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NO. 62862-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL TYRONE GRESHAM,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

In a criminal case where the defendant is accused of a sex offense RCW 10.58.090 permits evidence of a prior sex offense to be admitted notwithstanding ER 404(b) if it is otherwise admissible pursuant to ER 403 and the other rules of evidence. The defendant was charged with four counts of child molestation first degree. Over his objection the court permitted evidence the defendant had committed a prior sex offense against another similar aged child pursuant to that statute.

1. Does this statute violate the separation of powers doctrine?

2. Does this statute violate the federal and state constitutional provisions prohibiting ex post facto legislation when the statute became effective after the offense for which the defendant was on trial was committed but before trial on that charge?

II. STATEMENT OF THE CASE

J.L. was born September 6, 1990. J.L.'s mother, Marcy L., has been best friends with Leslie Gresham since grade school. J.L. developed a close relationship with Ms. Gresham and considered Ms. Gresham as her godmother. J.L. became acquainted with the

defendant, Michael Gresham, through his marriage to Ms. Gresham. 11-4-08 RP 123-125; 11-5-08 RP 237-238; 11-6-08 RP 421.

Periodically J.L. spent the night at the Gresham's. One time when J.L. was about 8 years old she was sleeping with K. in her bedroom. J.L. was not asleep, but pretended to be. The defendant came in the room and stood at the end of the bed J.L. was sharing with K. The defendant rubbed J.L.'s thigh, from her knee to her hip, first over and then under the covers. When the defendant tried to get in the bed J.L. pretended to start to wake up. The defendant then left and did not return that night.11-4-08 RP 126-131.

Other times while J.L. was over at the Gresham's Lynnwood apartment the defendant wrestled with J.L. The defendant tackled J.L. causing her to lay on the bed on her back with the defendant on top of her. The defendant's crotch touched J.L.'s crotch. Sometimes when the defendant tackled J.L. in this manner he moved his crotch on J.L.'s crotch, and other times he would not move it. J.L. felt the defendant's privates on her during these episodes. On one occasion the defendant put his hand on J.L's breast to push himself up when he got off of her. 11-4-08 RP 132-133.

When J.L. turned 9 her family moved out of a home in Edmonds and moved to Bothell. The defendant and his family moved into the Edmonds home the L's had been living in. On one occasion the defendant again laid on top of J.L. while she was in Mrs. Gresham's bedroom. J.L. was either 10 or 11 years old at the time. The defendant rubbed his privates on her while one of the younger kids was on his back. J.L. told the defendant to get off of her. When the other child got off the defendant he pushed himself up off of J.L. by placing his hand on her breast. 11-4-08 RP 134-135; 11-5-08 RP 242.

Another time when J.L. was 10 or 11 years old she and was staying the night at the defendant's Edmonds house she was again sleeping with K. in her room. J.L. had fallen asleep. She awoke to feel the defendant touching her private parts, in between her legs, over her underwear but under the clothes. When J.L. woke up and realized what was happening she scooted away from the defendant. The defendant then left the room. 11-4-08. RP 136 – 140.

On another occasion around Christmas time J.L. and her brother and sister were spending the night at the Gresham's. J.L. was 11 years old. The kids were sleeping in the living room; J.L.

slept on the couch. J.L. was awake, but her eyes were closed. The defendant came in the room and began rubbing J.L's upper thigh and in between her legs over her underwear. When J.L. opened her eyes and moved the defendant turned and walked out of the room. 11-4-08. RP 140 – 143.

The last occasion that the defendant touched J.L. happened at J.L's home in Bothell. J.L. was 11 years old. The defendant had been asked to baby-sit J.L. and her siblings while her mother and Mrs. Gresham went out. J.L. was downstairs in her bedroom lying on her bed with K. J.L. was facing away from the door but could see the defendant in the mirror coming in the room crawling on his hands and knees. The defendant lifted up the covers and placed his hand on her knee. He then slid his hand up her thigh about 4 inches when J.L. asked the defendant what he was doing. The defendant told her that it was too hot upstairs. He explained that he was going to get a pillow and sleep in the couch in J.L.'s room. J.L. told him to get out of her room. The defendant then left. 11-4-08 RP 145 – 153; 11-5-08 RP 243.

The defendant went into J.L.'s room and touched her crotch about six or seven times from the time that she was 7 or 8 until just before she turned 12. The first time that J.L. told anyone about the

defendant touching her was after an argument she had with her mother around Christmas 2002. J.L. did not give any details. Mr. and Mrs. L decided to keep J.L. away from the Gresham's after that. The molestations were not reported to the police until J.L. was being evaluated for drug and alcohol abuse when she was 14 or 15 years old. 11-4-08 RP 157-159, 161, 163; 11-5-08 RP 248, 251-253, 255, 258, 348.

The defendant was charged with four counts of child molestation first degree and two counts of child molestation second degree.[1] 1 CP 127-128. The defendant had previously been convicted of second degree assault with sexual motivation against A.C. Before trial commenced on the charges involving J.L. the court held a hearing to determine whether evidence of the assault against A.C. was admissible under either ER 404(b) for the purposes of showing common scheme or plan, or alternatively under RCW 10.58.090. 10-21-08 RP 11-27. The trial court denied the request to introduce testimony from A.C. under ER 404(b). 10-28-08 RP 53-58. The court then analyzed whether the evidence

[1] The State moved to dismiss counts V and VI charging child molestation second degree at the end of its case because there was no evidence presented that any of the assaults occurred after J.L. turned 12. The motion was granted. 11-6-08 RP 446.

was admissible pursuant to RCW 10.58.090. The court concluded that the evidence should be admitted pursuant to that statute. 10-28-08 RP 61-68.

A.C. testified that in 1992, when she was 9 years old, the defendant was dating her cousin. She had a good relationship with both her cousin and the defendant. In January 1992 A.C. spent the night at her cousin's home. She went to sleep in one of the bedrooms. She woke up and the defendant was lying next to her. The defendant was touching and rubbing A.C.'s crotch with his hand under her underwear. He did so for about 15 minutes, then got up and left. 11-4-08 RP 215-219.

A.C. spent the night at her cousin's home a second time around Easter 1992. Again the defendant came in A.C.'s room while she was supposed to be sleeping and began touching and rubbing her crotch under her underwear. 11-4-08 RP 220.

J.L. did not know about the incidents with A.C. until after she disclosed the defendant's assaults on her to her mother. J.L. did not get any details other than the defendant had done that type of thing before. 11-4-08 RP 162-163; 11-5-08 RP 254.

The defendant was found guilty of three counts of child molestation first degree and one count of attempted child molestation first degree. 1 CP 69-73.

III. ARGUMENT

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

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

> The reason for this high standard is based on our respect for the legislative branch of government as a co-equal branch of government, which, like the court, is sworn to uphold the constitution. We assume the legislature considered the constitutionality of its enactment and afford some deference to that judgment. Additionally, the Legislature speaks for the people and we are hesitant to strike a duly enacted statute unless fully convinced, after a searching legal

analysis, that the statute violates the constitution.

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

The defendant fails to sustain his burden to prove RCW 10.58.090 is unconstitutional on either bases relied upon.

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

The separation of powers doctrine is not formally enunciated in either the federal or state constitutions. The doctrine has traditionally been presumed to exist from the division of government into three distinct branches; executive, legislative, and judicial. Carrick v. Locke, 125 Wn.2d 129, 135, 882 P.2d 173 (1994). The purpose of the doctrine is to prevent one branch of government from encroaching on the "fundamental functions" of another. State v. Moreno, 147 Wn.2d 500, 505, 58 P.3d 265 (2002).

The doctrine does not absolutely bar different branches performing similar functions. "The validity of this doctrine does not depend on the branches of government being hermetically sealed off from one another." Carrick 125 Wn.2d at 135. The test for assessing whether an activity has violated the doctrine was enunciated in Zylstra v. Piva, 85 Wn.2d 743, 539 P.2d 823 (1975). "The question to be asked is not whether two branches of

government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another." Id. at 750.

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

> (1) In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence rule 403. . .
>
> (3) This section shall not be construed to limit the admission or consideration of evidence under any other evidence rule.

RCW 10.58.090.

In contrast ER 404(b) states:

> (b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs or acts, is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b).

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

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

In Fircrest the defendant challenged SHB 3055 relating to admissibility BAC tests in DUI prosecutions on the basis that it conflicted with the court's authority to reject evidence under ER 401, 402, 403, and 404(b). Fircrest, 158 Wn.2d at 395. The Supreme Court rejected that argument because the statute only made such test admissible if the State met its prima facie burden. The statute therefore permitted, but did not require, a court to admit

evidence of the test once that burden had been met. The trial court was free to exercise its discretion to exclude the evidence under any rule of evidence. Because it was permissive the statute did not invade the prerogative of the court, or threaten judicial independence. It thus did not violate the separation of powers doctrine. Id at 399.

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

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

RCW 10.58.090 does not mandate that the court admit evidence of a prior sexual offense. Rather, like the statutes at

issue in both Ryan and Fircrest, the evidence is only admissible. The admissibility of the evidence is subject to other rules of evidence. The defendant acknowledges that the statute is permissive. "RCW 10.58.090 permits the court to admit, in a criminal action in which the defendant is accused of a sex offense..." BOA at 20. Because it is permissive, rather than mandatory, there is no violation of the separation of powers doctrine. The legislature has not invaded the authority of the court to exclude evidence of a prior sex offense. It specifically stated admission of that evidence is dependant on the trial courts assessment of the evidence in light of ER 403 and other rules of evidence.

This statute should be contrasted with statutes which impose a mandatory obligation on the judicial branch. In Bar Ass'n, the legislature passed RCW 41.56.020 requiring the Bar Association to engage in collective bargaining with its employees. That statute conflicted with GR 12(b) which permitted collective bargaining at the discretion of the Board of Governors. The rule related to the inherent power of the court to control the bar association. Because the statute directly conflicted with the rule, and they could not be harmonized, the statute violated the separation of powers doctrine.

Id. 125 Wn.2d at 909. Unlike the statute at issue in Bar Ass'n, the statute leaves admission of evidence of a prior sex offense to the trial court's discretion under ER 403 and, with the exception of ER 404(b), other rules of evidence.

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

Other jurisdictions have found no irreconcilable conflict between statutes which are similar to RCW 10.58.090 and ER 404(b). Michigan determined the separation of powers doctrine was not violated because its version of the statute, MCL 768.27a, was a substantive rule of evidence that did not principally regulate the operation or administration of the courts. State v. Pattison, 741

N.W.2d 558, 562 (Mich. 2007). See also State v. McCoy, 682 N.W.2d 153, 161 (Minn. 2004) (adopting Minn.Stat § 634.20 which creates an exception to the ER 404(b) ban on propensity evidence for domestic violence offenses finding the legislative policy behind the statute best serves the interest of justice). These authorities more persuasively support the conclusion that RCW 10.58.090 does not irreconcilably conflict with ER 404(b).

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

1. The Statute Does Not Affect the Quantity Of Evidence Necessary To Convict.

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

"The ex post facto clauses prohibit states from enacting any law that (1) punishes an act that was not punishable at the time the act was committed, (2) aggravates a crime or makes the crime greater than it was when committed, (3) increases the punishment

for an act after the act was committed, and (4) changes the rules of evidence to receive less or different testimony than required at the time the act was committed in order to convict the offender." State v. Angehrn, 90 Wn. App. 339, 342-43, 952 P.2d 195 (1998) (citing Collins v. Youngblood, 497 U.S. 37, 42, 110 S. Ct. 2715, 2719, 111 L. Ed. 2d 30 (1990)). The defendant asserts the statute falls into the fourth category.

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

> Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offense was committed, might, in respect of that offence, be obnoxious to the constitutional inhibition upon Ex post facto laws. But alterations which do not increase the punishment, nor change the ingredients

> of the offence or the ultimate facts necessary to establish guilt, but-leaving untouched the nature of the crime and the amount or degree of proof essential to conviction-only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure.

Id. at 142

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

In contrast, the Court did find an amendment to a statute which was applied retroactive to the effective date of the amendment violated the ex post facto clause in Carmell v. Texas, 529 U.S. 513, 120 S.Ct. 1620, 146 L.Ed.2d 477 (2000). Carmell involved the sexual assault of the defendant's step-daughter

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

between 1991 and 1995 when the victim was 12 to 16 years old. Before 1993 sexual assaults against child victims over 14 years old could be proved either by testimony from the victim alone if the victim reported within 6 months of the assault, or with corroboration if the report came more than 6 months later. The 1993 amendment to the statute removed the corroboration requirement. Under the facts of the case the Supreme Court found the State's evidence would have been insufficient prior to the 1993 amendments, because there was no corroboration for the victim's testimony. Thus the quantum of evidence necessary to convict the defendant was less than previously required, putting the defendant's case squarely within the fourth category of circumstances which violated the ex post facto clause. Id. at 531, 1632.

The Washington State Supreme Court similarly found a violation of the ex post facto clause in Ludvigsen v. Seattle, 162 Wn.2d 660, 174 P.3d 43 (2007). There a statute was amended to eliminate a foundational requirement for admission of breath test results in a Driving While Intoxicated case. Like the corroboration evidence at issue in Carmell, without the breath test evidence, the defendant would be entitled to an acquittal, at least where the State

was proceeding only on the per se prong of the DUI statute.[3] Without the previously required foundation the evidence was admitted in DUI prosecutions tried after the effective date of the amendment. However, as applied to offenses which were committed before the effective date of the statute, the amendment violated the ex post facto clause because it reduced the quantity of evidence necessary to convict the defendant, i.e. the foundation necessary to establish the defendant's blood alcohol level. Id. at 663.

The distinction between Clevenger, Slider, Carmell, and Ludvigsen rests on the nature of the evidence addressed by the statutory amendments. In the former two cases the statute at issue related only to what the jury could consider in determining whether the defendant was guilty or not. Even without the amendment in Clevenger and Slider other evidence may have been sufficient to convict. In the latter two cases the amendment affected what the jury had to consider in finding the defendant guilty. Without that evidence the jury would be required to find the defendant not guilty.

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

RCW 10.58.090 does not violate the ex post facto clause because it only addresses what the jury can consider when determining whether or not the defendant is guilty. The evidence at issue in that statute is not necessary to convict on the current charges. Nor could it be, since it relates to "another sex offense". If the court excludes the evidence under ER 403 or another rule of evidence, the jury may still convict, even if the only evidence presented is the victim's testimony. The statute does not "alter[ ] the rules of evidence for the purpose of supplying a deficiency of legal proof for a class of crimes.[4]" The defendant is wrong when he states "the Legislature's intent in enacting the statute was to supply a deficiency of legal proof common in sex offense prosecutions."[5] Rather the Legislature's stated intent is "to ensure that juries receive the necessary evidence to reach a just and fair verdict." Laws of Washington 2008, Ch. 90, § 1.

The defendant cites testimony presented in the Legislature when debating the bill as evidence that the statute constitutes an ex post facto law as applied to his case. BOA at 33. That testimony

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[4] BOA at 32

[5] BOA at 26. The defendant may have meant the legislature intended to "remedy" or "eliminate" a deficiency in proof common in sex cases. The statute addresses evidence that adds to what the jury may consider; it does not take anything away from their consideration.

recognizes that there are times when jurors are disadvantaged in properly evaluating the evidence in sexual assault cases due to the nature of the offense. The testimony only acknowledges that evidence of other sexual offenses is helpful for juries when evaluating the weight of the evidence presented on the current crime. It does not state that no sexual assault may be proved without the evidence of a prior sexual offense. If that were the case no first time offender, nor an offender who has a prior sexual offense which is subject to exclusion under ER 403, would be convicted.

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

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

The defendant next argues RCW 10.58.090 violates Washington State Constitution Art. 1, § 23, employing a Gunwall

analysis.[6] Gunwall provides the framework for "determining whether, in a given situation, the constitution of the State of Washington should be considered as extending broader rights to its citizens than does the United States Constitution." Gunwall, 106 Wn.2d at 61. The defendant argues that the authors of Washington's constitution would have understood that the analysis for Washington's ex post facto clause was the same as that articulated in Calder v. Bull, 3 U.S. 386, 1 L.Ed. 648 (1798). BOA at 35. Calder concerned the federal constitution. Thus, the defendant concedes that Washington's ex post facto clause is no more protective than its federal counterpart.

The defendant's Gunwall analysis supports that conclusion. The six non-exclusive criteria that are examined when determining whether Washington's Constitution provides concurrent protection with the Federal Constitution are: (1) the textual language; (2) differences in the text; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern. Gunwall, 106 Wn. 2d at 58.

The language of the two provisions is virtually identical. The only difference is the addition of the word "ever" in the State

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[6] State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

version. That word does not create any difference between the two clauses since there is no exception to the prohibition against ex post facto laws in the federal version of that clause.

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

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

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

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

The defendant cites authority from Oregon and Indiana on the basis that the language of Washington Constitution Art. 1 §23 was derived from those state's constitutions. In Fugate the Oregon court considered whether a state statute which was enacted while the defendant's DUII charge was pending applied to his case. State v. Fugate, 26 P.3d 802 (Or. 2001). Prior to enactment under

the facts of his case the defendant was entitled to have evidence of his intoxication suppressed. After enactment he was not. The Court held the statute as applied retroactively to the defendant's case violated Oregon's ex post facto clause. Id. at 814. The application of Calders evidence category in Fugate is no different than it was in Ludvigsen. Fugate does not stand for the proposition that Oregon's ex post facto clause prohibits retroactive application of new rules of evidence which only assist the trier of fact in evaluating evidence that otherwise would have been properly admitted under the law at the time the offense occurred.

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

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

IV. CONCLUSION

Evidence that the defendant had committed a prior sexual offense was properly admissible under RCW 10.58.090. That statute did not violate either the Separation of Powers Doctrine, or the State or Federal ex post facto clauses. For those reasons the State requests that the Court affirm the defendant's conviction.

Respectfully submitted on September 2, 2009.

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