testify against him. The Court rejected the defendant's argument that the change in the law violated the *ex post facto* clause on the basis that it changed the type of evidence necessary for conviction. The Court reasoned:

Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offense was committed, might, in respect of that offence, be obnoxious to the constitutional inhibition upon *Ex post facto* laws. But alterations which do not increase the punishment, nor change the ingredients of the offence or the ultimate facts necessary to establish guilt, but-leaving untouched the nature of the crime and the amount or degree of proof essential to conviction-only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure.

Id. at 142.

Similarly this Court held the Child Hearsay statute, RCW 9A.44.120, did not violate the *ex post facto* clause when applied to offenses which occurred before the effective date of the statute. *State v. Slider*, 38 Wn. App. 689, 688 P.2d 538 (1984).² “Because RCW 9A.44.120 did not increase the punishment nor alter the degree of proof essential for a conviction, its application in the present case did not amount to a perversion of the prohibition against *ex post facto* laws.” *Id.* at 695 (emphasis in the original).

In contrast, the Court did find an amendment to a statute which was applied retroactive to the effective date of the amendment violated the *ex post facto* clause in *Carmell v. Texas*, 529 U.S. 513, 120 S.Ct. 1620, 146 L.Ed.2d 477 (2000). *Carmell* involved the sexual assault of the defendant’s step-daughter between 1991 and 1995 when the victim was 12 to 16 years old. Before 1993 sexual assaults against child victims over 14 years old could be proved either by testimony from the victim alone if the victim reported within 6 months of the assault, or with corroboration if the report came more than 6 months later. The 1993 amendment to the statute removed the corroboration requirement. Under the facts of the case the Supreme Court found the State’s evidence would have been insufficient prior to the 1993 amendments, because there was no corroboration for the victim’s testimony. Thus the quantum of evidence necessary to convict the defendant was less than previously required, putting the defendant’s

² The child’s statements were made in 1979. *Slider*, 38 Wn. App. at 690. The child hearsay statute became effective in 1982. See Laws of Washington 1982 Ch. 129 § 2§§.

case squarely within the fourth category of circumstances which violated the *ex post facto* clause. *Id.* at 531, 1632.

The Washington State Supreme Court similarly found a violation of the *ex post facto* clause in *Ludvigsen v. Seattle*, 162 Wn.2d 660, 174 P.3d 43 (2007). There a statute was amended to eliminate a foundational requirement for admission of breath test results in a Driving While Intoxicated case. Like the corroboration evidence at issue in *Carmell*, without the breath test evidence, the defendant would be entitled to an acquittal, at least where the State was proceeding only on the per se prong of the DUI statute.³ Without the previously required foundation the evidence was admitted in DUI prosecutions tried after the effective date of the amendment. However, as applied to offenses which were committed before the effective date of the statute, the amendment violated the *ex post facto* clause because it reduced the quantity of evidence necessary to convict the defendant, i.e. the foundation necessary to establish the defendant's blood alcohol level. *Id.* at 663.

The distinction between *Clevenger*, *Slider*, *Carmell*, and *Ludvigsen* rests on the nature of the evidence addressed by the statutory amendments. In the former two cases the statute at issue related only to what the jury could consider in determining whether the defendant was guilty or not. Even without the amendment in *Clevenger* and *Slider* other evidence may

³ RCW 46.61.502(1)(a) "A person is guilty of driving while under the influence of intoxicating liquor or any drug if the person drives a vehicle within this state and the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the persons breath or blood made under RCW 46.61.506."

have been sufficient to convict. In the latter two cases the amendment affected what the jury had to consider in finding the defendant guilty. Without that evidence the jury would be required to find the defendant not guilty.

RCW 10.58.090 does not violate the *ex post facto* clause because it only addresses what the jury can consider when determining whether or not the defendant is guilty. The evidence at issue in that statute is not necessary to convict on the current charges. Nor could it be, since it relates to “another sex offense”. If the court excludes the evidence under ER 403 or another rule of evidence, the jury may still convict, even if the only evidence presented is the victim’s testimony. The Legislature’s stated intent is “to ensure that juries receive the necessary evidence to reach a just and fair verdict.” Laws of Washington 2008, Ch. 90, § 1§§.

Carmell and *Ludvigsen* both addressed statutes which concerned evidence which was necessary for conviction. RCW 10.58.090 does not require less proof for conviction, or cause evidence necessary to convict be admissible when it otherwise would not be. Thus RCW 10.58.090 does not violate the *ex post facto* clause.

2. Washington’s *Ex Post Facto* Clause Should Not Be Analyzed Differently From The Federal Constitution’s *Ex Post Facto* Clause
Washington’s *Ex Post Facto* Clause Should Not Be Analyzed Differently From The Federal Constitution’s *Ex Post Facto* Clause.

The defendant next argues RCW 10.58.090 violates Washington State Constitution Art. 1, § 23§, employing a *Gunwall* analysis.⁴ *Gunwall* provides the framework for “determining whether, in a given situation, the constitution of the State of Washington should be considered as extending broader rights to its citizens than does the United States Constitution.” *Gunwall*, 106 Wn.2d at 61. The defendant argues that the authors of Washington’s constitution would have understood that the analysis for Washington’s *ex post facto* clause was the same as that articulated in *Calder v. Bull*, 3 U.S. 386, 1 L.Ed. 648 (1798). BOA at 14. *Calder* concerned the federal constitution. Thus, the defendant concedes that Washington’s *ex post facto* clause is no more protective than its federal counterpart.

The defendant’s *Gunwall* analysis supports that conclusion. The six non-exclusive criteria that are examined when determining whether Washington’s Constitution provides concurrent protection with the Federal Constitution are: (1) the textual language; (2) differences in the text; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern. *Gunwall*, 106 Wn. 2d at 58. The language of the two provisions is virtually identical. The only difference is the addition of the word “ever” in the State version. That word does not create any difference between the two clauses since there is

⁴ *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

no exception to the prohibition against *ex post facto* laws in the federal version of that clause.

Case authority which pre-dates the adoption of Washington's Constitution suggest that the Court accepted the test for an *ex post facto* law set out in *Calder. Fox v. Territory 2 Wash. Terr. 297, 5 P. 603* (1884). The Court found the law at issue in *Fox* did not constitute an *ex post facto* law by distinguishing it from other laws at issue in authority cited by the appellant. "It was an attempt of congress in the one case, and the state of Missouri in the other, to prescribe punishment by legislative enactment for participation in the rebellion, directed at particular classes, prescribing additional penalties for acts before that declared crimes, rendering punishable acts not before criminal, and changing the rules of evidence by which less or different testimony was made sufficient to convict." *Id.* at 300. (emphasis added).

The fifth *Gunwall* factor only speaks generally to whether the state constitution is more protective than the federal constitution. However the Supreme Court has recognized that it does not particularly shed light on specific issues. *State v. Ortiz*, 119 Wn.2d 294, 303, 831 P.2d 1060 (1992).

The sixth factor does not support the conclusion that Washington's Constitution is more protective than its federal counterpart. The goals of the *ex post facto* clauses of both constitutions are equally important both locally and nationally.

The defendant argues that the common law history suggests that the interpretation of Washington's *ex post facto* law analyzed under *Calder's* fourth category relating to evidence means that any change in the evidence rules which makes a conviction more easy, and which is applied retroactively, violates the constitutional provision. An examination of the cases cited by the defendant shows when courts talked about making a conviction "more easy" they meant a change in the law which either eliminated evidence necessary to convict, or eliminated an impediment to admission of evidence necessary to convict. This is no different than what Washington has interpreted the fourth *Calder* factor to be.

The defendant cites authority from Oregon and Indiana on the basis that the language of Washington Constitution Art. 1 §23§§ was derived from those state's constitutions. In *Fugate* the Oregon court considered whether a state statute which was enacted while the defendant's DUII charge was pending applied to his case. *State v. Fugate*, 26 P.3d 802 (Or. 2001). Prior to enactment under the facts of his case the defendant was entitled to have evidence of his intoxication suppressed. After enactment he was not. The Court held the statute as applied retroactively to the defendant's case violated Oregon's *ex post facto* clause. *Id.* at 814. The application of *Calder's* evidence category in *Fugate* is no different than it was in *Ludvigsen*. *Fugate* does not stand for the proposition that Oregon's *ex post facto* clause prohibits retroactive application of new rules of evidence which only assist the trier of fact in evaluating evidence that

otherwise would have been properly admitted under the law at the time the offense occurred.

Strong was concerned with whether a change in the law which prescribed incarceration instead of stripes violated the *ex post facto* clause because it increased the penalty between commission of the criminal act and sentencing for that act. *Strong v. State*, 1 Blackf. 193 (Ind. 1822). It did not discuss what it meant to “make conviction more easy.” There is no reason to believe that the Indiana court would have found an *ex post facto* violation under the fourth *Calder* category in a case such as this where the statute only made certain evidence admissible, but where that evidence itself was not necessary for a conviction.

An assessment of the *Gunwall* factors shows that Washington’s *ex post facto* clause is no more protective than its federal counterpart. Because RCW 10.58.090 does not violate the federal constitution, it does not violate Washington Constitution Art. 1, § 23§.

B. THE LEGISLATURE DID NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE WHEN IT ENACTED RCW 10.50.090. THE LEGISLATURE DID NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE WHEN IT ENACTED RCW 10.50.090.

The separation of powers doctrine is not formally enunciated in either the federal or state constitutions. The doctrine has traditionally been presumed to exist from the division of government into three distinct branches; executive, legislative, and judicial. *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994). The purpose of the doctrine is to prevent one branch of government from encroaching on the “fundamental

functions” of another. *State v. Moreno*, 147 Wn.2d 500, 505, 58 P.3d 265 (2002).

The doctrine does not absolutely bar different branches performing similar functions. “The validity of this doctrine does not depend on the branches of government being hermetically sealed off from one another.” *Carrick*, 125 Wn.2d at 135. The test for assessing whether an activity has violated the doctrine was enunciated in *Zylstra v. Piva*, 85 Wn.2d 743, 539 P.2d 823 (1975). “The question to be asked is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.” *Id.* at 750.

The defendant challenges the constitutionality of RCW 10.58.090 on the basis that it violates the separation of powers doctrine. He argues that the statute irreconcilably conflicts with ER 404(b), a rule promulgated by the Supreme Court. RCW 10.58.090 provides in part:

(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. . .

(3) This section shall not be construed to limit the admission or consideration of evidence under any other evidence rule.

RCW 10.58.090.

In contrast ER 404(b) states:

(b) Other Crimes, Wrongs, or Acts. 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.

ER 404(b).

The Supreme Court has recognized that its authority to adopt rules of evidence was delegated to the judiciary by the Legislature. “Therefore, rules of evidence may be promulgated by both the legislative and judicial branches.” *City of Fircrest v. Jensen*, 158 Wn.2d 384, 394, 143 P.3d 776 (2006).

Courts have rejected the argument that legislatively adopted rule of evidence violates the separation of powers doctrine. In *Ryan* the Court held the Child Hearsay statute, RCW 9A.44.120, did not violate the doctrine for two reasons. First, under ER 802 hearsay is not admissible, but the rule provides an exception for hearsay that was admissible pursuant to statute. Second, the statute did not require child hearsay to be admitted. Rather it was admissible if it contained particularized guarantees of trustworthiness. *State v. Ryan*, 103 Wn.2d 165, 178-79, 691 P.2d 197 (1984).

In *Fircrest* the defendant challenged SHB 3055 relating to admissibility BAC tests in DUI prosecutions on the basis that it conflicted with the court’s authority to reject evidence under ER 401, ER 402, ER

403, and ER 404(b). *Fircrest*, 158 Wn.2d at 395. The Supreme Court rejected that argument because the statute only made such test admissible if the State met its prima facie burden. The statute therefore permitted, but did not require, a court to admit evidence of the test once that burden had been met. The trial court was free to exercise its discretion to exclude the evidence under any rule of evidence. Because it was permissive the statute did not invade the prerogative of the court, or threaten judicial independence. It thus did not violate the separation of powers doctrine. *Id* at 399.

When there is a conflict between a court rule and a procedural statute the court attempts to harmonize them giving effect to both. *Fircrest*, 158 Wn.2d at 394, *State v. Blilie*, 132 Wn.2d 484, 491, 939 P.2d 691 (1997). Only in the event of an irreconcilable conflict will the court rule prevail. *Washington State Bar Assn. v. State of Washington*, 125 Wn.2d 901, 909, 890 P.2d 1047 (1995).

The defendant claims that RCW 10.58.090 irreconcilably conflicts with ER 404(b) because the statute permits the court to admit evidence of a defendant's prior sexual offense to prove his propensity to commit the current sexual offense whereas the rule excludes admission of evidence for that reason. The argument should fail because the statute and rule can be harmonized.

RCW 10.58.090 does not mandate that the court admit evidence of a prior sexual offense. Rather, like the statutes at issue in both *Ryan* and *Fircrest*, the evidence is only admissible. The admissibility of the evidence is subject to other rules of evidence. Because the statute is permissive, rather than mandatory, there is no violation of the separation of powers doctrine. The legislature has not invaded the authority of the court to exclude evidence of a prior sex offense. It specifically stated admission of that evidence is dependant on the trial courts assessment of the evidence in light of ER 403 and other rules of evidence.

This statute should be contrasted with statutes which impose a mandatory obligation on the judicial branch. In *Bar Ass'n*, the legislature passed RCW 41.56.020 requiring the Bar Association to engage in collective bargaining with its employees. That statute conflicted with GR 12(b) which permitted collective bargaining at the discretion of the Board of Governors. The rule related to the inherent power of the court to control the bar association. Because the statute directly conflicted with the rule, and they could not be harmonized, the statute violated the separation of powers doctrine. *Id.* 125 Wn.2d at 909. Unlike the statute at issue in *Bar Ass'n*, the statute leaves admission of evidence of a prior sex offense to the trial court's discretion under ER 403 and, with the exception of ER 404(b), other rules of evidence.

In Indiana, the court struck down a statute similar to RCW 10.58.090 because it conflicted with the common law and rules of evidence in *Brim v. State*, 624 N.E.2d 27 (Ind. 1993) and *State v. Day*, 643 N.E.2d 1 (Ind. 1995). *Brim* merely stated the statute was a nullity because it conflicted with ER 404(b) without conducting any analysis. *Brim*, 624 N.E.2d at 33. *Day* cited *Brim* for the same proposition, again with no analysis. *Day*, 643 N.E.2d at 2-3. The conclusion in these cases is inconsistent with Washington decisions which require the court to harmonize statutes and court rules if at all possible. Neither case provides persuasive authority for the defendant's position.

Other jurisdictions have found no irreconcilable conflict between statutes which are similar to RCW 10.58.090 and ER 404(b). Michigan determined the separation of powers doctrine was not violated because its version of the statute, MCL 768.27a, was a substantive rule of evidence that did not principally regulate the operation or administration of the courts. *State v. Pattison*, 741 N.W.2d 558, 562 (Mich. 2007). See also *State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004) (adopting Minn.Stat § 634.20§§ which creates an exception to the ER 404(b) ban on propensity evidence for domestic violence offenses finding the legislative policy behind the statute best serves the interest of justice). These authorities more persuasively support the conclusion that RCW 10.58.090 does not irreconcilably conflict with ER 404(b).

C. THE SENTENCE IMPOSED MUST BE REMANDED FOR CORRECTION THE LEGISLATURE DID NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE WHEN IT ENACTED RCW 10.50.090.

The defendant has a previous conviction for Rape in the Third Degree. CP 8-19. Because of this, the State believed the defendant was subject to sentencing pursuant to former RCW 9.94A.712. However, this offense is not in the predicate offense list of RCW 9.94A.030(34)(b), so the State believes this case must be remanded for re-sentencing to a determinate standard range sentence.

CONCLUSION

Evidence that the defendant had committed a prior sexual offense was properly admissible under RCW 10.58.090. That statute did not violate either the Separation of Powers Doctrine, or the State or Federal *ex post facto* clauses. For those reasons the State requests that the Court affirm the defendant's conviction. The State further asks that the case be remanded for re-sentencing to correct the indeterminate sentence.

Dated this 18 day of March, 2010.

Respectfully Submitted,

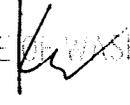
By: 
KATHERINE L. SVOBODA
Sr. Deputy Prosecuting Attorney
WSBA #34097

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DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

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

STATE OF WASHINGTON,

Respondent,

No.: 39404-9-II

v.

DECLARATION OF MAILING

NOEL WALKER,

Appellant.

DECLARATION

I, Wendy Sivonen hereby declare as follows:

On the 18th day of March, 2010, I mailed a copy of the Brief of Respondent to Manek R. Mistry and Jodi R. Backlund; Backlund & Mistry; 203 East Fourth Avenue, Suite 404; Olympia, WA 98501 and to Noel Walker DOC#282015; Airway Heights Corrections Center; PO Box 1899; Airway Heights WA 99001 1899, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

