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No. 62862-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL TYRONE GRESHAM,

Appellant.

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

APPELLANT'S REPLY BRIEF

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 OCT -6 PM 4:58

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A. ARGUMENT IN REPLY

1. RCW 10.58.090 VIOLATES THE SEPARATION OF POWERS DOCTRINE

As discussed in the opening brief, to establish a separation of powers violation, Mr. Gresham must show: (1) that RCW 10.58.090 is a rule of procedure, and (2) that it conflicts with a court rule. The State devotes its argument to the second requirement, implicitly conceding that the statute is a rule of procedure. The deciding question, therefore, is whether the statute conflicts with a court rule.

The State contends RCW 10.58.090 does not conflict with ER 404(b), because the statute does not *require* the trial court to admit evidence of a defendant's prior sexual misconduct. Instead, the evidence is admissible only if the court finds, using the balancing test of ER 403, that the probative value of the evidence outweighs its potential prejudicial impact. Yet it is undisputable that the statute permits the court to admit evidence that would otherwise be inadmissible under ER 404(b). The only way the statute could be harmonized with the court rule is if it could be read to preclude admission of prior misconduct evidence for the purpose of proving the defendant's character or propensity to commit the crime. Because the statute cannot be read in such a manner, it directly

conflicts with the evidence rules and violates the separation of powers doctrine.

By its express terms, the statute directly conflicts with ER 404(b). RCW 10.58.090 permits the court to admit, in a criminal action in which the defendant is accused of a sex offense, "evidence of the defendant's commission of another sex offense or sex offenses . . . *notwithstanding Evidence Rule 404(b).*" RCW 10.58.090(1) (emphasis added). The language of the statute reflects the Legislature's intent to override ER 404(b), which categorically bans the admission of prior misconduct evidence for the purpose of "prov[ing] the character of a person in order to show action in conformity therewith." ER 404(b). The statute further conflicts with ER 404(b) to the extent the statute does not require courts to identify the purpose of the evidence or to limit its consideration by the jury for only that purpose.

The State's argument that an evidence statute that removes impediments to admissibility does not violate the separation of powers doctrine if it does not *require* the evidence to be admitted in all cases, is not consistent with Washington case law. To Mr. Gresham's knowledge, no Washington case has ever upheld, on separation of powers grounds, a statute that permits a trial court to

admit evidence that the evidence rules otherwise forbid. In State v. Ryan, 103 Wn.2d 165, 167, 691 P.2d 197 (1984), a statute permitted courts to admit hearsay statements of child victims of sexual abuse as an exception to the hearsay rule. But legislative enactment of hearsay exceptions is specifically contemplated by the rules of evidence pursuant to ER 802. Id. at 178; ER 802 ("Hearsay is not admissible except as provided by these rules, by other court rules, *or by statute*") (emphasis added). The child hearsay statute therefore does not conflict with the evidence rules because it does not permit admission of evidence that the evidence rules forbid.

That conclusion is supported by State v. Zimmerman, 121 Idaho 971, 829 P.2d 861 (1992). There, the trial court admitted a child victim's hearsay statements in a sex offense prosecution pursuant to an Idaho statute similar to Washington's child hearsay statute. But Idaho has no evidence rule comparable to Washington's ER 802. Instead, I.R.E. 802 provides, "Hearsay is not admissible except as provided by these rules or other rules promulgated by the Supreme Court of Idaho." Id. at 974. Because Idaho's rules of evidence did not contemplate legislative enactment

of hearsay exceptions, the statute violated the separation of powers doctrine. Id.

Similarly, in Fircrest v. Jensen, 158 Wn.2d 384, 143 P.3d 776 (2006), at issue was a statute permitting admission of BAC test results once the State had met its prima facie burden. The statute did not violate the separation of powers doctrine because it did not permit the admission of evidence that the evidence rules otherwise forbade. Unlike the present case, the evidence did not fall under a specific evidence rule prohibiting its admission. Instead, admissibility depended on the ordinary rules of evidence. Id. at 399.

Finally, in State v. Saldano, 36 Wn. App. 344, 675 P.2d 1231 (1984), at issue was a court rule, ER 609, which permits the admission of evidence of a defendant's prior conviction for the purpose of attacking his credibility, but only if certain requirements are met. Prior to the adoption of ER 609, an accused's prior conviction could be admitted to attack his credibility *whenever* the accused testified in his own behalf. Id. at 350. Because the statute permitted the admission of evidence that the evidence rules otherwise forbade, the statute and court rule directly conflicted and the court rule superseded the statute. Id.

Cases from other states support the conclusion that an evidence statute that permits the admission of evidence that ER 404(b) otherwise prohibits is in direct conflict with the evidence rules. In State v. Mallard, 40 S.W.3d 473 (Tenn. 2001), for instance, a statute permitted admission of evidence of a defendant's prior convictions for drug offenses in a prosecution for unlawful possession of drug paraphernalia, for the purpose of determining whether a particular object was drug paraphernalia. The court concluded the only way to harmonize the statute with ER 404(b) was to read it as allowing admission of the evidence only if it was relevant to some material issue other than the defendant's character and propensity to commit the crime. Id. at 486. But as discussed, RCW 10.58.090 cannot be harmonized with ER 404(b) in that manner.

Similarly, in Opinion of the Justices (Prior Sexual Assault Evidence), 141 N.H. 562, 688 A.2d 1006 (1997), at issue was a proposed bill that would allow admission in a criminal prosecution for a sex offense, evidence of any other sexual assault committed by the defendant, for any relevant purpose other than showing the defendant's character, as long as the trial court found the probative value of the evidence outweighed the danger of unfair prejudice.

The court concluded the proposed bill directly conflicted with ER 404(b), which imposed more limits on the purposes for which such evidence could be admitted. Id. at 577.

Finally, in McEwen v. State, 695 N.E.2d 79 (Ind. 1998), at issue was a statute that allowed admission of evidence of a defendant's previous battery for purposes of proving motive, intent, identity, or common scheme and design. The statute was consistent with ER 404(b)'s prohibition on the introduction of other acts of misconduct to show propensity, but the statute did not require the balancing of prejudicial impact and probative value as required by ER 403. Id. at 89. Therefore, "[b]ecause the statute's substantive requirements for admissibility conflict with the Indiana Rules of Evidence, the statute is a nullity on that point." Id.

McEwen is consistent with the Indiana cases cited in the opening brief, Brim v. State, 624 N.E.2d 27 (Ind. 1994) and Day v. State, 643 N.E.2d 1 (Ind. Ct. App. 1994). It is also consistent with Washington case law, as discussed above.

Finally, the State relies on cases from Minnesota and Michigan, but those cases are not consistent with Washington jurisprudence as discussed above. In State v. McCoy, 682 N.W.2d 153 (Minn. 2004), at issue was a statute allowing admission of

evidence of similar conduct by the accused against the alleged victim of domestic abuse, unless the court found the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. The court candidly acknowledged the statute directly conflicted with ER 404(b). Id. at 158-59. But the court concluded that, because the statute was "reasonable," it would exercise its "supervisory power over Minnesota courts" and adopt the statute. Id. at 160. The holding of McCoy is clearly contrary to Washington case law, which, as discussed, consistently holds that where a statute directly conflicts with a rule of evidence, the court rule prevails.

Similarly, in State v. Pattison, 276 Mich. App. 613, 741 N.W.2d 558 (2007), at issue was a statute allowing admission in a prosecution for a listed offense, evidence that the defendant committed another listed offense against a minor, for its bearing on any matter to which it was relevant. The court concluded the rule was a "substantive rule of evidence" that "reflects the Legislature's policy decision that, in certain cases, juries should have the opportunity to weigh a defendant's behavioral history and view the case's facts in the larger context that the defendant's background affords." Id. at 620. But again, that conclusion is not consistent

with the conclusion of Washington courts, as discussed in the opening brief, that evidence rules are rules of procedure subject to the separation of powers doctrine. Moreover, it is not sufficient to say simply that courts "will defer to legislative enactment on all 'matters of public policy,'" because *all* enactments of the Legislature are matters of "public policy." Opinion of the Justices, 141 N.H. at 571. In other words, to say that a statute does not violate the separation of powers doctrine because it is a matter of "public policy" is simply to beg the question.

In sum, because RCW 10.58.090 permits the admission of evidence that ER 404(b) otherwise prohibits, it directly conflicts with the rule and violates the separation of powers doctrine.

2. THE STATUTE VIOLATES THE FEDERAL EX POST FACTO CLAUSE

The State contends RCW 10.58.090 does not violate the federal ex post facto clause as applied in this case, because it "did not increase the punishment nor alter the degree of proof essential for a conviction." SRB at 16. The State relies on Carmell v. Texas, 529 U.S. 513, 525, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000) and Ludvigsen v. Seattle, 162 Wn.2d 660, 174 P.3d 43 (2007).

It is true that in Carmell and Ludvigsen, the courts examined statutes that altered the quantum of evidence necessary to convict

the defendant. See Carmell, 529 U.S. at 517 (statute removed corroboration requirement whereby testimony from a child victim more than six months after assault had to be corroborated); Ludvigsen, 162 Wn.2d at 663 (statute eliminated foundation requirement for admission of breath test results necessary to make prima facie DUI case). As the State acknowledges, the statutes at issue in those cases put "the defendant's case squarely within the fourth [Calder¹] category of circumstances that violated the ex post facto clause." SRB at 17.

But the statute at issue in this case has the same effect on sex abuse prosecutions as the statutes at issue in Carmell and Ludvigsen had on the prosecutions in those cases. The statute lowers the quantum of evidence necessary to convict a defendant by lowering the requirements for admitting highly prejudicial prior sexual misconduct evidence. Contrary to the State's assertions, the Legislature's purpose in enacting the statute was to facilitate sex abuse prosecutions, which previously often depended on the victim's testimony alone. Testimony at the Senate Hearing states: "ER 404(b) should be changed as it applies to trials of sex offenses," because juries in such cases too often are unable to

¹ Calder v. Bull, 3 U.S. 386, 3 Dall. 386 (1798).

reach a verdict. S.B. Rep., 2008 Reg. Sess. S.B. 6933. Further, the statute directs courts to consider "the necessity of the evidence beyond the testimonies already offered at trial." RCW 10.58.090(6)(e).

Moreover, as discussed in the opening brief, courts have recognized for centuries the unfairly prejudicial impact of prior misconduct evidence in criminal prosecutions. The ban on the admission of propensity evidence is firmly rooted in the common law and exists today in ER 404(b). There should be no question that RCW 10.58.090 facilitates convictions by allowing the State to rely on highly prejudicial evidence that would otherwise be excluded.

The statutes at issue in Carmell and Ludvigsen fell squarely within the fourth Calder category, but RCW 10.58.090 also falls within its scope. The statute "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, 3 U.S. at 390-91. The statute alters the rules of evidence and allows different testimony, which the law previously excluded, in order to convict the offender.

RCW 10.58.090 is unlike the evidence statute at issue in State v. Clevenger, 69 Wn.2d 136, 417 P.2d 626 (1966). There, the statute removed the marital privilege in a criminal prosecution. Id. at 140. But the change permitted different testimony that was not inherently beneficial to the State. In contrast, RCW 10.58.090 is "inherently beneficial to the State." Ludvigsen, 162 Wn.2d at 672. It is therefore ex post facto as applied in this case.

3. THE STATUTE VIOLATES THE STATE EX POST FACTO CLAUSE

For the reasons set forth in the opening brief, this Court should interpret the Washington Constitution's ex post facto clause as applying to evidence statutes such as RCW 10.58.090, which ""retrench the rules of evidence, so as to make conviction more easy."" State v. Fugate, 332 Or. 195, 211, 26 P.3d 802 (2001) (quoting State v. Cookman, 324 Or. 19, 28, 920 P.2d 1086 (1996) (quoting Strong v. State, 1 Blackf. 193, 196 (Ind. 1822))).

The State contends the difference in language between the state and federal ex post facto clauses does not create any basis to interpret the state clause independently. SRB at 22. But the federal clause explicitly bans state ex post facto laws: "No State shall . . . pass any Bill of Attainder, ex post facto law, or Law impairing the Obligation of Contracts." U.S. Const. art. 1, § 10.

This supports the position that similar state provisions afford different protection. Otherwise, the state clauses would be superfluous, violating well-established rules of construction. Neil C. McCabe, Ex Post Facto Provisions of State Constitutions, 4 Emerging Issues St. Const. L. 133, 156 (1991).

The State contends the Oregon Supreme Court's decision in Fugate does not support Mr. Gresham's position, because the law at issue in Fugate differs significantly from the law at issue here. The State explains that in Fugate, "[p]rior to enactment under the facts of his case the defendant was entitled to have evidence of his intoxication suppressed. After enactment he was not." SRB at 23-24. But that description applies equally to the application of RCW 10.58.090 in this case. Prior to enactment of the law, Mr. Gresham was entitled to have evidence of his prior offenses suppressed; after enactment he was not.

The Oregon court explained that early decisions from Indiana indicate the Indiana Supreme Court understood the fourth Calder category as applying to changes in law that "'retrench the rules of evidence, so as to make conviction more easy.'" Fugate, 332 Or. at 213 (quoting Strong, 1 Blackf. at 196). Because the Oregon Constitution was modeled on Indiana's, the Oregon ex post

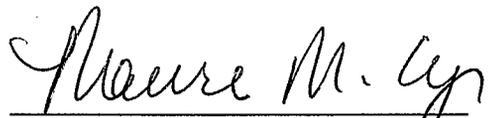
facto clause similarly forbids "change[s] in the rules of evidence that favor[] only the prosecution." Fugate, 332 Or. at 213-14. Because Washington's constitution was also modeled on Indiana's, the same interpretation should apply to Washington's ex post facto clause.

Like the law at issue in Fugate, RCW 10.58.090 operates only in favor of the prosecution. It retrenches the rules of evidence so as to make conviction more easy. It therefore violates the state ex post facto clause if applied to crimes committed before its effective date.

B. CONCLUSION

For the reasons set forth above and in the opening brief, RCW 10.58.090 violates the separation of powers doctrine and the state and federal ex post facto clauses. It is therefore void.

Respectfully submitted this 6th day of October 2009.



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

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NO. 62862-3-I)

MICHAEL GRESHAM,)

Appellant.)

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6TH DAY OF OCTOBER, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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2009 OCT -6 PM 4:58
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