

NO. 41634-4-II

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

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STATE OF WASHINGTON,

Respondent,

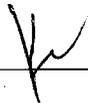
v.

STEVEN WELTY,

Appellant.

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

The Honorable S. Brooke Taylor, Judge

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BRIEF OF APPELLANT

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JENNIFER J. SWEIGERT  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

11/11/10 uhd

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A. ASSIGNMENTS OF ERROR

1. The court erred in admitting testimony by appellant's daughter and sister regarding uncharged acts of sexual abuse.

2. RCW 10.58.090 permitting evidence of prior sex offenses in contradiction to ER 404(b) violates state and federal constitutional provisions providing for the separation of powers, protecting against ex post facto legislation, and protecting the due process right to a fair trial.<sup>1</sup>

3. The court exceeded its authority in imposing conditions of community custody prohibiting possession of alcohol and possession or use of drugs of any kind.

4. The community custody condition prohibiting possession of "drugs" without respect to whether the drug is a controlled substance is unconstitutionally vague.

5. The court failed to enter findings of fact and conclusions of law after the bench trial.

Issues Pertaining to Assignments of Error

1. RCW 10.58.090 permits evidence of prior sex offenses if the court deems the probative value outweighs the danger of unfair

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<sup>1</sup> 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 upheld RCW 10.58.090 against the constitutional challenges discussed in this brief. The Washington Supreme Court granted review, which is pending. To preserve these issues in the event of a change in the law, Welty raises these constitutional challenges.

prejudice and sets forth seven mandatory factors the court must consider. ER 404(b) permits evidence of other bad acts to show they were part of a common scheme or plan with the charged offense.

a. Did the court err in admitting such evidence when it disregarded at least three of the seven factors required under the statute and at least one other also weighs against admission?

b. Did the court err in admitting such evidence when the testimony showed it occurred decades earlier, some of it while appellant was himself only a child and the commonalities were only that the complainants were all relatives and the acts complained of were oral sex that occurred in a bedroom?

2. Under the separation of powers doctrine, when a statute conflicts with a court rule governing courtroom procedure, the court rule takes precedence. Does RCW 10.58.090 violate the separation of powers doctrine because it directly conflicts with ER 404(b)?

3. A substantive change in the law violates the Ex Post Facto Clause when it is applied retroactively to disadvantage the defendant. RCW 10.58.090 permits the State to fill gaps in its proof relating to the crime charged by persuading the trier of fact with evidence of criminal character or propensity. Does RCW 10.58.090 violate state and federal ex

post facto provisions because it is a retroactive change in the law that effectively lessens the State's burden of proof?

4. Washington's Ex Post Facto Clause was modeled after Oregon's, which has been interpreted as providing greater protection than the federal provision in protecting against changes in the law that one-sidedly give advantage to the State over accused persons. Does Washington's constitution provide similarly greater protection and does RCW 10.58.090 violate Washington's Ex Post Facto Clause?

5. Washington's constitutional right to a jury trial encompasses the right as it was understood at the time of adoption. At that time, evidence used to infer guilt based on criminal character or propensity was generally banned as unfair. In permitting such evidence and inference, does RCW 10.58.090 violate Washington's due process right to a fair trial?

6. Courts may impose only those sentences authorized by statute. The Sentencing Reform Act authorizes conditions of community custody to include prohibitions on the use or possession of controlled substances without a prescription and on the use of alcohol. It does not permit other conditions such as a ban on over-the-counter drugs or the mere possession of alcohol unless crime related.

a. Where there was no evidence drugs or alcohol played any role in the offenses, are these conditions of appellant's community custody void because unauthorized by statute?

b. Due process vagueness doctrine requires that community custody conditions provide fair warning of what is prohibited and protect against arbitrary, ad hoc, or discriminatory enforcement. Alternatively, is the condition of community custody prohibiting appellant from possessing or using any and all "drugs" without a prescription void for vagueness because it could permit appellant to be arrested for taking lawful, over-the-counter medications available without a prescription?

7. CrR 6.1(d) requires the court to enter written findings of fact and conclusions of law in a case tried without a jury. This case was tried without a jury, but no such findings have yet been entered. Should this case be remanded for entry of written findings of fact and conclusions of law?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Clallam County prosecutor charged appellant Steven Welty with six counts of rape of a child in the first degree, six counts of child molestation in the first degree, and six counts of incest in the first degree. CP 22-30, 35-43. Welty was found guilty at a bench trial, and the court

imposed 102 months on the incest counts to run concurrently with indeterminate sentences of 318 months to life on the child rape counts and 196 months to life on the child molestation counts. Notice of appeal was timely filed. CP 3.

2. Substantive Facts

Welty's 14-year-old granddaughter E.G. testified he abused her at least once per year beginning when she was four and ending when she was eleven. 4RP<sup>2</sup> 3-5, 11. She said it happened virtually every time she visited him, whenever her grandmother left for work on weekdays. 4RP 7-9. E.G. and her older brother visited Welty every spring and winter vacation for a few days. 4RP 9. She testified Welty touched her chest and vagina with his hands, licked her vagina, and put his tongue inside her vagina. 4RP 7-8.

E.G. told no one until she was twelve. 4RP 12-13. That year she told her brother what had happened to her. 4RP 12-13, 35. He told no one because she told him not to tell. 4RP 35. When E.G. was fourteen, she told her mother, Welty's daughter. 3RP 34; 4RP 13.

E.G.'s mother A.G. was mortified because, she claimed, she herself had been abused by Welty throughout her childhood. 3RP 44-48. A.G. testified Welty first encouraged her to touch his erect penis when she was

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<sup>2</sup> There are six volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Sept. 22, 2010; 2RP – Oct. 1, 2010; 3RP – Oct. 4, 2010; 4RP – Oct. 5, 2010; 5RP – Oct. 6, 2010; 6RP – Nov. 16, 2010.

three. 3RP 44. Her parents divorced when she was five, and after that, whenever she visited Welty, he would either come into her room or bring her to his room and perform oral sex on her. 3RP 44-48. Despite these claims, she permitted E.G. to visit Welty regularly. 3RP 34. She claimed she believed E.G. would be safe because her brother and Welty's wife were also present and because she believed Welty had found God and become a changed man in the years since she was a child. 3RP 43. She denied telling E.G. about her own abuse until after E.G. disclosed to her. 3RP 52-53.

In a series of phone calls recorded by police, E.G.'s mother confronted Welty. Exs.<sup>3</sup> 10, 11, 12, 13. Welty first responded by saying, "Why would she say something like that?" Ex. 10. E.G.'s mother repeatedly called Welty a liar and told him to 'fess up. Ex. 10. Welty protested he was in shock and did not know what to say. Ex. 10.

In the second call, a couple of hours later, Welty stated, "[I]t became a playful time and it just happened to come into play, and I don't know why. And I have apologized to [E.G.] over and over and over again." Ex. 11. Welty also stated, "It breaks my heart because I promised you, I told you, I went through this with you." Ex. 11. When E.G.'s mother pressed for details, Welty told her, "[E.G.] was also pinching my titties. You know, she

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<sup>3</sup> Exhibits 5-9 are recordings of phone calls made by E.G.'s mother to Welty. Exhibits 10-14 are the transcripts of those calls. For ease of reference, this brief cites to the transcripts.

even does it now. And so, you know, it became blowing on my belly and, and blowing on her belly and . . . all of a sudden it just went too far.” Ex. 11. He explained, “I have always expressed my love in a, in a weird way. . . . I’m not saying it’s right but it’s something that has caused me to want to share a love and with [E.G.] I have no idea why it came about.” Ex. 11. Welty continued to insist it only happened one time. Ex. 11. In a third phone call, Welty again explained, “[W]e were blowing on each other’s belly and I just happened to slide down farther than the belly.” Ex. 12. He also denied putting his fingers inside her or breaking her hymen. Ex. 12.

Welty’s younger sister R.P. also testified he abused her when they were children. 3RP 24. Welty is three years older than his sister, and when they were children, they often slept in the same bed. 3RP 23. She testified he licked her bottom, clitoris, and vaginal opening in the middle of the night and she would awaken in a state of orgasm. 3RP 25, 29. She testified this occurred when she was between the ages of 6 and 10 and Welty was between 9 and 13. 3RP 24, 28.

The court admitted the testimony of A.G. and R.P. under RCW 10.58.090 and the common scheme or plan exception in ER 404(b). 4RP 60. The court reasoned that Welty’s relationship to the women, nature of the act, and the appearance and age of the women at the time was similar. 4RP 59-60. The court also found the probative value outweighed any prejudice.

4RP 60-61. The court found closeness in time or frequency was not a factor, the State's need for the evidence was compelling, and the other family members' testimony tended to corroborate E.G.'s account. 4RP 61, 64.

In finding Welty guilty, the court stated the basis for the decision was E.G.'s credibility, Welty's failure to deny the accusations, and the lack of any motive for E.G. or other family members to lie. 5RP 7-8. The court stated it would have found Welty guilty beyond a reasonable doubt on those factors alone. 5RP 11. Regarding the testimony by Welty's daughter and sister, the court declared,

In addition, there was further corroboration that I do not find as essential to the Court's finding but certainly provides the Court with some comfort that the decision that I made in this case is absolutely the correct one. We have testimony of the younger sister and the daughter about acts perpetrated on them with remarkable similarity in fact and in details to the allegations made by the granddaughter. . . . So once again, while this corroboration is just that, it is corroboration, it is not essential to the Court's decision but it provides this Court with overwhelming corroboration of the accuracy of the victim's testimony in this case. I therefore find that the defendant, Mr. Steven Welty, is guilty as charged on each of these counts.

5RP 11-12.

C. ARGUMENT

1. THE COURT ERRED IN CONSIDERING UNCHARGED PRIOR OFFENSES AS EVIDENCE OF GUILT.

Over Welty's strenuous objection, the trial court admitted and considered testimony from Welty's daughter and sister that he abused them

sexually when they were children. In finding Welty guilty, the court considered that testimony as “overwhelming corroboration” that E.G.’s account was true. 5RP 11-12. The court ruled the evidence was admissible under either RCW 10.58.090 or the common scheme or plan exception under ER 404(b). 4RP 60-61. But this decision was in error. First, the court failed to properly weigh the mandatory factors under RCW 10.58.090, instead simply disregarding those that did not apply. Additionally, the testimony was inadmissible under ER 404(b) because the incidents were far too disparate in time and circumstance and the similarities far too common to constitute a distinct plan.

a. The Court Erred in Failing to Consider Several Mandatory Factors Required by Statute.

RCW 10.58.090 requires the court to weigh and consider the following factors:

- (a) The similarity of the prior acts to the acts charged;
- (b) The closeness in time of the prior acts to the acts charged;
- (c) The frequency of the prior acts;
- (d) The presence or lack of intervening circumstances;
- (e) The necessity of the evidence beyond the testimonies already offered at trial;
- (f) Whether the prior act was a criminal conviction;
- (g) Whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or

misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; and

(h) Other facts and circumstances.

RCW 10.58.090. Under the statute, the trial judge must consider all of these factors. RCW 10.58.090 (“[T]he trial judge shall consider the following factors.”); see also State v. Scherner, 153 Wn. App. 621, 658, 225 P.3d 248 (2009) (RCW 10.58.090 “states the trial court must consider all of the factors.”). The plain language of the statute permits the court to consider additional factors, but it does not permit the court to disregard any of the required factors. Id. But that is precisely what the judge did in Welty’s case.

When prompted by the prosecutor to consider on the record the factors listed in the statute, the court gave weight only those factors it found compelling, instead of balancing them against the factors that weighed against admissibility:

I think the similarity of the act is probably the most compelling factor. The closeness in time is not a factor, nor is the frequency. The need for the testimony I think is another compelling fact for the reasons I just mentioned.

The great difficulty is corroborating the type of testimony that we heard from [E.G.] and the likelihood that without the other testimony it becomes one person’s word against another which rarely allows a finding of proof beyond a reasonable doubt.

Whether or not there were convictions on the prior act is not really a relevant factor here because these matters all just came to the light within the last few months and there hasn’t

even been an opportunity for charges, must [sic] less convictions, so I think the probative value far outweighs the prejudice.

4RP 61 (emphasis added). The prosecutor then reminded the court of the remaining factors and the court stated, “The presence or lack of intervening circumstances, I quite candidly don’t know what that means or why it’s in the statute.” 4RP 62. After explanation by the prosecutor, the court found there were no intervening circumstances that would impact the ruling. 4RP 62-63. Finally, the court concluded there was no unfair prejudice because there was no jury:

I feel fully capable of separating the wheat from the chaff and do not bring any prejudice at all to bear based on this testimony. The issue is a factual issue. The facts are the facts. The testimony is the testimony. The weighing ultimately that has to be done is whether or not each element of the charge has been proved beyond a reasonable doubt. And the only finding I can make with regard to the proffered testimony is that it tends to corroborate the testimony of the alleged victim in this case.

4RP 63-64. In summary, the court found factors (a), (d), (e), and (g) weighed in favor of admitting the testimony, and disregarded factors (b), (c), and (f).

The court erred in disregarding the factors that weigh against admission of the evidence. The legislature mandated that the court consider the closeness in time of the prior acts. RCW 10.58.090(6)(b). Here, the prior acts occurred many years, indeed decades, before. The acts against A.G.

occurred when she was a child. 3RP 44. The acts against R.P. occurred nearly fifty years ago, when she and Welty were both children. 3RP 23-24. This factor weighs heavily against admitting their claims of abuse so long ago.

The Legislature also mandated consideration of the frequency of the acts. RCW 10.58.090(6)(c). R.P. was not clear how often the acts occurred or for how long. She testified she was “between, um 6 and 8 I would say – 6 and 10, I’m not really clear on that, its been 45, 50 years ago.” 3RP 24. She testified it happened a lot, but stated, “I’m not clear because it was in the middle of the night when I was sleeping.” 3RP 25. A.G. similarly testified that while it happened quite often, she did not know exactly how often. 3RP 46.

The Legislature also mandated consideration of whether the prior act was a criminal conviction. RCW 10.58.090(6)(f). But again, the court simply disregarded and gave no weight to this factor. The court rationalized that there had been no time for convictions because neither of the women had come forward with their accusations until very recently. 4RP 61. But the significance of a criminal conviction would be that a court could be far more certain the testimony was reliable if the incident was proved beyond a reasonable doubt to an impartial jury in a fair trial. By contrast, here, the court can have no such reassurance. On the contrary, A.G. and R.P. were

testifying to incidents that supposedly occurred long ago when they were children, when they admitted their recollection was weak, and they never told anyone at the time, much less anyone in a position to press charges or bring the charges before a court. The considerable reassurance of accuracy that a criminal conviction would provide is entirely absent here. These are bare accusations based on distant recollections. This factor weighs against admissibility.

The court also erred in finding this testimony “necessary” under RCW 10.58.090(6)(e). The State already presented detailed testimony by E.G. regarding the alleged offenses. 4RP 4-12. In addition to that testimony, the State presented the recorded phone call in which A.G. confronted Welty about the incidents with E.G. and he made confused and inconsistent attempts to defend himself against her accusations. Exs. 10, 11, 12. The State also presented evidence of a “hue and cry,” corroborating E.G.’s testimony with evidence of her timely complaint to her brother about the sexual abuse. 4RP 35. Under these circumstances, evidence of other uncharged offenses occurring decades before was not necessary.

A court necessarily abuses its discretion when it bases its decision on an error of law. Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) (citing Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 S. Ct. 2447, 110 L. Ed. 2d 359

(1990)). A court also abuses its discretion when its decision is manifestly unreasonable or based untenable grounds. Id. Here, the court based its decision on an error of law when it opted to simply disregard all the factors weighing against its decision to admit the evidence. In addition, it was manifestly unreasonable to find these incidents were necessary. The court abused its discretion in improperly applying RCW 10.58.090 to admit A.G.'s and R.P.'s testimony.

b. The Prior Incidents Were Also Inadmissible Under ER 404(b) Because They Were Far Too Remote in Time to Have Been the Results of a Common Plan.

The common scheme or plan exception to ER 404(b) evolved out of the doctrine of chances. State v. Burkins, 94 Wn. App. 677, 689, 973 P.2d 15 (1999). "The more often that unusual and abnormal elements are present in similar circumstances with similar results, the less likely it is that an innocent intent underlies the abnormal elements." Id. (citing 2 John H. Wigmore, Evidence § 302, 241 (1979)). "Sufficient repetition of complex common features leads to a logical inference that all of the acts are separate manifestations of the same overarching plan, scheme, or design." Id. While the method of the crime need not be unique, there must, at a minimum, be substantial and marked similarities indicative of a common pattern. State v. DeVincentis, 150 Wn.2d 11, 13, 18, 20-21, 74 P.3d 119 (2003). Here, the court erred in admitting A.G. and R.P.'s testimony because the

commonalities are not complex but coincidental and the prior incidents occurred long ago under drastically different circumstances.

The court found a common scheme or plan because of “the similarity in the testimony at least on the modus operandi, and the nature, sex, relationship, age, appearance of the alleged victims.” 4RP 59-60. But these similarities are not evidence of a common plan. There is no unusual or complex modus operandi in this case. R.P. as a young child was designated to sleep on many occasions in Welty’s bed. 3RP 23. This situation was not his doing. 3RP 23. She was the only girl in family with three brothers. 3RP 23. Her parents did not see fit to provide her with her own bed, let alone her own room, and so she rotated sharing a bed with each of her brothers. 3RP 23. This does not indicate a “plan” on Welty’s part; he was only a child himself at the time. 3RP 24.

The fact that A.G. also described incidents occurring in either her bedroom or his or another bedroom is not the type of “modus operandi” that indicates a common plan. The bedroom is the traditionally private area of the home where sexual activity generally takes place. The location is purely coincidental and bears no indication of some larger plan. Similarly, having oral sex in a bedroom is hardly an “unusual” or “complex” common feature. See Burkins, 64 Wn. App. at 689.

The court also made much of the physical resemblance between E.G. and R.P. at her age. 4RP 59-60. But again, this commonality is purely coincidental does not indicate a common plan. Welty's accusers are women closely related to him, and to each other, by blood. 3RP 23, 32. The fact that they resemble each other is to be expected. If the women were strangers who bore a striking resemblance to each other, that might indicate he was seeking out women with a particular appearance. But that inference simply does not hold up when the women are all related.

This case is inherently different from Scherner, where prior acts were held to constitute a common scheme or plan because they involved similar oral sex, with relatives or close family friends, and occurred largely in bed. 153 Wn. App. at 657. In Scherner the evidence showed a series of similar acts involving four prior victims. Id. The frequency of repetition is an essential component of the common scheme or plan exception. See Burkins, 64 Wn. App. at 689 (inference of common plan rests on sufficient repetition). In this case, there were incidents involving only two members of Welty's family, one of whom claimed the incidents occurred when Welty was just a child himself. 3RP 23-24. That is insufficient to constitute a common scheme or plan.

Under ER 404(b)'s common scheme or plan exception, "[r]andom similarities are not enough." DeVincentis, 150 Wn.2d at 18. But that is all

the court relied on in this case. It appears from the court's oral decision that admission of this testimony had a strong effect on the outcome of the trial. When he was confronted by his daughter, Welty repeatedly denied anything other than one or two instances of accidental contact, yet the court found him guilty of six counts of child rape, six counts of child molestation, and six counts of incest. Exs. 9-12; 5RP 6-7. The court decided the case largely based on E.G.'s credibility and found the prior acts were "overwhelming corroboration" of E.G.'s accuracy. 5RP 7-8, 11-12. Welty asks this Court to reverse his conviction because the court abused its discretion in admitting, and then relying on evidence of prior uncharged acts.

2. RCW 10.58.090 IS AN UNCONSTITUTIONAL VIOLATION OF THE SEPARATION OF POWERS DOCTRINE BECAUSE IT IS IN DIRECT CONFLICT WITH ER 404(B).

The separation of powers doctrine flows from the tri-partite structure of government under Washington's constitution. Carrick v. Locke, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994) (citing State v. Osloond, 60 Wn. App. 584, 587, 805 P.2d 263 (1991)); Const. Arts. II, III, and IV (establishing the legislative department, the executive, and judiciary). In that structure, no branch of government may invade or usurp powers constitutionally assigned to another branch. State v. Moreno, 147 Wn.2d. 500, 505-06, 58 P.3d 265 (2002). Statutes are presumed constitutional but

may be struck down when shown to be unconstitutional beyond a reasonable doubt. Ludvigsen v. City of Seattle, 162 Wn.2d 660, 668, 174 P.3d 43 (2007). Application of this unconstitutional statute is manifest constitutional error that this court may consider for the first time on appeal because it involved practical and identifiable consequences. RAP 2.5; State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007), argument section D.1., supra. Courts review the constitutionality of a statute de novo. Ludvigsen, 162 Wn.2d at 668.

While the Legislature and the Courts both may prescribe rules of evidence, when the two are in conflict, court rules take precedence in procedural matters. City of Fircrest v. Jensen, 158 Wn.2d 384, 394, 143 P.3d 776 (2006). Substantive law “prescribes norms for societal conduct and punishments for violations thereof.” Id. (quoting State v. Smith, 84 Wn.2d 498, 501, 527 P.2d 674 (1974)). By contrast, practice and procedure relates to the “essentially mechanical operations of the courts” by which substantive law is effectuated. Id.

RCW 10.58.090 is within the courts’ purview as procedural, rather than substantive. This court is not necessarily bound by the Legislature’s characterization of the statute as substantive. See Laws 2008, ch. 90, §1; In re Pers. Restraint of Gronquist, 139 Wn.2d 199, 208, 986 P.2d 131 (1999). RCW 10.58.090 does not prescribe societal norms or punishments. Instead,

it alters the mechanism by which those norms and punishments are determined. It does so by allowing admission of otherwise inadmissible evidence for the otherwise impermissible purpose of inferring guilt based on criminal propensity or character. RCW 10.58.090. It is therefore procedural, rather than substantive in nature and is within the courts' ultimate purview. See Jensen, 158 Wn.2d at 394.

By its very terms, RCW 10.58.090 conflicts with ER 404(b). Under ER 404(b), evidence of other wrongs cannot be used to infer action in conformity on a particular occasion. It cannot be used merely to infer a criminal character, propensity, or disposition. By contrast, RCW 10.58.090, permits the use of prior sex offenses "notwithstanding Evidence Rule 404(b)." Nothing in the statute limits the admission of this in any way. Therefore, it permits evidence of other, uncharged bad acts for precisely the inference of bad character forbidden by ER 404(b). Because RCW 10.58.090 is procedural, rather than substantive and cannot be reconciled with the contradictory court rule, it is void as a violation of separation of powers. See State v. Thorne, 129 Wn.2d 736, 762, 921 P.2d 514 (1996) ("Legislation which violates the separation of power doctrine is void.")

3. IF RCW 10.58.090 IS SUBSTANTIVE, RATHER THAN PROCEDURAL, IT VIOLATES CONSTITUTIONAL PROTECTIONS AGAINST EX POST FACTO LEGISLATION.

A law violates the ex post facto clause when it: (1) is substantive, as opposed to merely procedural; (2) is retrospective (applies to events which occurred before its enactment); and (3) disadvantages the person affected by it. State v. Hennings, 129 Wn.2d 512, 525, 919 P.2d 580 (1996) (citing Weaver v. Graham, 450 U.S. 24, 29, 101 S. Ct. 960, 964, 67 L. Ed. 2d 17 (1981)). Under its plain language, RCW 10.58.090 operates retroactively: “Section 2 of this act applies to any case that is tried on or after its adoption.” Laws of 2008, ch. 90, § 3. Thus, it is applied against those whose offenses, like Welty’s, were committed long before the 2008 enactment. It can hardly be argued that RCW 10.58.090 does not disadvantage those accused of sex offenses by allowing courts and juries to consider all prior accusations, whether proven or not, as evidence of a disposition to commit such crimes.

The question is largely whether the statute is substantive or merely procedural. The legislative notes following RCW 10.58.090 state that, as an evidentiary rule, the statute is substantive, rather than procedural, in nature. Laws of 2008, ch. 90, §1. If the court agrees, then RCW 10.58.090 violates ex post facto principles.

The ex post facto clauses of the Washington State and United States constitutions<sup>4</sup> prohibit as substantive, legislation that alters the rules of evidence to permit conviction based on less evidence than the law required at the time of the offense. Ludvigsen, 162 Wn.2d at 668-72. The difference between ordinary changes to rules of evidence and changes that violate ex post facto lies in their “impact on the sufficiency of evidence necessary to convict.” Id. at 671. “Ordinary rules of evidence are procedural and neutral.” Id. Such ordinary rule changes do not implicate ex post facto concerns because even if the State may occasionally benefit from them, they “are not inherently beneficial to the State.” Id. RCW 10.58.090 is not such an ordinary rule of evidence. It dramatically tilts the playing field in the favor of the State.

At the time of the offenses in this case, evidence of other crimes or bad acts was governed by ER 404(b); evidence of “other crimes, wrongs, or acts” was not admissible to show “action in conformity therewith” but could be used to prove other propositions such as identity, knowledge, motive, a common scheme or plan, opportunity, or lack of mistake. ER 404(b); Laws of 2008, ch. 90, § 1. Essentially, evidence of prior crimes could be admitted, so long as the forbidden inference of “once a criminal, always a criminal,”

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<sup>4</sup> The United States Constitution provides, “No State shall ... pass any ... ex post facto law.” U.S. Const. art. I, § 10. The Washington State Constitution provides, “No ... ex post facto law ... shall ever be passed.” Const. art. I, § 23.

was avoided. See Burkins, 94 Wn. App. at 690. This was a fundamental principle of law land since before Washington became a state. See, e.g., McKinney v. Rees, 993 F.2d 1378, 1381 (9th Cir. 1993); State v. Bokien, 14 Wash. 403, 414, 44 P. 889 (1896) (citing general rule that “it is not competent to show the commission of another distinct crime by the defendant for the purpose of proving that he is guilty of the crime charged”).

RCW 10.58.090 constitutes a sea change in the use of evidence of other crimes in sex offenses cases. That statute declared that henceforth evidence of other sex crimes was admissible without any of the restrictions previously placed on such evidence by ER 404(b). In other words, the evidence was now admissible for any purpose whatsoever, including the forbidden “once a criminal, always a criminal” inference. RCW 10.58.090; accord Schroeder v. Tilton, 493 F.3d 1083, 1087 (9th Cir.2007) (nearly identical section 1108 of California evidence code permits evidence of prior sexual misconduct to demonstrate propensity to commit the crime charged so long as prejudice does not substantially outweigh probative value).

Previously, the State would have had to present sufficient evidence relating to the circumstances of the charged offenses to prove guilt beyond a reasonable doubt. See Bokien, 14 Wash. at 414. Now, any gaps in that proof could be filled with proof of other unrelated sex offenses. By permitting such gap-filling, RCW 10.58.090 effectively reduces the State’s

burden as to the charged offenses. Application of the 2008 law to the offenses in this case, committed between 2000 and 2006 violates the ex post facto clauses of both our state and federal constitutions and requires reversal of Welty's convictions.

4. RCW 10.58.090 ALSO VIOLATES THE GREATER PROTECTION OF WASHINGTON'S EX POST FACTO CLAUSE.

When determining whether the Washington Constitution provides greater protection than the federal constitution, courts consider six non-exclusive factors: the textual language of the state constitution; significant differences in the texts of parallel provisions of the federal and state constitutions; state constitutional and common law history; preexisting state law; differences in structure between the federal and state constitutions; and whether the matter is of particular state interest or local concern. State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986). Each of those factors indicates Washington's ex post facto clause provides broader protection than the federal constitution.

First, the textual language is slightly different. Article I, section 10 of the United States Constitution provides, "No State shall . . . pass any Bill of Attainder, ex post facto law, or Law impairing the Obligation of Contracts." The Washington Constitution provides: "[n]o bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever

be passed.” Const. art. I, § 23. These textual differences are significant because the framers understood Washington’s ex post facto clause as prohibiting retroactive legislation that favored the State over criminal defendants.

In 1798, the federal ex post facto clause was interpreted as prohibiting, among other categories of laws, “Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.” Calder v. Bull, 3 U.S. (3 Dall.) 386, 390-91, 1 L. Ed. 648 (1798). Despite Calder’s clear language regarding changes in the rules of evidence to receive “different” testimony, since then the Supreme Court has concluded ordinary rules of evidence do not implicate ex post facto concerns because they are generally evenhanded. Carmell v. Texas, 529 U. S. 513, 533 n.23, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (1999).

But at the time Washington’s constitution was adopted, the ex post facto clause was interpreted as barring changes in the rules of evidence that favor one side over the other. See Thompson v. Missouri, 171 U.S. 380, 387-88, 18 S. Ct. 922, 43 L. Ed. 204 (1898) (no ex post facto violation because the change “placed the state and the accused upon an equality”).

Oregon recently concluded its constitution incorporates this greater protection for defendants against changes in the rules of evidence that favor the State in a one-sided manner. State v. Fugate, 332 Or. 195, 213, 26 P.3d 802, 813 (2001). Washington's Ex Post Facto clause was largely modeled on the Oregon Constitution. R. Utter and H. Spitzer, The Washington State Constitution, A Reference Guide, 9 (2002). By adopting the different language of the Oregon constitution, the framers of Washington's constitution indicated that the Washington Ex Post Facto clause was intended to be more protective than the federal ex post facto provision. State v. Silva, 107 Wn. App. 605, 619, 27 P.3d 663 (2001) (decision to use other states' constitutional language indicates the framers did not consider the language of the U.S. Constitution to adequately state the extent of the rights meant to be protected by the Washington Constitution).

Two years after Washington became a state, the Supreme Court cited to Calder as providing "a comprehensive and correct definition of what constitutes an ex post facto law." Lybarger v. State, 2 Wash. 552, 557, 27 P. 449 (1891). The Lybarger court concluded the statute at issue did not violate ex post facto provisions, in part, because "[i]t does not change the rules of evidence to make conviction more easy." 2 Wash. at 560.

Greater protection is also warranted because regulation of criminal trials is a matter of particular state concern. State v. Smith, 150 Wn.2d 135, 152, 75 P.3d 935 (2003). Like Oregon's constitution upon which it was modeled, Washington's ex post facto clause should be held to provide greater protection than the federal provision. Changes in the rules of evidence that one-sidedly favor the State over criminal defendants, such as RCW 10.58.090, violate that protection.

5. PERMITTING JURIES AND COURTS TO RELY ON CRIMINAL PROPENSITY OR CHARACTER TO SHOW GUILT VIOLATES THE DUE PROCESS RIGHT TO A FAIR TRIAL.

The common law rule against propensity evidence has existed at least since 1684. McKinney, 993 F.2d at 1381. Since that time, courts have routinely considered the right to be tried only on the charged offenses as a fundamental component of the due process right to a fair trial. See, e.g., State v. Foskey, 636 F.2d 517, 523 (D.C. Cir. 1980) ([I]t is fundamental to American jurisprudence that a defendant must be tried for what he did, not for who he is.”). Thus, the general ban on finding defendants guilty based on criminal propensity, character, or disposition existed prior to both the state and federal constitutions.

Washington's state constitutional right to a jury trial “preserves the right as it existed at common law in the territory at the time of [our

constitution's] adoption.” State v. Recuenco, 163 Wn.2d 428, 444, n. 11, 180 P.3d 1276 (2008) (Fairhurst, J., dissenting) (quoting City of Pasco v. Mace, 98 Wn.2d 87, 96, 653 P.2d 618 (1982)). At the time of adoption, a fair trial was understood as one in which an accused person was tried only for the charged offenses, and not on his bad character or disposition to commit crimes. See McKinney, 993 F.2d at 1381; Foskey, 636 F.2d at 523. RCW 10.58.090 violates the due process right to a fair trial because it opens the floodgates to evidence of other uncharged wrongs in sex offense cases, and permits courts and juries to rely on the traditionally forbidden inference of bad character or criminal propensity. RCW 10.58.090 therefore violates article I, section 21 of Washington's constitution guaranteeing that the right to a fair trial shall remain inviolate.

6. THE COURT EXCEEDED ITS AUTHORITY IN IMPOSING CONDITIONS OF COMMUNITY CUSTODY.

a. The Condition of Community Custody Prohibiting Welty from Possessing Alcohol or Possessing or Using Any and All “Drugs” Is Unauthorized by Statute.

Sentencing courts may impose only those sentences the Legislature has authorized by statute. State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). When a trial court exceeds the authority of the statute, its action is void. Id. Unauthorized conditions of a sentence may be challenged for the first time on appeal. State v. Jones, 118 Wn. App. 199, 204, 76 P.3d

258 (2003); see also State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (illegal or erroneous sentences may be challenged for the first time on appeal).

Under RCW 9.94A.703, the sentencing court must impose certain conditions of community custody and may impose or waive certain others. Among the waivable conditions is a requirement that the offender “Refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions.” RCW 9.94A.703. However, in this case, the court went beyond what was authorized by statute and imposed a condition that prohibits Welty from possessing or using any “drugs” without regard to whether those drugs are illegal or controlled by prescription. Under a general understanding of the word “drugs,” Welty, who is nearly 60 years old, is prohibited from using ibuprofen if he has arthritis pain, taking an over the counter decongestant if he has a cold, or an antihistamine if he has an allergic reaction unless he first obtains a prescription. This extremely broad prohibition on all “drugs” goes far beyond what the Legislature authorized and is void.

The statute also permits other conditions of community custody if they are “crime related.” RCW 9.94A.703. The record here contains no indication drugs, whether illegal, prescription, or over the counter, were in

any way connected to this case. Therefore, the prohibition is also not authorized under the provision permitting crime-related conditions.

The trial court also prohibited Welty not just from consuming alcohol even from merely *possessing* it. CP 20. This condition may not be imposed unless reasonably related to the circumstances of Welty's offense. Jones, 118 Wn. App. at 203.<sup>5</sup> It is not.

Under Jones and RCW 9.94A.703, the court may impose a prohibition on consuming alcohol regardless of whether the crime involved alcohol. Jones, 118 Wn. App. at 207; RCW 9.94A.703 ("As part of any term of community custody, the court may order an offender to: . . . Refrain from consuming alcohol."). However, other alcohol related conditions, such as a requirement of treatment, are only authorized if they are crime related. Jones, 118 Wn. App. at 207-08. Here, there is no indication alcohol played any role in the offenses at issue. Yet, under this condition, Welty could be arrested based on perfectly legal use or possession of alcohol by a member of his household. He is not permitted even to host a party wherein some of the guests may imbibe. The court should reverse this general ban on possession of alcohol because it is unauthorized by statute. Paulson, 131 Wn. App. at 538.

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<sup>5</sup> Jones considered the Sentencing Reform Act as it existed in 2001. However, like the law in effect currently, the 2001 law permitted the court to impose a condition of community custody that the offender "shall not consume alcohol" without mention of possession. 118 Wn. App. at 206; RCW 9.94A.703.

b. The Condition Prohibiting Welty from Possessing or Using All Drugs Is Unconstitutionally Vague.

Under the due process clause, conditions of community custody are unconstitutionally vague when they do not provide sufficient notice such that an ordinary person would understand what is prohibited or provide ascertainable standard of guilt. State v. Sansone, 127 Wn. App. 630, 638-39, 111 P.3d 1251 (2005). This doctrine provides two important protections. First, it ensures citizens receive fair warning of what conduct they must avoid. Second, it protects from discriminatory, ad hoc, or arbitrary enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993).

Unlike statutes, conditions of community custody are not presumed constitutional. State v. Valencia, 169 Wn.2d 782, 792-93, 239 P.3d 1059 (2010). Appellate courts review conditions under an abuse of discretion standard and reverse when the condition is manifestly unreasonable. Id. at 791-92. Unconstitutionally vague conditions are manifestly unreasonable. Id. at 792, 793. The condition of community custody prohibiting Welty from possessing or using “drugs” is because it is not limited to narcotics or illicit or even prescription controlled substances. It is therefore unconstitutionally vague because it provides insufficient notice to Welty of what is prohibited and permits too much discretion to individual corrections officers.

The vague prohibition on “drugs” in this case is analogous to the prohibition on “paraphernalia” at issue in Valencia. As a condition of his community custody, Valencia was ordered not to “possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances.” Valencia, 169 Wn.2d at 785. The court concluded that the condition was not limited to drug paraphernalia, but instead could “potentially encompass a wide range of everyday items.” Id. at 794. Therefore, the condition left far too much to the discretion of an “inventive” community corrections officer, who could then arrest for possession of a plastic bag. Id. at 794-95.

The condition prohibiting Welty from possessing “drugs” similarly encompasses perfectly legal every day items and leaves a vast amount of discretion to the community corrections officer. Just as the term “paraphernalia” is colloquially used to refer to paraphernalia associated with illegal drug use, the term “drugs” is colloquially used to refer to illegal narcotics or controlled substances unavailable without a prescription. See Valencia, 169 Wn.2d at 794. But like paraphernalia, the term “drugs” has a far broader meaning as well. It refers to any “substance used as a medicine,” “substance intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease,” and “substance other than food intended to affect the structure or function of the body.” Webster’s Third New International

Dictionary 695 (Philip Babcock Gove et al. eds. 1993). This condition would be unobjectionable if it were limited to legally defined controlled substances. But it is not. The condition imposed upon Welty states merely, “You shall abstain from the possession or use of drugs and drug paraphernalia unless prescribed by a medical professional.” CP 20. As in Valencia, nothing in the language of this condition specifies that the drugs it prohibits are illegal drugs or controlled substances in any way. Thus, it could include a wide range of every day, non-prescription, non-illicit medications such as over the counter pain relievers and cold remedies. A community corrections officer could charge Welty with a violation for taking an aspirin. Because neither Welty nor his community corrections officer can be expected to know what is included in the colloquial term “drugs,” this condition of his community custody is unconstitutionally vague. Halstein, 122 Wn.2d at 116-17.

Like Valencia, Welty’s challenge to these community custody conditions is ripe even though it is not yet being enforced. Valencia, 169 Wn.2d at 790. A pre-enforcement challenge to a community custody condition is ripe when “the issues raised are primarily legal, do not require further factual development, and the challenged action is final.” Id. at 786 (quoting State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008)).

Here, the issues here are primarily legal because the prohibition on “drugs” does not provide Welty with sufficient notice of what may constitute a violation. As the court noted in Valencia, “Nothing about this contention will change between now and the time when he is released from prison.” 169 Wn.2d at 788 (quoting United States v. Loy, 237 F.3d 251, 258 (3d Cir. 2001)). Like Valencia and Loy, Welty should not have to discover the meaning of the terms, “under continual threat of reimprisonment, in sequential hearings before the court.” Id.

Like the prohibition on paraphernalia in Valencia, this ban on possessing “drugs” does not depend on further factual development such as the circumstances of enforcement. 169 Wn.2d at 788-89. The court contrasted conditions that are immediately restrictive with those that require some further action by the State. Id. Where the condition is enforcement of financial obligations or a condition allowing a search, much may depend on the circumstances under which the State seeks to enforce the conditions. Id. (discussing Bahl, 164 Wn.2d at 794). Here, the question is the meaning of the term “drugs” and whether it provides sufficient notice of what is prohibited. See Valencia, 169 Wn.2d at 789. That question does not depend on additional factual development.

As in Valencia, the finality prong is met; there is no indication Welty’s judgment and sentence is other than final. Because he could be

arrested immediately upon release for violation of this condition, the risk of hardship to him if not reviewed now, is great. Valencia, 169 Wn.2d at 790 (citing Bahl, 164 Wn.2d at 751-52). Therefore, under the test from Bahl and Valencia, Welty's claim is ripe. Welty asks this court to strike the condition of his community custody prohibiting possession or use of any drugs as unconstitutionally vague.

7. THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER THE BENCH TRIAL.

CrR 6.1(d) provides, "In a case tried without a jury, the court shall enter findings of fact and conclusions of law. In giving the decision, the facts found and the conclusions of law shall be separately stated." "Without comprehensive, specific written findings, the appellate court cannot properly review the trial court's resolution of the disputed facts and its application of the law to those facts." State v. Greco, 57 Wn. App. 196, 204, 787 P.2d 940 (1990). Oral findings are insufficient because they are not binding or final. Ferree v. Doric Co., 62 Wn.2d 561, 566-67, 383 P.2d 900 (1963) (oral decision is "no more than a verbal expression of [its] informal opinion at the time . . . necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned"). In this case, no written findings of fact or conclusions of law have been entered following the bench trial as required by law.

Where there is a complete failure to comply with CrR 6.1(d), the proper remedy is vacation of the judgment and sentence and remand for entry of written findings and conclusions. State v. Head, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998). Upon remand, no new evidence is permitted, but the trial court may reconsider whether the previously admitted evidence fully supports the state's case. Id. at 625.

Although remand is the typical remedy, the Head court noted the possibility that reversal may be appropriate where a defendant can show actual prejudice resulting from the absence of findings and conclusions or following remand for entry of the same. Id. at 624-25. For example, a defendant might be able to show prejudice resulting from the lack of written findings and conclusions where there is strong indication that findings ultimately entered have been "tailored" to meet issues raised on appeal. Id. Welty requests this Court remand for entry of written findings of fact and conclusions of law and reserves the right to raise the issue of prejudice in the reply brief or a supplemental brief if necessary.

D. CONCLUSION

Welty's bench trial was irreparably tainted by the admission of accusations of sexual misconduct from decades ago, some of it when he was still a child. Welty therefore requests this court reverse his convictions. Alternatively, this case should be remanded to strike the unauthorized and unconstitutional conditions of community custody and for entry of written findings of fact and conclusions of law.

DATED this 13<sup>th</sup> day of June, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

  
JENNIFER J. SWEIGERT

WSBA No. 38068  
Office ID No. 91051

Attorney for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 41634-4-II
	)	
STEVEN WELTY,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13<sup>TH</sup> DAY OF JUNE, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] BRIAN WENDT  
CLALLAM COUNTY PROSECUTOR'S OFFICE  
223 E. 4<sup>TH</sup> STREET, SUITE 11  
PORT ANGELES, WA 98823-0037
  
- [X] STEVEN WELTY  
DOC NO. 344050  
AIRWAY HEIGHTS CORRECTIONS CENTER  
P.O. BOX 2049  
AIRAWAY HEIGHTS, WA 99001



**SIGNED** IN SEATTLE WASHINGTON, THIS 13<sup>TH</sup> DAY OF JUNE, 2011.

x Patrick Mayovsky