

NO. 39750-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM KIPP,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 08-1-01272-5

SUPPLEMENTAL BRIEF OF RESPONDENT
Re: State v. Gresham

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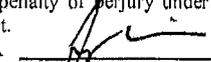
This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED February 23, 2012, Port Orchard, WA 
Original electronically filed with the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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STATUTES

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I. SUPPLEMENTAL ISSUE

1. Whether the Washington Supreme Court's decision in *State v. Gresham* changes the analysis in the present case regarding RCW 10.58.090 and the admissibility of evidence under ER 404(b)?

II. SUPPLEMENTAL ARGUMENT

A. **STATE V. GRESHAM CLEARLY HELD THAT RCW 10.58.090 IS UNCONSTITUTIONAL AND THUS IT CANNOT SERVE AS A BASIS FOR ADMITTING EVIDENCE OF PRIOR ACTS IN THE PRESENT CASE.**

The State relies on the facts and procedural history in its original brief and incorporates those sections herein. In the original brief that State argued that the trial court did not err in rejecting the Defendant's argument that RCW 10.58.090 was unconstitutional. After the initial briefing in this case the Washington Supreme Court issued its opinion in *State v. Gresham*, ___ Wn.2d ___ (2012) No. 84148-9 and 84150-1, 2012 WL 19664 (2012).

In *Gresham* the Supreme Court held that RCW 10.58.090 was an unconstitutional violation of the separation of powers doctrine because it irreconcilably conflicts with ER 404(b) regarding a procedural matter. *Gresham*, 2012 WL 19664 at page 11.

Given the Supreme Court's holding, the State now concedes that the trial court erred in rejecting the Defendant's argument that the statute was

unconstitutional. However, as the trial court also admitted the evidence in question under ER 404(b), this court should affirm the Defendant's conviction for the reasons outlined below.

B. STATE V GRESHAM DID NOT CHANGE THE TRADITIONAL ANALYSIS REGARDING ER 404(B) AND THE SUPREME COURT'S HOLDING MAKES IT CLEAR THAT EVEN WHEN A TRIAL COURT IMPROPERLY ADMITTED THE EVIDENCE AT ISSUE UNDER RCW 10.58.090 THE CONVICTION SHOULD NEVERTHELESS BE AFFIRMED AS LONG AS THE TRIAL COURT PROPERLY ADMITTED THE EVIDENCE AT ISSUE PURSUANT TO ER 404(B).

In *Gresham* the Supreme Court dealt with two consolidated cases, *State v. Scherner* and *State v. Gresham*. In *Scherner*, the trial court had found that the defendant's prior acts of molestation were admissible both under RCW 10.58.090 and under ER 404(b) as evidence of common scheme or plan. *Gresham*, 2012 WL 19664 at page 2.

In the *Gresham* case, however, the trial court held that the State had not proved the existence of a common scheme or plan and that ER 404(b) therefore barred admission of evidence of Gresham's prior crime. *Gresham*, 2012 WL 19664 at page 4. The trial court, however, found that evidence of Gresham's prior crime was admissible under RCW 10.58.090.

In the consolidated appeal the Supreme Court first addressed Scherner's case. The Court found that the trial court had not erred in

admitting the evidence of Scherner's crime under ER 404(b) as evidence of a common scheme or plan. *Gresham*, 2012 WL 19664 at page 4. The Court thus found that "For Scherner, the admissibility of evidence of his prior offense under the Washington Rules of Evidence is dispositive." *Gresham*, 2012 WL 19664 at page 4. The Court then went through the traditional ER 404(b) analysis and caselaw without making any changes to the existing law in this area. *See Gresham*, 2012 WL 19664 at page 5-8. The Court then ultimately concluded that,

As to Scherner, we hold the evidence of his prior acts of child molestation was admissible for the purpose of demonstrating a common scheme or plan. Thus, even without RCW 10.58.090, the evidence was admissible in his trial. Admission therefore was not error. We accordingly affirm Scherner's conviction.

Gresham, 2012 WL 19664 at page 13.

Turning to Gresham's case, the Supreme Court was faced with an analysis of RCW 10.58.090 since the trial court in Gresham's case found that the evidence at issue was not admissible under ER 404(b). *Gresham*, 2012 WL 19664 at page 4, 8. As outlined above, the Supreme Court ultimately held that RCW 10.58.090 was unconstitutional, and the Court thus overturned Gresham's conviction because there was no other basis for the admission of the evidence of Gresham's prior crimes and the error was not harmless. *Gresham*, 2012 WL 19664 at page 12.

In the present case, the trial court ruled that evidence of the Defendant's prior act was admissible under both RCW 10.58.090 and ER 404(b) (as evidence of a common scheme or plan). RP 98-107. The present case, thus mirrors Scherner's case (where the evidence was admitted under both ER 404(b) and RCW 10.58.090) and is distinguishable from Gresham's case (where the evidence was admitted only under RCW 10.58.090).

As outlined above, the State concedes that, pursuant to the *Gresham* opinion, RCW 10.58.090 is unconstitutional and thus cannot support the admission of the evidence at issue. The remaining issue, therefore, is whether the trial court properly admitted the evidence pursuant to ER 404(b). In its original brief the State argued why the trial court did not err in admitting the evidence under ER 404(b) and those arguments are hereby incorporated and are sufficient to address the issue. As the *Gresham* opinion did not change the law regarding ER 404(b), the State has nothing to add to its previous argument on this issue other than to note that the Supreme Court's opinion reaffirmed that the common scheme or plan exception to ER 404(b) remains a viable method for introducing evidence. *Gresham*, 2012 WL 19664 at page 5-7. For the reasons outlined in the State's original brief, the Defendant has failed to show that the trial court abused its discretion in admitting the evidence at issue pursuant to ER 404(b).

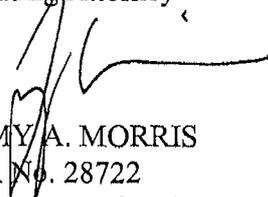
III. CONCLUSION

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed.

DATED February 23, 2012.

Respectfully submitted,

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DOCUMENT1

KITSAP COUNTY PROSECUTOR

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