

79481-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

DUSTIN GENE ABRAMS,

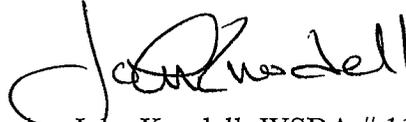
Respondent.

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STATE OF WASHINGTON
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DIRECT APPEAL
FROM THE SUPERIOR COURT OF GRANT COUNTY

APPELLANT'S REPLY BRIEF

Respectfully submitted:



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I. ARGUMENT IN REPLY

- A. THE WASHINGTON PERJURY STATUTE SHOULD BE CONSTRUED TO FURTHER ITS PURPOSE TO PUNISH AND DETER UNTRUTHFUL TESTIMONY.

Despite the State's insistence that a straightforward application of RCW 9A.72 does not prevent a final jury determination of the elements as required by the constitution (CP 44, 46), the Grant County superior court has found the criminal perjury statute unconstitutional under United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995) and Johnson v. United States, 520 U.S. 461, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (CP 49-52).¹ The State has appealed this ruling. CP 62-69.

The Appellant's Brief argued that the perjury statute is constitutional on its face. However, if there is any offending portion, it must be severed rather than invalidating the entire statute.

The Defendant relies entirely upon the principle "expressio unius est exclusio alterius," in his argument about the meaning of RCW 9A.72.010(1). Brief of Respondent at 9, citing State v. Delgado, 148 Wn.2d 723, 63 P.2d 792 (2003). But courts have applied the principle of "expressio unius"

¹ N.B. Both the trial court's Memorandum Decision (CP 50) and the Brief of Respondent (at 2) attempt to paint the State's argument as including a concession that the statute is unconstitutional. This is a plain (if convenient) misstatement of the State's argument, which has always been that nowhere in the statute is the jury prohibited from determining every element of the crime.

sparingly for a number of reasons. Commentators have traditionally described this canon as a “valuable servant, but a dangerous master.” Ford v. United States, 273 U.S. 593, 612, 47 S.Ct. 531, 71 L.Ed. 793 (1927). Some have criticized the canon noting that it makes sense only if all omissions in legislative drafting are deliberate and the legislature is truly omniscient. Richard A. Posner, *Statutory Interpretation -- in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 813 (1983). As one court has recognized, the doctrine of “expressio unius” is often an uncertain guide, because it wrongly assumes that every silence is pregnant. Ill. Dep’t. of Public Aid v. Schweiker, 707 F.2d 273, 277 (7th Cir. 1988).

Apart from these general concerns which make the application of the rule questionable, there are specific reasons why it should not be applied to Washington’s perjury statute. The doctrine means that when a legislature expresses requirements through a list, a court may assume what is not listed is excluded. 2A Norman J. Singer, Sutherland Statutory Construction, 47.2-3 at 216-17 (5th Ed. 1992). See, e.g., State v. Williams, 94 Wn.2d 531, 537, 617 P.2d 1012 (1980) (when a statute specifically designates things or classes of things upon which it operates, it can be inferred that the legislature intended to exclude any omitted matters).

Under this definition, the doctrine of “expressio unius” is inapplicable to RCW 9A.72.010(1). This section only states: “whether a false statement

is material shall be determined by the court as a matter of law.” It **does not** provide a list and **does not** designate the things or classes of things upon which the perjury statute operates. There must be a list of several items in order to find a pattern so as to apply the doctrine. One can hardly find a pattern from which to create a rule out of this section.

1. In Construing the Washington Perjury Statute, this Court’s Primary Obligation Is to Further Legislative Intent.

The more fundamental flaw in the Defendant’s argument is that it fails to address legislative intent. The canon of “expressio unius” may not be applied to defeat the intent of the legislature. Washington State Labor Council v. Reed, 149 Wn.2d 48, 65 P.3d 1203 (2003).

Indeed, the primary goal of statutory interpretation is to ascertain and give effect to the intent of the legislature. Quadrant Corp. v. State Growth Management Hearings Bd., 154 Wn.2d 224, 238, 110 P.3d 1132 (2005).

This is done by considering the statute as a whole, by giving effect to all that the legislature has said, and by using related statutes to help identify the legislative intent embodied in the provision in question. Dep’t of Labor & Indus. v. Gongyin, 154 Wn.2d 38, 45, 109 P.3d 816 (2005). The canon of “expressio unius” may not be employed to defeat legislative intent revealed by other tools of statutory construction. State v. Baldwin, 109 Wn.App. 516, 527, 37 P.3d 1220 (2007).

2. The Plain Language of the Perjury Statute, Read in the Context of the United States and Washington Constitutions and Relevant Statutes, Requires a Jury Determination of Materiality.

This Court must construe the perjury statute in the context of Washington's *entire* statutory and constitutional scheme. This means, first, that Washington's perjury statute must be construed in the light of constitutional requirements. Statutes are presumed to be constitutional, and a party challenging a statute has the burden of establishing its invalidity beyond a reasonable doubt. Higher Educ. Facilities Auth. v. Gardner, 103 Wn.2d 838, 843, 699 P.2d 1240 (1985). A statute, if possible, should be construed as constitutional. State v. Rohrich, 132 Wn.2d 472, 476, 939 P.2d 697 (1997); Hightide Seafoods v. State, 106 Wn.2d 695, 698, 725 P.2d 411 (1986); State v. Moore, 79 Wn.2d 51, 58, 483 P.2d 630 (1971). Principles of construction which require this Court to harmonize statutory provisions with the constitution and with other statutes are rooted in the constitutional doctrine of separation of powers and this Court's respect for the legislative function.

Second, statutes are to be read together, whenever possible, to achieve a harmonious total statutory scheme which maintains the integrity of the respective statutes. State ex. rel. Citizens Against Tolls (CAT) v. Murphy, 151 Wn.2d 226, 88 P.3d 375 (2004). As this Court has explained, while

statutory interpretation always begins with the plain language of the statute, in determining plain meaning, courts must look to all that the legislature has said in the statute in question as well as in related statutes which disclose legislative intent about the provision in question. Restaurant Dev., Inc. v. Cananwill, Inc., 150 Wn.2d 674, 80 P.3d 598 (2003). On another occasion, this Court has explained that in construing a statute or statutes, all acts relating to the same subject matter or having the same purpose should be read in connection therewith as together constituting one law and must be read “in pari materia.” State v. Houck, 32 Wn.2d 681, 203 P.2d 693 (1949).

Finally, Washington’s perjury statute should be construed in light of the historical context in which the statute was passed in order to identify the problem the statute was intended to solve. Wash. State Nurses Ass’n. v. Bd. of Med. Examiners, 93 Wn.2d 117, 605 P.2d 1269 (1980). And it should be construed with an understanding that the legislature at the time of the enactment of the perjury statute is presumed to have known the existing state of the Washington case law regarding perjury. Sabey v. Howard Johnson & Co., 101 Wn.App. 575, 5 P.3d 730 (2000). RCW 9A.72.010 does not explicitly direct juries to determine materiality. But Washington’s perjury statute, when read in the context of Washington’s entire constitutional and statutory scheme, does.

Like the federal constitution, our state constitution guarantees the

right to jury trial. WASH. CONST. art. 1, § 21. This provision guarantees a jury determination of all factual questions. State v. Furth, 5 Wn.2d 1, 104 P.2d 925 (1940). Washington's legislative scheme mirrors this. In RCW 4.44.080, our legislature directed courts to determine all questions of law in civil actions, and in a companion section, RCW 4.44.090, directed that in a civil jury trial, all questions of fact should be decided by the jury. In RCW 10.46.070, our legislature made those provisions applicable to criminal trials as well.

At the time of enactment of both the applicable constitutional and statutory provisions, courts had almost uniformly held materiality to be a question of law. See State v. Carpenter, 130 Wash. 23, 28, 225 P. 654 (1924). Courts were, therefore, prohibited from submitting the issue of materiality to the jury. See State v. Chambers, 81 Wn.2d 929, 932, 506 P.2d 311 (1973).

Controlling case law now holds that materiality is a mixed question of law and fact. See United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 64 (1995). Therefore, while RCW 9A.72.010(1) requires materiality to be submitted to the judge as a matter of law, the U.S. Constitution, RCW Title 4, RCW 9A.72.020, and RCW 10.46.070 require materiality to be submitted to a jury if the defendant requests a jury trial and if the issue of materiality involves any factual questions.

“All provisions should be harmonized whenever possible, and an interpretation which gives effect to both provisions is the preferred interpretation.” Emwright v. King Cy., 96 Wn.2d 538, 543, 637 P.2d 656 (1981).

Even after Gaudin, all these provisions are consistent with each other. RCW 9A.72.010(1) provides for a preliminary determination by a judge. RCW 9A.72.020 and RCW 10.46.070 provide for a subsequent determination of materiality by the jury at trial. Washington law also requires the trial judge to make an initial determination of materiality in a perjury case when it finds probable cause (CrR 3.2(1)(b)) and allows a defendant to submit the issue of materiality to the judge before trial through a Knapstad motion. State v. Knapstad, 147 Wn.2d 346, 727 P.2d 48 (1986).

A preliminary finding under RCW 9A.72.010 is no more inconsistent with the right to jury determination of materiality as an element of perjury than any of these procedures. Because the Court can construe RCW 9A.72.010 as consistent with a defendant’s right to a jury trial in a perjury case, it must do so.

The legislative intent for juries to determine all questions of fact is clear, certain, and strongly manifested, accordingly, the doctrine of “*expressio unius*” is inapplicable. Moen v. Spokane City Police Dept., 110 Wn.App. 714, 719, 42 P.3d 456 (2002); State v. Murphy, 35 Wn.App. 658, 664, 669

P.2d 891, review denied, 100 Wn.2d 1034 (1983).

B. IF THE PROVISION REQUIRING THE TRIAL JUDGE TO DETERMINE MATERIALITY IS UNCONSTITUTIONAL, IT IS SEVERABLE, AND, WHEN STRUCK DOWN, DOES NOT AFFECT THE BALANCE OF THE PERJURY STATUTE.

If RCW 9A.72.010(1) is unconstitutional, then this portion can and should be severed in order to preserve RCW 9A.72. The legislature demonstrated its intent that the perjury statute survive the striking of the materiality provision (1) by placing the provision for a judge determination of materiality in a section separate from that defining the elements of perjury, (2) by phrasing the provision in terms of procedure rather than substance, and (3) by enacting a severability clause.

An act of the legislature is not unconstitutional in its entirety because one or more of its provisions is unconstitutional unless the invalid provisions are unseverable and it cannot reasonably be believed that the legislature would have passed the one without the other, or unless elimination of the invalid part would render the remainder of the act incapable of accomplishing the legislative purposes. State v. Anderson, 81 Wn.2d 234, 236, 501 P.2d 184 (1972). The remainder of an act is not rendered incapable of accomplishing the legislative purposes unless the unconstitutional and constitutional portions of the statute are so interrelated that, despite the presence of the severability clause, it cannot be reasonably believed that the

legislative body would have passed the latter without the former. McGowan v. State, 148 Wn.2d 278, 294-95, 60 P.3d 67 (2002).

Under this test, to be severable the invalid provisions must be grammatically, functionally, and volitionally severable from the valid ones. McGowan v. State, 148 Wn.2d. at 295.

The language which the superior court and Defendant find offensive is the final phrase of RCW 9A.72.010(1).

“Materially false statement” means any false statement oral or written, regardless of its admissibility under the rules of evidence, which could have affected the course or outcome of the proceeding; *whether a false statement is material shall be determined by the court as a matter of law.*

RCW 9A.72.010(1) (emphasis added). A provision is grammatically severable if it is distinct and can be removed as a whole without affecting the wording of other provisions. Hotel Employees and Restaurant Employees, Intern. Union v. Davis, 981 P.2d 990, 1009 (Cal. 1999). The final phrase of RCW 9A.72.010(1) is *grammatically* severable both from the remainder of this section and, clearly, from entirely different sections like RCW 9A.72.020 and RCW 9A.72.030. It is not necessary for an invalid clause to be located in a section separate from the valid clause in order to be severable. See e.g., State v. Graham, 14 Wn.App. 1, 4, 538 P.2d 821 (1975); State v. Jones, 9 Wn.App. 1, 5, 511 P.2d 74 (1973). In the instant case, however, the elements of perjury and that portion of the statute requiring the trial court to determine

materiality are located in separate sections, so as to be easily grammatically severable. RCW 9A.72.010(1), RCW9A.72.020.

RCW 9A.72.010 and RCW 9A.72.020 are *functionally* separate, because one dictates procedure and the other substance. That portion of RCW 9A.72.010 which requires that the trial judge determine materiality is procedural in nature. United States v. Gaudin, 515 U.S. at 521; Gasperini v. Ctr. for Humanities, 518 U.S. 415, 426, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996) (statute which assigns decision making authority is procedural in nature). RCW 9A.72.020, which defines the elements of first degree perjury, is substantive in nature. People v. Laughlin, 137 Cal. App. 4th 1020, 1026 (Cal. App. 2006).

This Court has consistently held that where a statute's procedural provisions have been held in whole or in part to be unconstitutional, the substantive remainder of those statutes remain valid. Household Fin. Corp. v. State, 40 Wn.2d 451, 244 P.2d 260 (1952) (holding that the unconstitutionality of a provision for a *de novo* trial in superior court in the appeal section of an act did not render the remainder of the appeal section invalid); State ex rel. French v. Clausen, 107 Wash. 667, 182 P. 610 (1919) (holding that while the statute unconstitutionally provided for appointment of legislators to a commission, the remainder of this statute was upheld so that private citizens could be appointed); Shook v. Sexton, 37 Wash. 509, 79

P.1093 (1905) (upholding a statute prohibiting animals running at large even after a portion pertaining to fines was invalidated); State v. Graham, 14 Wn.App. at 4 (holding that the unconstitutional venue provision in habitual offender statute does not affect the balance of the statute). Even a criminal statute which defines the elements of a crime in one subsection and impermissibly shifts the burden of proof on an element of the offense to the defendant in another subsection survives the invalidation of the offending provision. State v. Crediford, 130 Wn.2d 747, 927 P.2d 1129 (1969).

A provision is “volitionally” severable if it was not critical to the enactment of the balance of the legislation. Calfarm Ins. Co. v. Deukmejian, 771 P.2d 1247 (Cal. 1988). This is demonstrated if the remainder of the statute is complete in itself and would have been adopted by the legislature had it foreseen the partial invalidity of the statute. Id., 28 Cal. 3d at 821. That RCW 9A.72.010 is *volitionally* severable from the balance of the perjury statute is demonstrated by the legislature’s enactment of the severability clause, the legislature’s stated desire to have factual issues submitted to juries, and its obvious desire to discourage perjury.

The Defendant has asserted, without argument or authority, that the requirement that judges determine materiality is “at the heart” of Washington’s perjury statute. Respondent’s Brief at 15. While it is true that severance is improper when it renders the statutory scheme incapable of

accomplishing the legislature's purposes (State v. Crediford, 130 Wn.2d at 760), this occurs only where the severance renders the act "virtually worthless." Leonard v. Spokane, 127 Wn.2d 194, 202, 897 P.2d 358 (1995) (holding that the unconstitutional funding provision rendered the redevelopment act incapable of effecting its legislative purpose). Striking the offending portion in RCW 9A.72.010 will not affect the State's ability to enforce Washington's perjury statute. Nor will it affect the purposes furthered by the statute's enactment.

Our legislature has declared that the general purpose of the criminal code is to forbid and prevent conduct that inflicts or threatens substantial harm to individuals or public interests. RCW 9A.04.020(1)(a). This general purpose is especially applicable to perjury. Perjury has long been recognized as a serious offense that results in incalculable harm to the integrity of the legal system as well as to the private individual. United States v. Norris, 217 F.3d 262, 274 (5th Cir. 2000). Truthful testimony is essential to the administration of justice and the functional capacity of every branch of government. The legislature's reasons for punishing and deterring the crime of perjury are particularly compelling. Because every branch and level of government relies upon sworn testimony, the integrity of the governmental process depends in large part on the truthfulness of statements made under oath. See ABF Freight Sys. Inc. v. Nat'l Labor Relations Bd., 510 U.S. 317,

323, 114 S.Ct. 835, 127 L.Ed.2d 152 (1994). At the bare minimum, a well functioning system of justice must be able to determine the truth, and, therefore, perjury provisions are necessary to punish severely those who lie in official proceedings. See generally, Richard H. Underwood, *Perjury: An Anthology*, 13 ARIZ. J. INT'L & COMP. LAW 307, 329-335 (1996). There is no reason to believe our legislature would have foregone punishing perjury if materiality could not be determined by the trial judge alone. Even the additional protection of preliminary judicial determinations of materiality will be unaffected by severance since defendants will retain the right to challenge probable cause through Knapstad motions and to waive the right to a jury trial.

In other states with similar perjury statutes, the courts have *not* struck their perjury statutes, but merely required a jury finding on the element of materiality. The Defendant has cited these cases. In People v. Vance, 933 P.2d 576 (Colo. 1977), the Colorado supreme court determined that the Colorado perjury statute was unconstitutional to the extent it provided for a judicial, rather than a jury, determination of materiality. (Griego v. People, 19 P.2d 1 (Colo. 2001) overruled People v. Vance, finding that the error was not structural but could be harmless.) Although the Colorado court vacated Vance's conviction, it did not dismiss the case on the grounds that the perjury statute was unconstitutional, but rather remanded his case for a new trial in

which materiality would be submitted to the jury as a question of fact. See also State v. Anderson, 603 A.2d 928 (1992) (N. J. 1992) (finding perjury conviction unconstitutional (pre-Gaudin) where the trial judge determined the element of materiality and remanding for retrial with a jury determination of element of materiality); State v. Walker, 574 N.W.2d 280 (Iowa 1988) (upholding perjury conviction, because the court had submitted issue of materiality to the jury in contravention of statute which required materiality to be determined by judge). Had those courts believed that the unconstitutionality of the materiality provisions of their respective state perjury statutes rendered those statutes unconstitutional in their entirety, those courts would have determined that these cases be dismissed with prejudice.

Under principles of statutory construction, every effort must be made to preserve the constitutionality of the perjury statute. Because the integrity of our justice system depends in large part on the truthfulness of statements made under oath our entire judicial system, striking down the perjury statute, as the superior court has done, threatens incalculable harm.

II. CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, the trial court's order of dismissal should be vacated and this case remanded for trial with a jury determination of the elements.

DATED: Sept 7, 2007.


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Prosecuting Attorney

RCW 4.44.080

Questions of law to be decided by court.

All questions of law including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it.

[Code 1881 § 223; 1877 p 47 § 227; 1869 p 56 § 227; RRS § 342.]

Notes:

Rules of court: Cf. ER 104 and ER 1008.

RCW 4.44.090

Questions of fact for jury.

All questions of fact other than those mentioned in RCW 4.44.080, shall be decided by the jury, and all evidence thereon addressed to them.

[Code 1881 § 224; 1877 p 47 § 228; 1869 p 56 § 228; RRS § 343.]

Notes:

Rules of court: Cf. ER 1008.

Charging juries: State Constitution Art. 4 § 16.

Right to trial by jury: State Constitution Art. 1 § 21; RCW 4.48.010.

RCW 9A.72.010 Definitions.

The following definitions are applicable in this chapter unless the context otherwise requires:

(1) "Materially false statement" means any false statement oral or written, regardless of its admissibility under the rules of evidence, which could have affected the course or outcome of the proceeding; whether a false statement is material shall be determined by the court as a matter of law;

(2) "Oath" includes an affirmation and every other mode authorized by law of attesting to the truth of that which is stated; in this chapter, written statements shall be treated as if made under oath if:

(a) The statement was made on or pursuant to instructions on an official form bearing notice, authorized by law, to the effect that false statements made therein are punishable;

(b) The statement recites that it was made under oath, the declarant was aware of such recitation at the time he or she made the statement, intended that the statement should be represented as a sworn statement, and the statement was in fact so represented by its delivery or utterance with the signed jurat of an officer authorized to administer oaths appended thereto; or

(c) It is a statement, declaration, verification, or certificate, made within or outside the state of Washington, which is certified or declared to be true under penalty of perjury as provided in RCW 9A.72.085.

(3) An oath is "required or authorized by law" when the use of the oath is specifically provided for by statute or regulatory provision or when the oath is administered by a person authorized by state or federal law to administer oaths;

(4) "Official proceeding" means a proceeding heard before any legislative, judicial, administrative, or other government agency or official authorized to hear evidence under oath, including any referee, hearing examiner, commissioner, notary, or other person taking testimony or depositions;

(5) "Juror" means any person who is a member of any jury, including a grand jury, impaneled by any court of this state or by any public servant authorized by law to impanel a jury; the term juror also includes any person who has been drawn or summoned to attend as a prospective juror;

(6) "Testimony" includes oral or written statements, documents, or any other material that may be offered by a witness in an official proceeding.

[2001 c 171 § 2. Prior: 1995 c 285 § 30; 1981 c 187 § 1; 1975 1st ex.s. c 260 § 9A.72.010.]

Notes:

Purpose -- 2001 c 171: "The purpose of this act is to respond to *State v. Thomas*, 103 Wn. App. 800, by reenacting, without changes, legislation relating to the crime of perjury, as amended in sections 30 and 31, chapter 285, Laws of 1995." [2001 c 171 § 1.]

Effective date -- 2001 c 171: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 7, 2001]." [2001 c 171 § 4.]

Effective date -- 1995 c 285: See RCW 48.30A.900.

RCW 9A.72.020

Perjury in the first degree.

(1) A person is guilty of perjury in the first degree if in any official proceeding he makes a materially false statement which he knows to be false under an oath required or authorized by law.

(2) Knowledge of the materiality of the statement is not an element of this crime, and the actor's mistaken belief that his statement was not material is not a defense to a prosecution under this section.

(3) Perjury in the first degree is a class B felony.

[1975 1st ex.s. c 260 § 9A.72.020.]

RCW 10.46.070

Conduct of trial — Generally.

The court shall decide all questions of law which shall arise in the course of the trial, and the trial shall be conducted in the same manner as in civil actions.

[1891 c 28 § 70; Code 1881 § 1088; 1873 p 237 § 249; 1854 p 119 § 111; RRS § 2158. FORMER PART OF SECTION: 1891 c 28 § 66, part; Code 1881 § 1078; 1873 p 236 § 239; 1854 p 118 § 101; RRS § 2137, part, now codified as RCW 10.49.020.]

Notes:

Rules of court: This section superseded, in part, by CrR 6. See comment preceding CrR 6.1.