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No. 39404-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Noel Walker,

Appellant.

Grays Harbor County Superior Court Cause No. 08-1-00459-0

The Honorable F. Mark McCauley

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Walker's conviction violated his Fourteenth Amendment right to due process.
2. The trial judge erroneously admitted evidence of uncharged sexual misconduct as substantive evidence of guilt.
3. Mr. Walker's conviction was unlawfully based on propensity evidence.
4. RCW 10.58.090 was applied in a manner that violates the federal *ex post facto* clause.
5. RCW 10.58.090 was applied in a manner that violates the state *ex post facto* clause.
6. RCW 10.58.090 was enacted in violation of the constitutional separation of powers.
7. RCW 10.58.090 is void because it conflicts with ER 404(b) and undermines the Supreme Court's authority over trial courts.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process prohibits the admission of propensity evidence to establish the charged crime. Here, the trial court admitted evidence of prior sexual misconduct as substantive proof that Mr. Walker committed the charged crime. Did the admission of propensity evidence violate Mr. Walker's Fourteenth Amendment right to due process?
2. The federal *ex post facto* clause prohibits enactment of substantive law that is retrospective and that disadvantages the accused. Here, RCW 10.58.090, which allows the introduction of propensity evidence as substantive proof of guilt, was applied retrospectively to the disadvantage of Mr. Walker.

Was RCW 10.58.090 applied in a manner that violated the federal *ex post facto* clause?

3. Washington's *ex post facto* clause covers any evidence rule that retrospectively allows conviction based on different evidence than previously required. RCW 10.58.090 allows the introduction of propensity evidence as substantive proof of guilt. Was RCW 10.58.090 applied in a manner that violated the state *ex post facto* clause?

4. The separation of powers doctrine prohibits the legislature from enacting procedural statutes that conflict with rules promulgated by the Supreme Court. RCW 10.58.090 addresses the admissibility of propensity evidence and directly conflicts with ER 404(b). Was RCW 1058.090 enacted in violation of the constitutional separation of powers?

INTRODUCTION AND SUMMARY OF ARGUMENT

Sexual crimes against children are among the most heinous of all offenses. When provided with proof of prior sexual misconduct, the average juror will vote to convict even absent sufficient evidence establishing the charged crime. Because of this, courts have long prohibited the admission of propensity evidence as substantive proof of guilt.

RCW 10.58.090 (which allows propensity evidence to be admitted as substantive evidence of guilt) violates due process, because it conflicts with the presumption of innocence and the burden of proof. Furthermore, by enacting RCW 10.58.090, the legislature intruded on a core judicial function: the statute conflicts with ER 404(b), which prohibits the use of propensity evidence as substantive proof of guilt. Finally, RCW 10.58.090 violates the state and federal prohibitions on *ex post facto* laws, because it allows the use of propensity evidence as substantive proof of guilt even for offenses occurring before the statute's effective date.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Noel Walker was a single father living with his daughter and son in rural Lewis County. RP (4/14/09) 57-58. His daughter K. had a friend

H.L. stayed over, and H.L. accused Mr. Walker of touching her. RP (4/14/09) 63-78.

The state charged Mr. Walker with Child Molestation in the Second Degree, said to have occurred between December 1, 2007 and January 1, 2008. CP 1. Mr. Walker was granted the right to represent himself at trial, and the court appointed stand-by counsel.¹ RP (10/27/08) 3-13. The court held a CrR 3.5 hearing and ruled that Mr. Walker's statement to law enforcement was admissible at trial. RP (12/12/08) 31-33.

The state sought to introduce an accusation by another girl, L.G., who alleged that Mr. Walker had touched her inappropriately. No charges had been filed regarding this allegation. RP (4/3/09) 15-17; RP (4/8/09) 3-34; Notice of Intent to Offer Evidence and Memorandum of Authorities (filed 1/26/09), Memorandum (filed 3/18/09), Supp. CP.

L.G., who was fourteen years old at the time of trial, accused Mr. Walker of waking her up in the middle of the night to rub lotion on her legs. RP (4/8/09) 4-15. She said that he also tried to touch her inside her

¹ Later in the proceedings, Mr. Walker asked for an attorney to be appointed to represent him at trial, which was set for the following week. After determining that the attorney could not be ready for trial, the court denied the motion. RP (12/12/08) 38-39. Mr. Walker then retained an attorney, who appeared on his behalf until Mr. Walker again asked to represent himself. RP (12/15/08) 50-54; RP (4/3/09) 15-18; RP (4/8/09) 3-37; RP (4/13/09) 19-46.

pants. According to L.G., Mr. Walker told her she was more beautiful than the last time he had seen her, and asked her if her sister was a virgin. RP (4/8/09) 15-17. She became uncomfortable, and asked to be allowed to sleep in K.'s room. Mr. Walker allowed her to do so. RP (4/8/09) 17-18.

The court held a hearing and ruled that L.G.'s testimony would be admitted under RCW 10.58.090. RP (4/8/09) 23-34. Specifically, the court found that L.G. was credible, that she was not easily led, and that her allegation was close in time to the charged crime, all of which caused him to conclude that it was more likely than not that something happened. RP (4/8/09) 23-34. The judge indicated that L.G.'s testimony was important (because otherwise the case would be just a swearing contest between Mr. Walker and H.L.), and that the evidence was not unfairly prejudicial. RP (4/8/09) 28-29. The court also held that the evidence would be admissible if it were offered to show a common scheme or plan. RP (4/8/09) 30.

At trial, H.L. told the jury that she slept over with K. in December of 2007. She said that K. got sick and left the bedroom, and alleged that Mr. Walker came in, lay next to her on the bed, and asked her questions while touching her chest. RP (4/14/09) 68-70. According to H.L., Mr. Walker kissed her on the lips more than once, rubbed her under her clothing, told her not to tell her parents, and said "I'm not a perv." RP

(4/14/09) 71-73, 76. H.L. acknowledged that she continued to visit K.'s home after this incident, and said that once in July of 2008 Mr. Walker tried to watch her change into her bathing suit. RP (4/14/09) 79-84. H.L. spent that night at the Walker residence, and the next morning (according to her trial testimony) Mr. Walker told her they could have had something together, and related a dream about wild sex with her. RP (4/14/09) 87.

L.G. testified that she spent the night at the Walker residence, and that Mr. Walker woke her late at night to rub lotion on her legs. RP (4/14/09) 139, 145-146. She told the Jury that Mr. Walker said she was beautiful, asked if her sister was a virgin, and tried to touch her inside her pants. RP (4/14/09) 146-149. When she asked to go into K.'s room, Mr. Walker let her. RP (4/14/09) 148. After H.L. and L.G. testified, two detectives told the jury that Mr. Walker had admitted he was afraid his thoughts about H.L. would get him into trouble, but that he declined to sign a statement. RP (4/14/09) 169-176; RP (4/15/09) 200-201.

The jury convicted Mr. Walker as charged. The court imposed a sentence of 48 to 120 months, and this timely appeal followed. CP 8-19, 20.

ARGUMENT

I. MR. WALKER'S CONVICTION WAS OBTAINED IN VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE STATE INTRODUCED PROPENSITY EVIDENCE AS SUBSTANTIVE PROOF OF HIS GUILT.

The use of propensity evidence to prove a crime can violate due process under the Fourteenth Amendment.² U.S. Const. Amend. XIV; *Garceau v. Woodford*, 275 F.3d 769, 775 (9th Cir. 2001), *reversed on other grounds* at 538 U.S. 202, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003); *see also McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993). A conviction based in part on propensity evidence is not the result of a fair trial. *Garceau*, at 776, 777-778.

Propensity evidence is highly prejudicial, and there are numerous justifications for excluding it:

For example, courts, reasoning that jurors may convict an accused because the accused is a "bad person," have typically excluded propensity evidence on grounds that such evidence jeopardizes the constitutionally mandated presumption of innocence until proven guilty. The jury, repulsed by evidence of prior "bad acts," may overlook weaknesses in the prosecution's case in order to punish the accused for the prior offense. Moreover, as scholars have suggested, jurors may not regret wrongfully convicting the accused if they believe the accused committed prior offenses. Courts have also barred admission of propensity evidence on grounds that jurors will credit propensity evidence with more weight than such evidence deserves. Researchers have shown that

² The U.S. Supreme Court has reserved ruling on this issue. *Estelle v. McGuire*, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

character traits are not sufficiently stable temporally to permit reliable inferences that one acted in conformity with a character trait. Furthermore, courts have excluded propensity evidence because such evidence blurs the issues in the case, redirecting the jury's attention away from the determination of guilt for the crime charged.

Natali & Stigall, "*Are You Going to Arraign His Whole Life?*": *How Sexual Propensity Evidence Violates the Due Process Clause*, 28 Loyola U. Chi. L.J. 1, at 11-12 (1996).

In Washington, propensity evidence has traditionally been excluded under ER 404(b), which provides that "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." A trial court "must always begin with the presumption that evidence of prior bad acts is inadmissible." *State v. DeVincentis*, 150 Wn.2d 11, 17-18, 74 P.3d 119 (2003). ER 404(b)'s *raison d'etre* is to exclude propensity evidence.

In 2008, the legislature radically altered the traditional rule, allowing the admission of propensity evidence in prosecutions for sex offenses. *See* RCW 10.58.090. Under the statute, if evidence of other crimes (or uncharged criminal misconduct) is necessary for conviction, such evidence may be admitted as substantive evidence. Such evidence is admitted to show that the accused person has a propensity to commit

sexual crimes, regardless of the strength of the evidence presented in a particular case.

In this case, the prosecutor introduced evidence of uncharged sexual misconduct to prove Mr. Walker's guilt. The trial court acknowledged that the evidence was necessary to enable the state to overcome the difficulties inherent in a swearing contest. RP (4/8/09) 28. By painting Mr. Walker as someone with a propensity to commit sex crimes, the state shifted the focus away from evidence of the charged crime, and toward evidence of Mr. Walker's character. This violated his Fourteenth Amendment right to due process. *Garceau, supra*.

The admission of propensity evidence undermines the presumption of innocence and the beyond-a-reasonable-doubt standard of proof. It enables conviction based on character rather than evidence. Because RCW 10.58.090 violates due process, Mr. Walker's conviction must be reversed. His case must be remanded to the trial court, with instructions to exclude propensity evidence. *Garceau, supra*.

II. THE ADMISSION OF PROPENSITY EVIDENCE UNDER RCW 10.58.090 IN MR. WALKER'S CASE VIOLATES THE STATE AND FEDERAL PROHIBITIONS AGAINST *EX POST FACTO* LAWS.

A. The state and federal constitutions prohibit *ex post facto* laws.

Article I, Section 10 of the United States Constitution and Article I, Section 23 of the Washington Constitution, the *ex post facto* clauses, forbid the state from enacting any law that imposes punishment for an act that was not punishable when committed, or increases the quantum of punishment annexed when the crime was committed. *Collins v. Youngblood*, 497 U.S. 37, 42, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990); *State v. Ward*, 123 Wn.2d 488, 496, 870 P.2d 295 (1994).

B. RCW 10.58.090 violates the federal prohibition on *ex post facto* laws.

A law violates the *ex post facto* clause if it is substantive (rather than merely procedural), is retrospective, and disadvantages the person affected by it. *State v. Hennings*, 129 Wn.2d 512, 525, 919 P.2d 580 (1996) (citing *Weaver v. Graham*, 450 U.S. 24, 29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 (1981); *Youngblood*, 497 U.S. at 45). RCW 10.58.090 violates the state and federal *ex post facto* prohibitions.

1. The legislature has stated RCW 10.58.090 is substantive in nature.

The legislative notes following RCW 10.58.090 indicate that since it is an evidentiary rule, it is substantive in nature. Laws 2008, ch. 90, §1. While the legislature's characterization of a statute does not necessarily control the constitutional *ex post facto* analysis, this statute is substantive in nature, as it does not fit within the understanding of a procedural statute. *In re the Personal Restraint of Gronquist*, 139 Wn.2d 199, 208, 986 P.2d 131 (1999).

[Although] cases do not explicitly define what they mean by the word "procedural," it is logical to think that the term refers to changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes.

Youngblood, 497 U.S. at 45 (citing *Dobbert v. Florida*, 432 U.S. 282, 292, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977); *Beazell v. Ohio*, 269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216 (1925); *Mallett v. North Carolina*, 181 U.S. 589, 597, 21 S.Ct. 730, 45 L.Ed. 1015 (1901)). RCW 10.58.090 does not merely define the procedure by which a case is adjudicated but rather redefines the bounds of relevancy for a sex offense prosecution. Under the statute, prior sexual misconduct is admissible without limitation, and may be used as substantive proof of guilt. Thus, the legislature appropriately recognized the substantive reach of the statute.

2. RCW 10.58.090 applies to events occurring prior to its enactment.

The statute also applies to events that occurred prior to its enactment. The legislature specifically stated the statute should apply to any case tried after its enactment without concern for when the alleged offense may have occurred. Laws 2008, ch. 90 § 3. Here, the statute was applied retrospectively to events occurring prior to the effective date of the statute.

3. RCW 10.58.090 substantially disadvantaged Mr. Walker.

RCW 10.58.090 allows evidence that is inadmissible under ER 404(b) (or admissible for a more limited purpose) to be admitted for any purpose whatever; this includes substantive use of propensity evidence as proof of guilt. In presenting the evidence, the state was effectively asking the jurors to use the evidence as bald propensity evidence, since Mr. Walker had committed other sexual misconduct, he must have committed the charged offense. Washington courts have long excluded this class of evidence precisely because is unreliable, irrelevant, and overly prejudicial. See *State v. Bokien*, 14 Wn. 403, 414, 44 P. 889 (1896).

The statute is substantive, retrospective, and disadvantages persons accused of sex offenses. Under the test enunciated in *Hennings, supra*, application of RCW 10.58.090 to offenses committed prior to its

enactment violates the *ex post facto* clause of the United States Constitution.

C. RCW 10.58.090 also violates the greater protections of Wash. Const. Article I, Section 23.

The scope of a provision of the state constitution is determined with respect to the six nonexclusive factors set forth in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).³ RCW 10.58.090 alters the rules of evidence for the purpose of convicting a person charged with a sex offense: under the statute, proof of sexual misconduct or prior sex offenses may be used as substantive evidence of an accused person's guilt of the charged crime. The statute therefore falls under the fourth category of *ex post facto* laws set forth by the U.S. Supreme Court shortly after the federal constitution was approved:

1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the

³ The six non-exclusive *Gunwall* factors are: (1) the textual language of the state constitution; (2) significant differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) matters of particular state interest or local concern. *Gunwall*, at 61-62.

commission of the offence, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive.

Calder v. Bull, 3 Dall. 386, 390-91, 1 L.Ed. 648 (1798).⁴ A *Gunwall* analysis reveals the framers of the Washington Constitution would have drafted the state *ex post facto* clause to prohibit laws falling under the fourth *Calder* category. Accordingly, the framers would have understood RCW 10.58.090 to be unconstitutional if applied to Mr. Walker's case.

1. The language of the state constitution.

The first *Gunwall* factor requires examination of the text of the state constitutional provisions at issue. Wash. Const. Article I, Section 23 provides that “[n]o bill of attainder, *ex post facto* law, or law impairing the obligations of contracts shall ever be passed.” Wash. Const. Article I, Section 23. The strong, simple, direct, and mandatory language (“[no] *ex post facto* law... shall ever be passed”) implies a high level of protection.

⁴ While the fourth category identified in *Calder* seems to clearly bar retroactive changes in the type of evidence which is admissible, the Supreme Court has concluded that “[o]rdinary” rules of evidence do not implicate *ex post facto* concerns because they do not alter the standard of proof. *Carmell v. Texas*, 529 U.S. 513, 533 n.23, 120 S.Ct. 1620, 146 L.Ed.2d 577 (1999). For example, the Court held a law permitting the admission of a defendant's letters to his wife for the purposes of comparing them to letters admitted into evidence was not an *ex post facto* violation because the change in law “did nothing more than remove an obstacle arising out of a rule of evidence that withdrew from the consideration of the jury testimony which, in the opinion of the legislature, tended to elucidate the ultimate, essential fact to be established, namely, the guilt of the accused. Nor did it give the prosecution any right that was denied to the accused. It placed the state and the accused upon an equality.” *Thompson v. Missouri*, 171 U.S. 380, 387-88, 18 S.Ct. 922, 43 L.Ed. 204 (1898).

Thus the language of the provision favors the independent application of the state constitution advocated in this case.

2. Significant differences in the texts of parallel provisions of the federal and state constitutions.

The second *Gunwall* factor requires analysis of the differences between the texts of parallel provisions of the federal and state constitutions. The state *ex post facto* clause differs from the federal clause in one important respect: the state clause provides that no *ex post facto* law “shall *ever* be passed.” Wash. Const. Article I, Section 23 (emphasis added). The state clause’s use of the word “ever” suggests that the framers of the state constitution had a great aversion to *ex post facto* laws, requiring special emphasis on the prohibition.

The Washington clause mirrors the provisions of the Oregon and Indiana Constitutions. *Compare*, Const. Article I, Section 23; Or. Const. Art. I, § 21; Ind. Const. Art. I, § 24. Indeed, the Declaration of Rights, of which Article I, Section 23 is a part, “was largely based upon W. Lair Hill’s proposed constitution and its model, the Oregon Constitution.” R. Utter and H. Spitzer, *The Washington State Constitution, A Reference Guide*, p 9 (2002). Because it is borrowed from the Oregon Constitution, which in turn took its *ex post facto* language from the Indiana

Constitution,⁵ it is useful to look to how the courts of those states have interpreted the relevant provisions of their constitutions. *Biggs v. Dep't of Retirement*, 28 Wn.App. 257, 259, 622 P.2d 1301 (1981) (turning to interpretations of the Indiana Constitution to interpret similar provisions, although not identical, provisions of Washington Constitution).

Applying an analysis similar to that set forth in *Gunwall*, the Oregon Supreme Court has determined the *ex post facto* protections of the Oregon Constitution are broader than the protections which the United States Supreme Court has recognized in the federal constitution.⁶ *State v. Fugate*, 26 P.3d 802, 813 (Or. 2001). Specifically, the Oregon court has interpreted the mirror provisions of the Oregon Constitution's *ex post facto* clause to prohibit the retroactive application of laws that alter the rules of evidence in a manner which favors only the prosecution. *Fugate* took pains to distinguish that result from changes in evidentiary rules which apply equally to both the defense and the prosecution, since this

⁵ *State v. Cookman*, 920 P.2d 1086, 1091 (Or. 1996).

⁶ When determining whether a provision of the Oregon Constitution provides greater protection than does the federal constitution, Oregon courts consider the provision's "specific wording, the case law surrounding it, and the historical circumstances that led to its creation." *Priest v. Pearce*, 840 P.2d 65, 67-69 (Or. 1992). By comparison, *Gunwall* directs a court to consider six nonexclusive factors. See note 3, above. *Gunwall*, at 61-62

type of law of general application was never viewed as resulting in the evil to which the *ex post facto* clause is addressed. *Fugate* at 813.

In reaching its conclusion, the Oregon court looked to Indiana's interpretation of its *ex post facto* protections. Prior to adoption of the Oregon Constitution, the Indiana Supreme Court determined

The words *ex post facto* have a definite, technical signification. The plain and obvious meaning of this prohibition is, that the Legislature shall not pass any law, after a fact done by any citizen, which shall have relation to that fact, so as to punish that which was innocent when done; or to add to the punishment of that which was criminal; or to increase the malignity of a crime; or to retrench the rules of evidence, so as to make conviction more easy.

Strong v. The State, 1 Blackf. 193, 196 (1822). Because that interpretation of Indiana's constitution was available to the framers of the Oregon Constitution when they chose to adopt the language of Indiana's *ex post facto* clause, the Oregon court interpreted the Oregon provisions as "forbid[ding] *ex post facto* laws of the kind that fall within the fourth category in *Strong* and *Calder*, viz., laws that alter the rules of evidence in a one-sided way that makes conviction of the defendant more likely." *Fugate*, at 813.

That interpretation of the Indiana Constitution was also available to the framers of Washington Constitution in 1889. Rather than simply adopt the language of Article I, Section 10, the framers instead chose to adopt the language of the Oregon and Indiana constitutions. By adopting

the different language of the Oregon and Indiana Constitutions, logically, the framers of the Washington Constitution did not intend Article I, Section 23 to be interpreted identically to the federal Bill of Rights, since they used different language and the federal Bill of Rights did not then apply to the states. R. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. Puget Sound L. Rev. 491, 496-97 (1984); *State v. Silva*, 107 Wn.App. 605, 619, 27 P.3d 663 (2001) (“The decision to use other states’ constitutional language also indicates that the framers did not consider the language of the U.S. Constitution to adequately state the extent of the rights meant to be protected by the Washington Constitution.”).

Thus, differences in the language between the state and federal constitutions also favor an independent application of the state constitution in this case.

3. Common law and state constitutional history.

Under the third *Gunwall* factor, this court must look to state constitutional and common law history. Prior to adoption of the state constitution, the Supreme Court explained its understanding that the federal *ex post facto* clause prohibited statutes “changing the rules of evidence by which less or different testimony was made sufficient to convict.” *Fox v. Territory*, 2 Wash. Terr. 297, 300, 5 P. 603 (1884). This

same view persisted after ratification. See *Lybarger v. State*, 2 Wash. 552, 560-61, 27 P. 449 (1891). In *Lybarger*, the court addressed whether the state constitutional provision allowing prosecution by Information (rather than presentment to grand jury) was *ex post facto* as applied to crimes occurring before the constitution was adopted. *Id.* at 555. The court applied the four factors set forth in *Calder*, at 390-01, and held the change in law at issue in *Lybarger* was merely "procedural" and did not fall under any of the factors. *Lybarger*, at 557. However, the court explained its understanding that the fourth *Calder* factor bars "change[s in] the rules of evidence to make conviction more easy [sic]." *Id.*, at 560-61.

Furthermore, as outlined above, the framers of the Washington constitution would have been familiar with Oregon and Indiana precedent addressing those states' *ex post facto* provisions. The state constitution reflects the political ideals of the Progressive Era, and the influence of these ideals on western state politics of the period. Cornell W. Clayton, *Toward a Theory of the Washington Constitution*, 37 Gonz. L. Rev. 41, 67-68 (2001/2002). The historical milieu and political culture in Washington at the time included the aim to secure a popular democratic government while simultaneously protecting individual rights by incorporating the traditional prohibitions on bills of attainder and *ex post facto* laws. *Id.*

Thus, common law and state constitutional history favor the interpretation urged by Mr. Walker.

4. Pre-existing state law.

The fourth *Gunwall* factor “directs examination of preexisting state law, which ‘may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims.’” *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 809, 83 P.3d 419 (2004) (quoting *Gunwall*, at 62). There does not appear to be any preexisting legislative enactments addressing *ex post facto* concerns. Accordingly, the fourth *Gunwall* factor does not weigh in favor or against an independent application of the state provision.

5. Differences in structure between the federal and state constitutions.

In *State v. Young*, the Supreme Court noted that “[t]he fifth *Gunwall* factor... will always point toward pursuing an independent state constitutional analysis because the Federal Constitution is a grant of power from the states, while the State Constitution represents a limitation of the State’s power.” *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994).

6. Matters of particular state interest or local concern.

The sixth *Gunwall* factor deals with whether the issue is a matter of particular state interest or local concern. There is no need for national uniformity on the scope of protection from *ex post facto* laws. Furthermore, the regulation of criminal trials is a matter of particular state concern. *State v. Boland*, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990). *Gunwall* factor number six thus also points to an independent application of the state constitutional provision in this case.

7. Conclusion: the *Gunwall* factors favor Mr. Walker's interpretation of the state constitutional prohibition against *ex post facto* laws.

Five of the six *Gunwall* factors favor an independent application of Article I, Section 23 in this case. Each factor establishes that our state constitution provides greater protection to criminal defendants than does the federal constitution.⁷

The framers of Washington Constitution adopted language that differs from the language of the federal constitution; language that had been interpreted 67 years prior to its inclusion in the Washington Constitution to bar retroactive legislation which alters the rules of evidence in a one-sided fashion. The foregoing analysis demonstrates that

⁷ Division I has held that *Gunwall* analysis does not compel this result. See *State v. Gresham*, ___ Wn.App. ___, ___ P.3d ___ (2009).

by doing so, the framers intended to apply that same protection in Washington.

RCW 10.58.090 unquestionably alters the rules of evidence in a manner that makes convictions easier. Accordingly, it violates Article I, Section 23 when applied to incidents prior to its enactment.

D. Division II should not follow Division I's decision in *Gresham*.

Division I of the Court of Appeals recently decided that RCW 10.58.090 does not violate the state or federal *ex post facto* laws. *State v. Gresham*, ___ Wn.App. ___, ___ P.3d ___ (2009). The *Gresham* decision is flawed, and should not be followed by Division II for three reasons.

First, the *Gresham* court incorrectly concluded that RCW 10.58.090 is essentially a procedural statute rather than a substantive one:

[The statute] does not alter the facts necessary to establish guilt, and it leaves unaltered the degree of proof required for a sex offense conviction. It only makes admissible evidence that might otherwise be inadmissible.

Gresham, at ___. This ignores the legislature's specific pronouncement that the statute is substantive and not procedural. Laws 2008, ch. 90, §1. Furthermore, the statute permits the use of propensity evidence as substantive proof of guilt. This permits a jury to convict with diminished proof of the charged crime if the accused person has a history of sexual misconduct.

Second, the statute is not even-handed - it specifically disadvantages the person accused while benefiting the prosecution. It is not an evidence rule that permits either side to introduce additional evidence; instead, it allows the prosecution to prove a charged crime by showing that the accused has a propensity to commit similar offenses. The *Gresham* court did not address this issue.

Third, although Division I asserted that the state and federal clauses are “coextensive,” it failed to provide citation to any authority, and did not engage in a *Gunwall* analysis. *Gresham*, at _____. Here, by contrast, Mr. Walker urges an independent application of the state constitution, and provides authority therefore.⁸

For all these reasons, Division II should not follow Division I’s decision in *Gresham*, *supra*.

E. Mr. Walker’s conviction must be reversed.

Where a constitutional error occurs during a trial, the error is presumed to be prejudicial unless the state can prove beyond a reasonable doubt the jury would have reached the same verdict had the error not occurred. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17

⁸ Although it is not clear from the court’s opinion, Mr. Gresham did provide a *Gunwall* analysis, and asserted that the state *ex post facto* clause provided greater protection than its federal counterpart. Division I’s opinion does not explain its failure to grapple with this issue.

L.Ed.2d 705 (1967). Thus, the state must convince this Court beyond a reasonable doubt that the guilty verdicts in this case were not attributable to the erroneously admitted evidence. *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). The state cannot meet that burden here. Accordingly, Mr. Walker's conviction must be reversed and the case remanded with instructions to exclude propensity evidence.

III. RCW 10.58.090 VIOLATES THE CONSTITUTIONAL SEPARATION OF POWERS.

A. The state and federal constitutions prevent one branch of government from usurping the powers of another.

A fundamental principle of our constitutional system is that governmental powers are divided among three departments—the legislative, the executive, and the judicial—and that each is separate from the other. *Carrick v. Locke*, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994) (citing *State v. Osloond*, 60 Wn.App. 584, 587, 805 P.2d 263, *review denied*, 116 Wn.2d 1030 (1991)).

Neither the Washington nor federal constitutions specifically enunciate a separation of powers doctrine, but this separation is universally recognized as deriving from the tripartite system of government established in both constitutions. *See, e.g.*, Const. Arts. II, III, and IV (establishing the legislative department, the

executive, and judiciary); U.S. Const. Arts. I, II, and III (defining legislative, executive, and judicial branches); *Carrick*, at 134-35. *Carrick* recognized that although the Washington Constitution contains no specific separation of powers provision, “the very division of our government into different branches has been presumed throughout our state’s history to give rise to a vital separation of powers doctrine.” *Id.*, at 134-35, (citing *Osloond*, at 587); *In re Juvenile Director*, 87 Wn.2d 232, 238-40, 552 P.2d 163 (1976).

The fundamental principle of the separation of powers is that each branch wields only the power it is given. *State v. Moreno*, 147 Wn.2d 500, 505, 58 P.3d 265 (2002). Thus, courts have announced the following test for determining whether an action violates the separation of power:

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, at 135 (quoting *Zylstra v. Piva*, 85 Wn.2d 743, 750, 539 P.2d 823 (1975)).

B. The Washington Constitution vests the Supreme Court with the sole authority to adopt procedural rules.

Article IV, Section 1 of the Washington Constitution vests the Washington Supreme Court with the sole authority to govern court

procedures. *City of Fircrest v. Jensen*, 158 Wn.2d 384, 394, 143 P.3d 776 (2006); *State v. Fields*, 85 Wn.2d 126, 129, 530 P.2d 284 (1975); “[T]here is excellent authority from an historical as well as legal standpoint that the making of rules governing procedure and practice in courts is not at all legislative, but purely a judicial, function.” *State ex rel. Foster-Wyman Lumber Co. v. Superior Court for King County*, 148 Wn. 1, 4, 9, 267 P. 770 (1928).

Thus, “when a court rule and a statute conflict, the nature of the right at issue determines which one controls.” *State v. W.W.*, 76 Wn.App. 754, 758, 887 P.2d 914 (1995). “If the right is substantive, then the statute prevails; if it is procedural, then the court rule prevails.” *Id.*

C. If RCW 10.58.090 is a procedural rule, its enactment violates the separation of powers doctrine.

The legislative notes following RCW 10.58.090 claim the act is substantive. If that is the case, then as argued above the retroactive application of that substantive change violates the *ex post facto* provisions of the federal and state constitutions.

In the alternative, if defining the bounds of the admissibility of evidence is a procedural function and one that lies at the heart of the judicial function, then the legislature’s effort to alter the rules of admissibility violates the separation of powers doctrine.

Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated.

State v. Smith, 84 Wn.2d 498, 501, 527 P.2d 674 (1974). RCW 10.58.090

does not prescribe societal norms or establish punishments. Instead it alters the mechanism by which the substantive rights—a person’s guilt of crime—is effectuated by allowing admission of otherwise inadmissible evidence.

If RCW 10.58.090 is a purely procedural statute, the legislature lacked the authority to enact it. Because the legislature did not have the authority to enact RCW 10.58.090, the statute is void. *State v. Thorne*, 129 Wn.2d 736, 762, 921 P.2d 514 (1996). The prejudicial impact of the statute in Mr. Walker’s case requires reversal of his conviction.

D. Division II should not follow Division I’s decision in *Gresham*.

In *Gresham, supra*, Division I held that RCW 10.58.090 does not violate the constitutional separation of powers. According to Division I, the statute can be harmonized with ER 404(b) because the trial court retains “ultimate authority [under ER 403] to determine what evidence will be considered by the fact finder in any individual case.” *Gresham, at* _____. This reasoning is flawed, and should not be followed.

While it is true that individual trial courts may exclude evidence otherwise admissible under the statute, a larger systemic conflict exists because the Supreme Court has decreed that *all* propensity evidence will be excluded (except for evidence qualified for admission for a limited purpose under ER 404(b)). By granting individual trial courts permission to admit such evidence, the legislature has undermined the Supreme Court's authority. In effect, the legislature has authorized trial courts to ignore a Supreme Court rule. The fact that individual trial courts retain discretion does not affect the analysis when there is a direct conflict with a properly promulgated rule.⁹

Division II should not follow Division I's decision in *Gresham*. The statute is unconstitutional, because it undermines the Supreme Court's authority over trial courts. Accordingly, the statute is void, and Mr. Walker's conviction must be reversed.

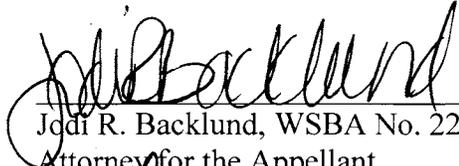
⁹ The cases cited by Division I did not involve a conflict between a statute and a specific court rule. See *Gresham*, at ___ (citing *Fircrest*, *supra*, and *State v. Long*, 113 Wn.2d 266, 778 P.2d 1027 (1989)). Instead, those cases turned on whether or not the legislature had impaired the ability of courts to determine questions of admissibility in individual cases. *Gresham*, at ___. Here, by contrast, the statute directly conflicts with a specific court rule, and interferes with the Supreme Court's power to promulgate rules.

CONCLUSION

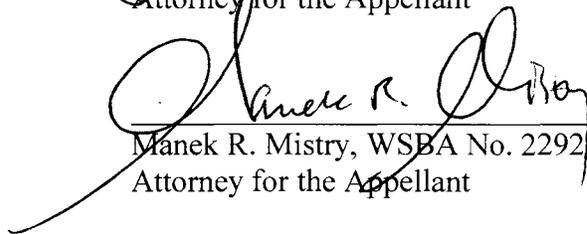
For the foregoing reasons, Mr. Walker's conviction must be reversed. The case must be remanded to the superior court with instructions to exclude propensity evidence.

Respectfully submitted on December 28, 2009.

BACKLUND AND MISTRY



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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Noel Walker, DOC #282015
Airway Heights Corrections Center
P. O. Box 1899
Airway Heights, WA 99001-1899

and to:

Grays Harbor County Prosecutor's Office
102 W Broadway Ave Rm. 102
Montesano WA 98563-3621

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on December 28, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 28, 2009.



Jodi R. Backlund, WSBA No. 22917
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