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NO. 62669-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

RICKY HORNE,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY RAMSDELL

---

**BRIEF OF RESPONDENT**

---

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**A. ISSUES PRESENTED**

1. Whether defendant Ricky Horne has failed to establish that the admission of testimony under RCW 10.58.090 violated the federal and state ex post facto clauses.

2. Whether Horne has failed to establish that the legislature violated the separation of powers clause when enacting RCW 10.58.090.

3. Whether the trial court violated Horne's constitutional rights to a jury trial and due process when it found that he was convicted of a prior sex offense and sentenced him as a persistent offender.

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

On November 6, 2007, the State charged Horne with one count of second-degree rape. CP 1. The matter first went to trial in May of 2008. The Honorable Greg Canova declared a mistrial when the jury was unable to reach a verdict. 5RP 606-09.

The case was reassigned to the Honorable Jeffrey Ramsdell and went to trial again in September of 2008. The jury found Horne guilty as charged. CP 108.

At sentencing, the State presented evidence that Horne had been previously convicted of first-degree rape. 14RP 5-18. The court observed that in his trial testimony, Horne also admitted that he committed this rape. 14RP 19-20. The court found that Horne was a persistent offender and sentenced him to life in prison. 14RP 19, 25. This appeal follows.

## **2. SUBSTANTIVE FACTS**

### **a. The Rape Of L.M.**

L.M. lived in an apartment at the Morrison Hotel in downtown Seattle. 12RP 84.<sup>1</sup> On the night of October 20, 2007, L.M. was in her room drinking beer and smoking crack cocaine with Darlene Fields. 11RP 130-31; 12RP 85-90, 96. Another resident, Russell "Tina" Lambeth, came by and asked for help in buying crack. 11RP 132; 12RP 90-91. L.M. agreed and they headed outside. 12RP 92.

L.M. approached Horne, whom she knew as "T," and asked if he had any crack. 12RP 87, 96-98. Horne responded that he

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<sup>1</sup> The verbatim report of proceedings consists of 14 volumes designated as follows: 1RP: May 20, 2008; 2RP: May 22, 2008; 3RP: May 27, 2008; 4RP: May 28, 2008; 5RP: May 29 and 30, 2008; 6RP: September 24, 2008; 7RP: September 25, 2008; 8RP: October 1, 2008; 9RP: October 2, 2008; 10RP: October 13, 2008; 11RP: October 14, 2008; 12RP: October 15, 2008; 13RP: October 16, 2008; 14RP: November 21, 2008.

had some, and L.M. gave him \$30 in exchange for a piece of crack.  
12RP 99-100.

After L.M. voiced suspicions that the crack was not real, Horne took it back and told her to try smoking it. 12RP 100-01. Horne stated that he knew someone with a pipe and began walking towards the waterfront with L.M. following him. 12RP 101.

Horne led L.M. to a secluded area underneath the Alaskan Way Viaduct, spread out a blanket and told her to sit down. 12RP 110-14. He produced a pipe, and they smoked the crack together. 12RP 114-15. Horne's demeanor suddenly changed. He called L.M. a "bitch," told her it was a good day to die and began hitting her in the face. 12RP 115-16. Horne unzipped his pants and told L.M. to suck his penis. 12RP 115. She complied. 12RP 116. He complained that she was not doing it right and hit her more. 12RP 118. Horne told L.M. to take her pants off and forced his penis inside her. 12RP 118-19.

During this time, Horne repeatedly assaulted L.M. He took a lighter to her hair, but it did not catch on fire. 12RP 120-21. Horne threatened her with a long stick that he was carrying. 12RP 117-18. At some point, L.M.'s dentures were knocked out of her mouth. 12RP 122.

After Horne was done, he told her to get cleaned up, and he made her carry a bag back. 12RP 121-22. L.M. went back to her apartment and saw her friend Darlene Fields. 12RP 124-25. After Fields noticed L.M.'s black eye, L.M. reluctantly disclosed that she had been raped. 11RP 135-39; 12RP 125. L.M. talked to a Morrison Hotel counselor, who assisted her in calling the police. 10RP 148-50; 11RP 141-43; 12RP 126.

While en route, the police saw Horne, holding a stick, near the Morrison and noted that he matched the description of the suspect. 10RP 45-56, 78-83. Officers detained Horne, and L.M. identified him as the rapist. 10RP 57-61, 84-94; 12RP 127.

L.M. was transported to Harborview Medical Center. 10RP 95-98; 12RP 127. A nurse noted that her left eye was swollen shut, that she had scratches on her back and had dirt on her face, hands, ears and in her vaginal area. 12RP 43-49. The nurse collected swabs from various parts of L.M.'s body. 12RP 49-56.

A Washington State Patrol Crime Laboratory forensic scientist examined the swabs and found semen on L.M.'s vaginal and anal swabs. 11RP 53-59. Further analysis of the swabs resulted in a single male DNA profile consistent with Horne's.

11RP 59-63. The frequency of Horne's DNA profile is 1 in 5.3 quadrillion. 11RP 65.

b. Horne's Prior Rape Of J.R.

The jury heard testimony that Horne raped a young woman in 1980.

On January 13, 1980, 17-year-old J.R. left an alcohol and drug treatment program in Seattle and attempted to hitch-hike to her home in Pierce County. 11RP 74-76. Horne and another man picked J.R. up and drove her to a house. 11RP 78-87. After they entered the house, Horne began demanding that she have sex with him. 11RP 84-85. When J.R. said no, he hit her. 11RP 85. Horne pulled her to the floor and forced her to perform oral sex. 11RP 87-89. He then rolled her over and forced her to have vaginal sex. 11RP 88-89. During this time, he repeatedly hit her in the head with an aerosol can. 11RP 89.

When Horne was done, he forced J.R. to have oral sex with the other man. 11RP 89-90. J.R. lost consciousness at one point and woke up as Horne was forcing her to perform oral sex again. 11RP 90. Horne allowed her to leave but threatened to kill her if she called the police. 11RP 91.

J.R. ran to the nearest telephone booth and called the police. 11RP 91.

Many years later, in 1998, Horne called the Seattle Police Department and talked to an employee. 11RP 29-31. During the conversation, he became angry while talking about the 1980 rape of J.R. and stated, "the bitch deserved it." 11RP 32-33.

c. Horne's Defense

Horne testified at trial and claimed that he had consensual sex with L.M. 13RP 11-21. According to Horne, after their walk, they went into a tent, and L.M. started kissing him and suggested they get naked. 13RP 18-19. Horne claimed that he initially resisted her, but ultimately engaged in oral and vaginal sex with L.M. 13RP 1-21. Horne left her, and, hours later, he returned to the Pioneer Square area. 13RP 22-23. L.M. approached him, showed him her black eye, and, a few minutes later, the police arrested him. 13RP 24-25.

During cross-examination, Horne admitted to raping J.R. in 1980. 13RP 26. He also admitted that, years later when he called the Seattle Police Department, he may have said that "the bitch deserved it." 13RP 32-34.

**C. ARGUMENT**

**1. HORNE HAS FAILED TO ESTABLISH THAT RCW 10.58.090 IS UNCONSTITUTIONAL.**

Horne claims that RCW 10.58.090 violates the federal and state ex post facto clauses and the state separation of powers clause.<sup>2</sup> As a general principle applicable to all of Horne's constitutional claims, this Court must presume that RCW 10.58.090 is constitutional. State v. Lanciloti, 165 Wn.2d 661, 667, 201 P.3d 323 (2009). Horne bears the burden of showing the statute is unconstitutional beyond a reasonable doubt. State v. Shafer, 156 Wn.2d 381, 387, 128 P.3d 87 (2006). He has failed to meet this burden.

a. Background

During the 2008 session, the Washington Legislature enacted RCW 10.58.090. The statute provides that in sex offense cases, evidence of the defendant's commission of another sex offense is admissible subject to the court's balancing of factors under ER 403. The statute provides in pertinent part:

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<sup>2</sup> Horne's constitutional challenges to RCW 10.58.090 appear to be identical to those in two pending appeals: State v. Gresham, COA No. 62862-3-I and State v. Scherner, COA No. 62507-1-I. Both cases are set for oral argument on November 6, 2009.

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.

RCW 10.58.090(1).

The statute requires that the court consider the following non-exclusive factors when deciding whether to exclude evidence of the defendant's other sex offenses under ER 403:

When evaluating whether evidence of the defendant's commission of another sexual offense or offenses should be excluded pursuant to Evidence Rule 403, the trial judge shall 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(6).<sup>3</sup>

This statute was based upon federal rules enacted in 1994. Federal Rules of Evidence 413, 414 and 415. At least nine other states have enacted similar statutes or rules.<sup>4</sup>

RCW 10.58.090 went into effect on June 12, 2008. Prior to the second trial, the State gave notice that it would offer testimony from two prior rape victims, J.R. and M.G., under the statute. CP 148-52, 159-69. As discussed above, Horne raped J.R. in 1980; he was later convicted of first-degree rape. CP 150-51. In 1979, Horne raped 14-year-old M.G. after offering her a ride and drugs. CP 149. Though M.G. reported the rape to the police, she declined to cooperate in Horne's prosecution. CP 150. There was a third rape victim whom the State did not seek to call; a woman reported

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<sup>3</sup> These factors were apparently modeled after factors applied by the federal courts applying the Rule 403 balancing test to evidence offered under Federal Rules of Evidence 413 and 414. United States v. LeMay, 260 F.3d 1018, 1027-29 (9th Cir. 2001).

<sup>4</sup> See Arizona Evid. R. 404(c); Ark. Code § 16-42-103; Cal. Evid. Code § 1108; Fla. Stat. § 90.404(2)(b); 725 Ill. Comp. Stat. 5/115-7.3; Iowa Code § 701.11; La. Code Evid. art. 412.2; Mich. Comp. Laws § 768.27a; Okla. Stat. 12, § 2413.

that Horne had raped her in 1995, but she declined to cooperate with prosecution of the case. CP 151.

Horne challenged the constitutionality of RCW 10.58.090 and argued that the evidence was not admissible under the statute. CP 50-78; 7RP 40-52. The trial court rejected the constitutional challenges to the statute. 7RP 65-72. After considering the factors in RCW 10.58.090(6), the court held that evidence relating to J.R. was admissible. 7RP 72-77. The court excluded M.G.'s proffered testimony as unfairly prejudicial and cumulative, and noted that Horne had not been convicted of raping her. 7RP 77.

Before testimony relating to the rape of J.R. and before closing arguments, the trial court gave the following instruction:

Evidence of a prior offense, standing alone, is not sufficient to prove the defendant guilty beyond a reasonable doubt of the crime charged in this case. As you consider this evidence, bear in mind that the State has the burden of proving each and every element of the crime charged in this case beyond a reasonable doubt and this evidence does not reduce the State's burden.

I remind you that the defendant is not on trial for any act conduct or offense not charged in this case.

CP 117; 11RP 26, 72; 13RP 85. Horne agreed to the wording of this instruction. 11RP 17-18.

b. The Admission Of Testimony Under RCW 10.58.090 Did Not Violate The Ex Post Facto Clauses.

Horne argues that the admission of evidence under RCW 10.58.090 violated the federal and state ex post facto clauses because the statute became effective after Horne committed the rape.

The United States and Washington Constitutions both contain ex post facto clauses. U.S. Const. art 1, § 10; Const. art. 1, § 23. "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, 111 L. Ed. 2d 30 (1990)). Under this fourth category concerning changes to the rules of evidence, the Washington Supreme Court has explained:

If it is characterized as a procedural change in the admissibility of evidence, it does not violate the ex post facto clause. If it is characterized as a substantive change in the amount of evidence necessary to support a conviction, then it violates the ex post facto clause.

Ludvigsen v. City of Seattle, 162 Wn.2d 660, 671, 174 P.3d 43 (2007).

Courts have rarely found that a new rule of evidence violates the ex post facto clauses. In particular, the Washington Supreme Court has held that a new rule of evidence that allowed for the admission of previously excluded witness testimony did not violate the ex post facto clause. In State v. Clevenger, 69 Wn.2d 136, 417 P.2d 626 (1966), Clevenger was charged with committing incest and indecent liberties on his three-year-old daughter. His wife was permitted to testify due to an amendment to the spousal privilege statute, passed after the commission of the crime, which created an exception for crimes committed against one's child. The Washington Supreme Court rejected Clevenger's ex post facto challenge to the amended statute, explaining:

[A]lterations which do not increase the punishment, nor change the ingredients of the offence [sic] 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. Such regulations of the mode in which the facts constituting guilt may be placed before the jury, can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offence [sic] charged.

69 Wn.2d at 142 (quoting Hopt v. Utah, 110 U.S. 574, 590, 4 S. Ct. 202, 28 L. Ed. 262 (1884)).

Similarly, in State v. Slider, 38 Wn. App. 689, 688 P.2d 538 (1984), the Court of Appeals upheld the admission of child hearsay under the recently enacted child hearsay statute, RCW 9A.44.120. The court held that the application of the statute did not run afoul of the ex post facto clause because the statute "did not increase the punishment nor alter the degree of proof essential for a conviction[.]" Id. at 695; see also State v. Ryan, 103 Wn.2d 165, 179, 691 P.2d 197 (1984) (rejecting ex post facto challenge to child hearsay statute).

In contrast, in Ludvigsen, the Washington Supreme Court concluded that amendments to the Washington Administrative Code (WAC) effectively reduced the quantum of evidence necessary to convict a defendant of driving while intoxicated. 162 Wn.2d at 673-74. Under the relevant municipal ordinance, the City

was required to prove the defendant failed a valid breath test. A 2004 amendment to the WAC relieved the City of a previous requirement that, in order to establish a valid breath test, it prove that the breath test machine's thermometer had been properly certified. Addressing an ex post facto challenge to this amendment, the court framed the issue as "whether the WAC amendments changed ordinary rules of evidence or changed the evidence necessary to convict Ludvigsen of a DWI." Id. at 671-72. The court concluded that the amendments had changed the evidence necessary for a conviction:

[U]nder the per se prong, the validity of the breath test is a part of the prima facie case the government must prove. The City redefined the meaning of a valid test and thereby changed the meaning of the crime itself.... The subsequent change reduced the quantum of evidence to establish a prima facie case and to overcome the presumption of innocence.

Id. at 672-73 (footnotes omitted).

RCW 10.58.090 did not reduce the quantum of evidence necessary to establish a prima facie case. The elements of the crime remain the same, and the quantum of proof required to satisfy those elements remains the same. It is similar to the statutory amendments at issue in Clevenger and Slider; it allows for the testimony of witnesses who otherwise may not have been

permitted to testify.<sup>5</sup> Accordingly, admission of J.R.'s testimony at Horne's trial did not violate the ex post facto clauses.

c. Horne Fails To Show That The State Ex Post Facto Clause Provides Greater Protection Than The Federal Clause.

Horne argues that the ex post facto clause in article 1, section 23 of the Washington State Constitution provides greater protection than the ex post facto clause in the United States Constitution. However, the state constitutional provision is worded virtually identically to its federal counterpart, and Washington courts have never interpreted it differently. This Court should reject Horne's claim that the admission of evidence under RCW 10.58.090 violated the state constitution's ex post facto clause.

To determine whether a state constitutional provision provides greater protection than its federal counterpart, the court considers the six nonexclusive factors identified in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). The six factors are: (1) the

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<sup>5</sup> Courts in other jurisdictions have rejected ex post facto challenges to statutes similar to RCW 10.58.090. See State v. Willis, 915 So.2d 365, 383 (La. Ct. App. 2005) (rejecting ex post facto challenge and holding that Louisiana statute "did not alter the amount of proof required in the Defendant's case as it merely pertains to the *type of evidence* which may be introduced."); People v. Pattison, 276 Mich. App. 613, 619, 741 N.W.2d 558 (Mich. Ct. App. 2007) (rejecting ex post facto challenge to Michigan law).

state provision's textual language; (2) significant differences between the federal and state texts; (3) state constitutional and common law history; (4) existing state law; (5) structural differences between the federal and state constitutions; and (6) matters of particular state interest or local concern. Id. at 61-62.

An examination of the Gunwall factors does not support Horne's claim that the ex post facto clause in article 1, section 23 provides greater protection than the federal clause. With respect to the first and second factors, the language of the two provisions is virtually identical. The federal ex post facto clause provides "[n]o State shall... pass any Bill of Attainder, ex post facto Law or Law impairing the Obligation of Contracts." U.S. Const. art. 1, § 10. The Washington State Constitution similarly states that "[n]o bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed." Const. art. 1, § 23. The Washington Supreme Court has held that where language of the state constitution is similar to that of the federal constitution, the state constitutional provision should receive the same definition and interpretation given to the federal provision. In re Detention of Turay, 139 Wn.2d 379, 412, 986 P.2d 790 (1999).

With respect to the third and fourth factors, state constitutional and common law history and existing state law, Washington courts have never interpreted the state ex post facto clause differently from its federal counterpart. Early in the state's history, the court looked for guidance to United States Supreme Court's decisions concerning ex post facto claims. See Lybarger v. State, 2 Wash. 552, 557, 27 P. 449 (1891) ("As to the question whether or not the law now in force... is an *ex post facto* law we will quote and abide by the classified definition of Chief Justice Chase in Calder v. Bull."). Over the last 100 years, the Washington courts have regularly cited United States Supreme Court's interpretation of the federal ex post facto clause when considering claims brought under article 1, section 23. State v. Ward, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994); State v. Edwards, 104 Wn.2d 63, 70, 701 P.2d 508 (1985); Johnson v. Morris, 87 Wn.2d 922, 923-28, 557 P.2d 1299 (1976). Washington caselaw provides no support for Horne's claim that the state constitutional provision is interpreted more broadly.

The fifth Gunwall factor, the differences in structure between state and federal constitutions, does not support a broader interpretation of the state constitutional provision. Both the federal

and state ex post facto clauses were intended to be restrictions on a *state's* power to enact certain laws.

The sixth Gunwall factor requires consideration of whether the matter is of particular state or local concern. The goals of the ex post facto clauses of both constitutions appear to be equally important, locally and nationally.

In his Gunwall analysis, Horne primarily relies upon an Oregon decision, State v. Fugate, 332 Or. 195, 26 P.3d 802 (2001). In Fugate, the Oregon Supreme Court held that the Oregon State Constitution's ex post facto clause was violated by retroactive application of "laws that alter the rules of evidence in a one-sided way that makes conviction of the defendant more likely." Fugate, 332 Or. at 213. In so holding, the court acknowledged that its decision was inconsistent with the decisions of the United States Supreme Court concerning the ex post facto clause. Id. As authority for its different interpretation, the Oregon court relied upon an 1822 decision by the Indiana Supreme Court, Strong v. State, 1 Blackf. 193 (Ind. 1822).

However, a review of Strong reveals that it provides no support for interpreting the state constitutional ex post facto clause differently from the federal counterpart. The issue in Strong was

not a change in the rules of evidence but whether a change in punishment -- from stripes (whipping) to confinement in the State prison -- constituted an ex post facto violation. The Indiana Supreme Court noted that an ex post facto violation could occur when the law "retrench[ed] the rules of evidence, so as to make conviction more easy." Id. But as support for this proposition, the court cited federal caselaw. When the Indiana Supreme Court later considered an ex post facto challenge to a new rule of evidence, it did not cite Strong, but looked to federal caselaw for guidance. Marley v. State, 747 N.E.2d 1123, 1130 (Ind. 2001). Consistent with Washington caselaw, the Indiana Supreme Court recognized that the ex post clause was not violated by a change to a rule of evidence which allowed for the testimony of witnesses who previously would not have been permitted to testify. Id.

Accordingly, Fugate and relevant Indiana caselaw do not support a broader interpretation of the Washington State Constitution's ex post facto clause. The Oregon court's decision was based upon dicta from an 1822 Indiana decision, and that portion of the Indiana decision was, in turn, based upon federal caselaw. Because Horne has provided no persuasive evidence that the framers of the Washington State Constitution intended that

the ex post facto clause have a different meaning than its federal counterpart, this Court should hold that the admission of the evidence under RCW 10.58.090 did not violate article 1, section 23.

d. The Legislature's Enactment Of RCW 10.58.090 Does Not Violate The Separation Of Powers.

Horne also argues that the legislature's enactment of RCW 10.58.090 violates the separation of powers. In rejecting this argument, the trial court accurately observed that there is "a tradition of the legislature to some extent being involved in evidentiary issues." 7RP 48. Because the courts and the legislature share the authority to enact rules of evidence and the legislature's enactment of RCW 10.58.090 does not threaten the independence or integrity of the courts, this claim fails.

The doctrine of separation of powers comes from the constitutional distribution of the government's authority into three branches. State v. Moreno, 147 Wn.2d 500, 505, 58 P.3d 265 (2002). The purpose of the doctrine is to prevent one branch of government from aggrandizing itself or encroaching upon the "fundamental functions" of another. Id. (citing Carrick v. Locke, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)). "Though the doctrine

is designed to prevent one branch from usurping the power given to a different branch, the three branches are not hermetically sealed and some overlap must exist." City of Fircrest v. Jensen, 158 Wn.2d 384, 393-94, 143 P.3d 776 (2006). "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." Carrick, 125 Wn.2d at 135.

The courts have long recognized the legislature's authority for enacting rules of evidence.<sup>6</sup> "[R]ules of evidence may be promulgated by both the legislative and judicial branches." Fircrest, 158 Wn.2d at 394. The Washington Supreme Court has acknowledged that its authority to enact rules of evidence derives, in part, from a statute, RCW 2.04.190, and has held that "[t]he adoption of the rules of evidence is a legislatively delegated power of the judiciary." Id.

As a historical matter in Washington, the legislature and the courts have shared the responsibility for enacting rules of evidence.

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<sup>6</sup> See State v. Sears, 4 Wn.2d 200, 215, 103 P.2d 337 (1940) (the legislature has the power to enact laws which create rules of evidence); Slider, 38 Wn. App. at 695-96 ("Our Supreme Court has also recognized (implicitly) the Legislature's authority to enact evidentiary rules when it analyzed the rape shield statute.").

Prior to the enactment of the Rules of Evidence in 1979, the trial courts applied rules of evidence based upon statutes and common law. See generally 5 R. Meisenholder, Washington Practice (1965). A Judicial Council Task Force, which included representatives of both the legislature and the judiciary, drafted the current rules of evidence. 5 K. Tegland, Washington Practice, Evidence Law and Practice, at V-IX (2nd ed. 1982). To this day, numerous statutes supplement the Rules of Evidence on various issues.<sup>7</sup> The legislature has enacted a number of statutes that relate particularly to evidence and testimony in sex offense cases.<sup>8</sup>

Since the enactment of the evidence rules, the courts have repeatedly rejected claims that the legislature's enactment of an evidentiary rule violated the separation of powers. In State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984), the Washington Supreme Court rejected the claim that the legislature's enactment of the child hearsay statute, RCW 9A.44.120, violated the separation of powers. In doing so, the court held that, "apparent conflicts

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<sup>7</sup> See, e.g., RCW 5.45.020 (business records); RCW 5.46.010 (copies of business and public records); RCW 5.60.060 (evidentiary privileges); RCW 5.66.010 (admissibility of expressions of apology, sympathy, fault).

<sup>8</sup> RCW 9A.44.020 (rape shield); RCW 9A.44.120 (child hearsay statute); RCW 9A.44.150 (child witness testimony concerning sexual or physical abuse).

between a court rule and a statutory provision should be harmonized, and both given effect if possible." Id. at 178.

More recently, in Fircrest, the defendant challenged a statute that provided that breath test results were admissible if the State satisfied a certain threshold burden. The statute was passed in response to a Washington Supreme Court decision holding breath tests were inadmissible if they failed to comply with certain procedures in the WAC. 158 Wn.2d at 396-97. The court held that the statute did not violate the separation of powers:

The legislature has made clear its intention to make BAC test results fully admissible once the State has met its prima facie burden. No reason exists to not follow this intent. The act does not state such tests must be admitted if a prima facie burden is met; it states that such tests are *admissible*. The statute is permissive, not mandatory, and can be harmonized with the rules of evidence. There is nothing in the bill, either implicit or explicit, indicating a trial court could not use its discretion to exclude the test results under the rules of evidence. The legislature is not invading the prerogative of the courts nor is it threatening judicial independence. SHB 3055 does not violate the separation of powers doctrine.

Id. at 399.

Here, the legislature, which retains authority to enact rules of evidence, did not invade the prerogative of the courts by enacting RCW 10.58.090. The statute carves out a narrow exception to

ER 404(b), a rule that already contains numerous other exceptions. The statute provides that the trial court has discretion to exclude the evidence after applying balancing factors under ER 403. The statute can be harmonized with the existing evidence rules, and the court can give effect to both. Other state courts, rejecting separation of powers challenges to similar statutes, have recognized that such evidentiary statutes do not infringe on the court's authority to establish rules of practice and procedure, but reflect policy concerns that are a legitimate subject of legislation.<sup>9</sup> This Court should hold that the legislature's enactment of RCW 10.58.090 did not violate the separation of powers.

**2. THE TRIAL COURT PROPERLY FOUND THAT HORNE HAD A PRIOR CONVICTION FOR FIRST-DEGREE RAPE.**

Horne asks this Court to reverse his sentence, arguing that the trial court's finding that he had a prior first-degree rape conviction violated his federal constitutional rights to due process and to a jury trial. This argument is without merit. The Washington courts have repeatedly rejected the argument that the State is

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<sup>9</sup> Pattison, 276 Mich. App. at 619-20; see also State v. McCoy, 682 N.W.2d 153, 159-61 (Minn. 2004).

required to submit a defendant's prior convictions to a jury and prove them beyond a reasonable doubt.

In Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490 (italics added). The "prior conviction" exception stemmed from the Court's earlier decision in Almendarez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998).

Despite this explicit language, defendants have argued that Apprendi conferred a right to a jury trial in persistent offender sentencings; i.e., that the State must prove the relevant prior convictions to a jury beyond a reasonable doubt. State v. Wheeler, 145 Wn.2d 116, 119, 34 P.3d 799 (2001), cert. denied, 535 U.S. 996 (2002). The Washington Supreme Court has rejected this argument: "Unless and until the federal courts extend Apprendi to require such a result, we hold these additional protections [charging prior "strike" convictions in an information and proving them to a jury beyond a reasonable doubt] are not required under the United

States Constitution or by the Persistent Offender Accountability Act (POAA) of the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW." Id. at 117.<sup>10</sup>

Horne suggests that the United States Supreme Court's decision in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), altered this law as it applies to prior convictions, in that it extended the constitutional protections to facts that elevate a sentence above the standard range. Again, the Washington Supreme Court has rejected this argument. In State v. Thiefault, 160 Wn.2d 409, 418, 158 P.3d 580 (2007), another POAA case, the defendant cited Blakely as well as Apprendi in support of his argument that he had a right to a jury determination of his prior conviction. Rejecting this argument, the court reiterated: "This court has repeatedly rejected similar arguments and held that Apprendi and its progeny do not require the State to submit a defendant's prior convictions to a jury and prove them beyond a reasonable doubt." Thiefault, 160 Wn.2d at 418.

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<sup>10</sup> See also In re Personal Restraint of Lavery, 154 Wn.2d 249, 256, 111 P.3d 837 (2005) ("In applying Apprendi, we have held that the existence of a prior conviction need not be presented to a jury and proved beyond a reasonable doubt."); State v. Smith, 150 Wn.2d 135, 139-56, 75 P.3d 934 (2003), cert. denied, 541 U.S. 909 (2004) (rejecting claim that federal and state constitution required a jury trial for determining prior convictions at sentencing).

Horne argues that the court should reconsider the prior conviction exception, citing Justice Thomas's concurring opinion in Appendi. The Washington Supreme Court has already rejected this precise argument and observed that it is bound to follow the United States Supreme Court's established precedent on the issue. State v. Jones, 159 Wn.2d 231, 240 n.7, 149 P.3d 636 (2006).

Based on this unbroken line of cases, this Court should hold that Horne did not have a right to a jury determination on proof beyond a reasonable doubt of his prior rape conviction and affirm his sentence.

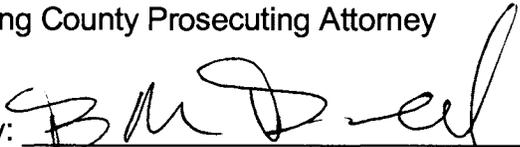
**D. CONCLUSION**

For the reasons set forth above, the State respectfully requests that this Court affirm Horne's conviction and sentence.

DATED this 9<sup>th</sup> day of October, 2009.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David Donnan, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. RICKY HORNE, Cause No. 62669-8-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame  
Name  
Done in Seattle, Washington

10/9/09  
Date