

63478-0

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No. 63478-0

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

STATE OF WASHINGTON,  
Respondent,  
v.  
DANIEL JOHNSON,  
Appellant.

2010 JUL -1 PM 4:35  
COURT OF APPEALS  
STAFF  
FILED

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

BECAUSE IT FAILED TO APPLY THE ANALYSIS REQUIRED BY THE STATUTE, THE TRIAL COURT ERRED IN ADMITTING PROPENSITY EVIDENCE PURSUANT TO RCW 10.58.090.

RCW 10.58.090 requires:

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).

Prior to ruling on the admissibility of the state's proffered propensity evidence, the trial court consider many of the factors listed in RCW 10.58.090(6). However with respect to the requirement that it determine the "necessity of the evidence beyond the testimonies already offered," the trial court stated "I'm not quite

sure what a court is supposed to do with it.” RP 500. The court explained further “I’m just not going to analyze that factor ‘cause I don’t - - I just don’t know - - I’m not sure which way it is supposed to be analyzed.” Id.

But the State, will not take the trial court at its word, insisting “[a] review of the record reveals the court did consider the necessity of the evidence before admitting it.” Brief of Respondent at 16. There can be no doubt following the trial court’s own statements that it did not address the necessity of the evidence.

Next the State contends that a finding of necessity is not a prerequisite to admission of propensity evidence under RCW 10.58.090. Brief of Respondent at 15-16. In support of this claim, the State quotes a portion of a recent opinion of this Court decisions that provides “the trial court **must** consider all the factors. . . .” (Emphasis added) Brief of Respondent at 16 (citing State v. Scherner, 153 Wn.App. 621, 658, 225 P.3d 248 (2009), review granted, No. 84150-1 (June 1, 2010). As is clear from the language of Scherner quoted in the State’s brief, that opinion does not support the State’s claim that a trial court is free to disregard any of the factors set out in the statute.

Instead the statute directs the "trial judge shall consider the following factors"

It is well settled that the word "shall" in a statute is presumptively imperative and operates to create a duty.... The word "shall" in a statute thus imposes a mandatory requirement unless a contrary legislative intent is apparent.

State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1995) (citing Erection Co. v. Department of Labor & Indus., 121 Wn.2d 513, 518, 852 P.2d 288 (1993)). As discussed in Mr. Johnson's initial brief there is no contrary intent expressed in the statute to overcome the presumption that "shall" is mandatory in this instance.

Finally the State contends that "as a practical matter the court did consider [the necessity of the evidence]. Brief of Respondent at 17. This claim is premised upon the erroneous assertion that the necessity determination is akin to the determination required by ER 403. Brief of Respondent at 17.

ER 403 provides:

Although relevant, evidence may be excluded if its 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

There is nothing in 403 which requires a court to consider the necessity of the evidence. Instead, that rule requires a judge to weigh evidence's relevance against its prejudicial effect. Second, if "necessity" is the same as the analysis of 403, the necessity element of RCW 10.58.090(6)(e) is superfluous with the provisions of RCW 10.58.090(6)(g). That subsection requires a court to consider:

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[.]

That provision is not merely "akin" to ER 403, it mirrors the rule's language. It is a basic rule of statutory construction that every statutory provision must be interpreted so as not to be superfluous with another. See, State v. Beaver, 148 Wn.2d 338, 343, 60 P.3d 586 (2002) (every statutory term is intended to have some material effect). Thus, because RCW 10.58.090(6)(g) separately requires the ER 403 balancing, the necessity determination of RCW 10.58.090(6)(e) must require something else. Therefore, the State is incorrect in its claim that the Court's application of ER 403 satisfies the requirement that the court consider the necessity of the propensity evidence.

Lastly, the State contends that the evidence was admissible despite the court's failure to determine its necessity. But in making this claim, the State, like the trial court, does not address the question of necessity. Instead, the State focuses exclusively on the remaining factors. Brief of Respondent 17-20. The State omits that factor from its consideration even after claiming it is addressing "all the relevant factors." (Emphasis in original) Brief of Respondent at 17. This of course misses the point that in addition to those factors, the RCW 10.58.090 also requires a determination of necessity. The State's view of which factors notwithstanding, by including the necessity factor in the statute the Legislature made clear its belief that "necessity" is a relevant factor.

Despite the plain requirement that it determine the evidence is necessary before admitting it, the trial court did not do so. RP 500. A court abuses its discretion when an "order is manifestly unreasonable or based on untenable grounds." Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). A court abuses its discretion by using the wrong legal standard or by resting its decision upon facts unsupported by the record. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (quoting Fisons, 122 Wn.2d at 339); see

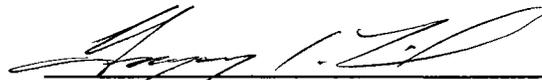
also State v. Mail, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993)  
(failure to follow statutory procedure is legal error reviewable on  
appeal).

In this case, the court candidly admitted it did not consider  
nor determine the necessity of the information. RP 500-01. The  
court's failure to employ the analysis required by RCW  
10.58.090(6) constitutes an abuse of discretion.

B. CONCLUSION

For the reasons above, and in Mr. Johnson's initial brief, this  
Court must reverse Mr. Johnson's conviction and sentence.

Respectfully submitted this 30<sup>th</sup> day of June, 2010.

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 63478-0-I
v.	)	
	)	
DANIEL JOHNSON,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 1<sup>ST</sup> DAY OF JULY, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> BRIAN MCDONALD, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( <input checked="" type="checkbox"/> ) ( <input type="checkbox"/> ) ( <input type="checkbox"/> )	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> DANIEL JOHNSON 919825 CLALLAM BAY CORRECTIONS CENTER 1830 EAGLE CREST WAY CLALLAM BAY, WA 98326	( <input checked="" type="checkbox"/> ) ( <input type="checkbox"/> ) ( <input type="checkbox"/> )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 1<sup>ST</sup> DAY OF JULY, 2010.

x \_\_\_\_\_ 

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