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STATE OF WASHINGTON

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NO. 84148-9

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROGER SCHERNER,

Petitioner.

STATE'S SECOND SUPPLEMENTAL BRIEF

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A. SUPPLEMENTAL ISSUES

The Court has requested supplemental briefing on the following issues:

1. Whether the challenged portion of RCW 10.58.090 is severable.
2. Whether the admission of the challenged evidence, if erroneous, was harmless.
3. Whether the failure to give an ER 404(b) limiting instruction was harmless.

B. ARGUMENT

1. RCW 10.58.090(6)(e) IS SEVERABLE FROM THE REST OF THE STATUTE.

Scherner has asserted a variety of constitutional challenges to RCW 10.58.090. Most of his arguments challenge the entire statute, yet he makes a directed challenge to one portion of the statute. He argues that his right to due process was violated by one of the eight non-exclusive factors set forth in RCW 10.58.090(6): "[t]he necessity of the evidence beyond the testimonies already offered at trial." Scherner claims that this factor improperly requires the judge to relinquish his or her impartiality. Supplemental Brief of Petitioner Roger Scherner at 6. The State has responded to the merits of this claim and argued that there is

nothing unique about a trial court considering the necessity of evidence when determining its admissibility and that under certain circumstances this factor may favor the defense and support excluding the evidence. State's Supplemental Brief at 15-16.

Should this Court conclude that Scherner's constitutional challenge to the "necessity" factor has merit, the proper remedy is to strike and sever that factor, rather than invalidate the entire statute. The challenged factor is simply one of eight non-exclusive factors intended to give the trial court guidance when evaluating the admissibility of the evidence under ER 403. It is not so intimately connected with the rest of RCW 10.58.090 as to render the statute useless in accomplishing its purpose.

Ordinarily, only the part of a statute that is constitutionally infirm will be invalidated, leaving the rest intact. In re Parentage of C.A.M.A., 154 Wn.2d 52, 67, 109 P.3d 405 (2005) (quoting Guard v. Jackson, 83 Wn. App. 325, 333, 921 P.2d 544 (1996), aff'd, 132 Wn.2d 660, 940 P.2d 642 (1997)). Constitutional and unconstitutional provisions of legislation are severable unless (1) the constitutional and unconstitutional provisions are so connected that it is not plausible that the legislature would have passed one without the other, or (2) the part eliminated is so

intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislature. State v. Abrams, 163 Wn.2d 277, 285-86, 178 P.3d 1021 (2008). A severability clause is not necessary in order to meet the severability test. In re Parentage of C.A.M.A., 154 Wn.2d at 67-68.

With respect to the first part of the severability test, the challenged portion of RCW 10.58.090 is not so intimately connected with the statute that the legislature would not have passed the statute without it. The legislature enacted RCW 10.58.090 in order "to ensure that juries receive the necessary evidence to reach a just and fair verdict." Laws of 2008, ch. 90 § 1. The purpose of the statute is to provide the trial court with the discretion to admit evidence of a defendant's commission of another sex offense. The challenged section is simply one of eight *non-exclusive* factors for the trial court to consider when deciding whether the proffered evidence should otherwise be excluded under ER 403. It is inconceivable that the "necessity of the evidence" factor was so critical that the legislature would not have enacted the statute without it.

In fact, the non-exclusive factors set forth in RCW 10.58.090(6) were added only to provide additional guidance to the

trial court when conducting an ER 403 analysis. The comparable federal rules contain no express reference to Federal Rule of Evidence 403. See Federal Rules of Evidence 413, 414 and 415. However, when rejecting constitutional challenges to these rules, the federal Courts of Appeal held that it was significant that the evidence of other sex offenses was still subject to exclusion under Rule 403. See United States v. LeMay, 260 F.3d 1018, 1026-27 (9th Cir. 2001); United States v. Enjady, 134 F.3d 1427, 1430-33 (10th Cir. 1998). Through caselaw, the federal courts articulated a number of factors for the trial court to consider when conducting a Rule 403 analysis. United States v. Guardia, 135 F.3d 1326, 1331 (10th Cir. 1998). The non-exclusive factors set forth in RCW 10.58.090(6) were lifted verbatim from Ninth Circuit decisions. LeMay, 260 F.3d at 1027-28. Had the legislature understood that the "necessity of the evidence" factor posed a constitutional problem, it would have simply omitted it from the statute.

With respect to the second part of the severability test, the "necessity of the evidence" factor is not so intimately intertwined with the statute as to make the remainder of the act unable to accomplish its legislative purposes. The challenged factor is

grammatically severable; it is separate and distinct and can be removed without affecting the other statutory provisions. The clause is also functionally severable. RCW 10.58.090(6)(e) is simply one non-exclusive factor for the trial court to consider, and the statute permits the trial court broad discretion to consider "[o]ther facts and circumstances" that the court might deem relevant. RCW 10.58.090(6)(h). The remainder of the statute still accomplishes RCW 10.58.090's general legislative purpose: to permit the admission of prior sex offenses subject to a trial court's ER 403 balancing. Should this Court conclude that RCW 10.58.090(6)(e) is unconstitutional, it should strike and sever that portion of the statute.

The State anticipates that Scherner may argue that if the "necessity of the evidence" factor is stricken, he should be entitled to a new trial because the trial court considered that factor in determining whether the evidence was inadmissible under ER 403. This Court should reject such an argument. This was not a close call by the trial court; even without this factor, the record indicates that the court would have admitted the evidence. In fact, the court concluded that, under ER 403, the probative value of the evidence "substantially outweighed" any undue prejudice. RP 109-12. If this

Court remains uncertain as to whether the trial court would have admitted the evidence without consideration of this factor, the proper remedy is to remand to the trial court to reconsider the ER 403 issue without the "necessity of the evidence" factor. See State v. Gomez, 75 Wn. App. 648, 656 n.11, 880 P.2d 65 (1994). If the trial court holds that it would have admitted the RCW 10.58.090 evidence without this factor, Scherner's convictions should be affirmed.

2. ANY ERROR IN ADMITTING THE EVIDENCE OF SCHERNER'S PRIOR SEX OFFENSES WAS HARMLESS.

The trial court found there were two bases for the admission of Scherner's prior sex offenses: RCW 10.58.090 and ER 404(b). Assuming the trial court erred in admitting the evidence under RCW 10.58.090, any error was harmless because, as the trial court held, this evidence was also admissible under ER 404(b) as evidence of a common scheme or plan. The evidence clearly established that Scherner employed a common scheme in satisfying his sexual desire for young children by molesting young girls staying at his house or traveling with him.

Assuming the trial court also erred in admitting the evidence under ER 404(b), any such error was also harmless. Evidentiary

errors under ER 404(b) are not of constitutional magnitude. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). The error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004); State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

Even without the evidence of Scherner's prior sex offenses, there was significant evidence of his guilt. The circumstances surrounding M.S.'s disclosure of the sexual abuse supported her credibility. She had no motive to fabricate; in fact, she was embarrassed by what happened, and her parents learned of the abuse only after M.S. had revealed to a friend that Scherner had French-kissed her. There was powerful evidence that Scherner admitted to the crimes; the police secretly tape-recorded a conversation between Scherner and M.S. where he admitted to molesting her.¹ Ex. 32, 33. When later confronted by the police,

¹ During the conversation, M.S. asked Scherner why he touched her vagina, and he responded, "all I can do is say I am sorry I did it. I wish I hadn't and I thought I had explained to you why I probably did it." Ex. 32; Ex. 33 at 2-3. He proceeded to tell her, "we... would have to be as quiet about it as you can because it's just so embarrassing, so unnatural and so unreal." Ex. 32; Ex. 33 at 4.

Scherner replied, "I don't recall touching her," but stated that "anything is possible but I don't believe I did." RP 835, 838. Finally, Scherner's flight to Florida shortly before trial was evidence of his consciousness of guilt. It is not reasonably probable that the results of the trial would have been different absent the evidence of Scherner's other sex offenses.

3. ANY ERROR IN FAILING TO PROVIDE THE JURY WITH AN ER 404(b) LIMITING INSTRUCTION WAS HARMLESS.

Scherner has assigned error to the failure to give an ER 404(b) limiting instruction. If this Court holds that the evidence was properly admitted under RCW 10.58.090, it need not address this issue. Moreover, in prior briefing, the State has argued that Scherner cannot assign error to the trial court's failure to give an ER 404(b) limiting instruction because he never proposed a proper instruction.² See Brief of Respondent at 50-52.

² Scherner's proposed instruction stated in part that, "You are not to consider the prior allegation as evidence that the defendant's conduct in this case conformed with the conduct alleged in the prior allegation." CP 271-72. This proposed language is inaccurate. When evidence is admitted under the common scheme or plan exception, the jury may consider whether the defendant's conduct in the current matter was consistent with his prior behavior. State v. Lough, 125 Wn.2d 847, 861, 889 P.2d 487 (1995). "Unless a requested instruction may be given without modification, error may not be assigned upon the refusal of the court to give it." Knight v. Pang, 32 Wn.2d 217, 232, 201 P.2d 198 (1948); see also Griffin v. West RS, Inc., 143 Wn.2d 81, 90, 18 P.3d 558 (2001); State v. Refsnes, 14 Wn.2d 569, 574, 128 P.2d 773 (1942); State v. Humphries, 21 Wn. App. 405, 411, 586 P.2d 130 (1978).

In any event, the failure to give a limiting instruction is subject to harmless error analysis. State v. Mason, 160 Wn.2d 910, 935, 162 P.3d 396 (2007); City of Seattle v. Patu, 108 Wn. App. 364, 377, 30 P.3d 522 (2001). As noted above, because errors relating to the admission of ER 404(b) evidence are not of constitutional magnitude, reversal is not required unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.

The error here was harmless given the strength of the State's evidence, as discussed in the preceding section. See United States v. Pittman, 418 F.3d 704, 707 (7th Cir. 2005) (holding that the failure to give ER 404(b) limiting instruction was harmless because of overwhelming evidence of defendant's guilt).

Moreover, the prosecutor's discussion of the prior sex offense evidence was entirely appropriate and consistent with ER 404(b)'s "common scheme or plan" theory of admissibility. See Patu, 108 Wn. App. at 377 (holding that the failure to give a limiting instruction was harmless where prosecutor discussed the defendant's prior conviction for the permissible purpose of attacking credibility). The prosecutor argued that the evidence was relevant to show "a pattern in the practice on the part of [Schermer]"

because the prior acts "were committed in a remarkably similar fashion." RP 1022. Again in rebuttal, the prosecutor argued that Scherner "has molested children over the decades in remarkably the same fashion." RP 1045. Because it is highly unlikely that the jury considered the prior sex offense evidence improperly, the Court should hold that any error was harmless.

C. CONCLUSION

For all the foregoing reasons, the Court should affirm the Court of Appeals and affirm Scherner's convictions.

DATED this 15th day of March, 2011.

Respectfully submitted,

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BY RONALD R. CARPENTER

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to

Eric Lindell, the attorney for the petitioner Roger Scherner, at 4409 California Avenue SW, Suite 100, Seattle, WA 98116,

Maureen Cyr, the attorney for the petitioner Michael Gresham, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, and

Kathleen Webber, the attorney for the State of Washington in State v. Gresham at the Snohomish County Prosecutor's Office, 3000 Rockefeller Avenue, M/S #504, Everett, Washington 98201

containing a copy of the SECOND SUPPLEMENTAL BRIEF OF RESPONDENT, in STATE V. SCHERNER, Cause No. 84148-9, in the Washington Supreme Court.

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

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