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JAN 27 2012

King County Prosecutor  
Appellate Unit

NO. 66546-4-1

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

STATE OF WASHINGTON,

Respondent,

v.

EARL FLEMING

Appellant.

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

The Honorable Bruce Heller, Judge

REPLY BRIEF OF APPELLANT

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FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2012 JAN 27 PM 4:19

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A. ARGUMENT IN REPLY

THE TRIAL COURT ERRED WHEN IT ADMITTED K.F.'S TESTIMONY.

Since the filing of the opening brief in this case, the Supreme Court issued its decision in State v. Gresham, \_\_\_ P.3d \_\_\_, 2012 WL 19664 (filed January 5, 2012). The Court found RCW 10.58.090 unconstitutional because it violated the separation of powers doctrine. Gresham, at \*8-\*11. Therefore, Judge Heller erred in Fleming's case when he admitted K.F.'s testimony under this statute.

Gresham also is instructive regarding Judge Heller's decision to admit K.F.'s testimony under ER 404(b) as evidence of a common scheme or plan. The Gresham court reiterated that ER 404(b) "is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." Id. at \*5. "Common scheme or plan" evidence is not an exception to this prohibition; there are no exceptions. Rather, when evidence demonstrates such a scheme or plan, the evidence falls outside the prohibition. Id. This discussion in Gresham underscores the importance of ensuring that evidence truly qualifies as "common

scheme or plan” and is not admitted or used as evidence of propensity.

Moreover, the facts in Scherner, a case consolidated with Gresham, demonstrate the type of evidence that qualifies as a scheme or plan. Scherner was charged with three counts of child molestation for improperly touching his granddaughter, M.S., on a trip the two took together. Id. at \*1. At trial, prosecutors were permitted to use evidence that Scherner had molested four other children. Notably, as with M.S., Scherner made sure each child was away from home so that he could easily gain access. Two of the victims were molested while spending the night at Scherner’s home. Two others were molested while on trips with Scherner. Id. at \*2. The Supreme Court found the testimony of these other victims properly admitted as demonstrating a common scheme or plan. Id. at \*6.

In Fleming’s case, there was no similar evidence of a scheme or plan.

In its brief, the State argues Fleming’s plan was to “isolate and abuse his daughters.” BOR, at 13. Anytime the accused and the victim live together, however, there will be opportunities for isolation. This is not a plan. Rather, this is inherent in every family

situation. In any event, according to T.F., other family members often were home during the abuse. See 5RP 91 (family home and sleeping); 5RP 103-104 (sister Christie in room); 5RP 143-149 (Christie and Champagne in home listening to music); 5RP 155-156 (K.F. and Champagne home; Christie in room). Moreover, extended family and renters often lived in the homes. 4RP 64, 69, 71, 73; 5RP 3-5. And in both the Renton and Kent homes, Champagne's bedroom door was just steps away from T.F.'s bedroom. 4RP 81, 84. While Scherner truly involved a plan to isolate the victims, Fleming's case does not.

The State notes Judge Heller's findings that the touching in both cases was "similar, if not identical," both daughters were abused in the family home, the abuse occurred when the mother was gone or elsewhere in the house, and the girls were "roughly the same age when the abuse occurred." BOR, at 18 (citing 4RP 12-13).

First, as explained in the opening brief, the touching was not similar. While both girls described massages, T.F. alleged far more serious conduct. Second, that both daughters were abused in the family home, like isolation, is the product of circumstances, not a plan, when the accused and victim live in the same

household. Third, that the mother was not immediately present to see the abuse describes almost every molestation ever committed. It does not establish a plan, either. Lastly, the girls were not roughly the same age. T.F. alleged years of continuous abuse beginning when she was 11, while K.F. alleged only a single instance when she was 15.

When additional dissimilarities are considered – one daughter alleged the use of alcohol while the other did not; one daughter said resistance was futile while the other said Fleming stopped immediately when challenged – it is apparent the State did not demonstrate a common scheme or plan. And when further evaluated in light of the prejudice resulting from K.F.'s testimony, the evidence should not have been admitted at Fleming's trial. See AOB, at 17-20 (discussing prejudicial impact).

Because it was error to admit K.F.'s testimony, the question is whether, within reasonable probabilities, the error materially affected the trial outcome. Gresham, at \*12. The State contends the error was harmless.<sup>1</sup> BOR, at 21. Arguing its evidence was strong, the State cites to T.F.'s testimony; T.F.'s tiger blanket,

“which appeared to have semen stains”; and Flemings failure to deny the charges when talking to Champagne on the telephone and confronted with the DNA test results. Id.

The tiger blanket, however, was apparently never tested to identify the content or source of the stain. See 6RP 75-78. Dr. Donald Riley challenged the DNA paternity calculations, particularly since Corey’s DNA had never been tested. See 9RP 18-19, 22, 28-33, 46 59-62, 74, 78-80, 84-86. And it is inaccurate to say Fleming never denied the accusations. He told Champagne, “I didn’t do nothing to us. [Y]our daughter did this to us.” Exh. 7; Exh. 20, at 11.

Without K.F.’s testimony, the State was without an eyewitness to the alleged crimes and forced to rely on T.F.’s sometimes inconsistent testimony and the disputed paternity statistics. The trial deputy recognized the importance of K.F.’s testimony in convincing jurors to convict Fleming, repeatedly emphasizing it during closing argument. See 10RP 28, 40-42, 65-66. The error was extremely harmful.

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<sup>1</sup> Gresham disposes of the State’s argument that any error under ER 404(b) was harmless because the testimony was admissible under RCW 10.58.090. See BOR, at 22.

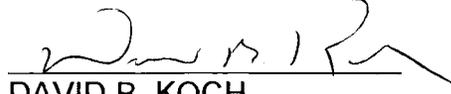
B. CONCLUSION

For the reasons discussed in Fleming's opening brief and above, this Court should reverse and remand for a new trial.

DATED this 27<sup>th</sup> day of January, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

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