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REC'D

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King County Prosecutor
Appellate Unit

637363

NO. 63736-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

KURT SCHAUER,

Appellant.

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

The Honorable Helen Halpert, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. RCW 10.58.090 IS UNCONSTITUTIONAL EX POST FACTO LEGISLATION BECAUSE PERMITTING INFERENCE OF GUILT BASED ON PROPENSITY IS AKIN TO REDUCING THE BURDEN OF PROOF.

a. Permitting an Inference of Guilt Based on Propensity, Is a Significant Departure from Prior Evidence Law.

The term “propensity evidence” is a misnomer. In reality, the term is shorthand for two discrete concepts: 1) evidence of past misconduct unrelated to the crime charged, 2) used to infer guilt based on a propensity for crime in general or for a particular type of crime. Historically speaking, under ER 404(b), evidence of past misconduct is not necessarily excluded from criminal trials, so long as it does not raise the forbidden inference of guilt based on propensity: “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. It may, however, be admissible for other purposes.” ER 404(b). Thus, ER 404(b) contains exceptions for past misconduct that is specifically relevant to show motive, intent, identity, knowledge, etc., rather than simply to show criminal propensity. ER 404(b). The cases upholding the constitutionality of RCW 10.58.090, and the State in its Brief of Respondent, have failed to appreciate this distinction.

A law that merely permitted evidence of past crimes would not be a significant departure from prior Washington law. Such evidence has long

been admissible, so long as it was relevant to some purpose other than the inference of guilt based on character or propensity. ER 404(b); State v. Fisher, 165 Wn.2d 727, 746, 202 P.3d 937 (2009); see also State v. Holmes, 43 Wn. App. 397, 400, 717 P.2d 766 (1986) (rejecting the “once a thief, always a thief” rationale for admitting evidence). But the statute at issue here drastically departs from prior evidence law, not by expanding the scope of admissible evidence, but by expanding the scope of permissible *inference*. RCW 10.58.090 (“evidence of the defendant’s commission of another sex offense or sex offenses is admissible, *notwithstanding Evidence Rule 404(b)*”) (emphasis added).

There is a qualitative difference between laws that expand the universe of permissible evidence (*i.e.* by permitting child hearsay) or permissible witnesses (*i.e.* by permitting convicts or spouses to testify) on the one hand, and on the other hand, a law such as RCW 10.58.090 that permits a jury to infer that an accused person’s past crime or misconduct shows guilt in a particular instance.

b. RCW 10.58.090 Violates the Ex Post Facto Clause Because Permitting the Jury to Infer Guilt Based on Other Crimes Is Akin to a Decreased Burden of Proof.

The State argues RCW 10.58.090 does not violate the Ex Post Facto Clause because it merely expands the potential universe of witnesses and

evidence. Brief of Respondent at 16-17. The court in State v. Gresham similarly conflated the evidence and the inference, imprecisely reasoning that RCW 10.58.090 “only makes admissible evidence that might otherwise be inadmissible.” State v. Gresham, 153 Wn. App. 659, ___ P.3d ___, 2009 WL 4931789 at *6 (2009).

As discussed above, this argument misses the crucial distinction between the evidence to be admitted, and the inference to be drawn there from. This statute does not “only remove existing restrictions upon the competency of certain classes of persons as witnesses.” Brief of respondent at 16 (quoting State v. Clevenger, 69 Wn.2d 136, 142, 417 P.2d 626 (1966)). Nor does it merely admit additional categories of evidence such as child hearsay. Brief of Respondent at 17 (citing State v. Slider, 38 Wn. App. 689, 695, 688 P.2d 538 (1984)).

The Scherner court appears to appreciate that the statute permits a previously forbidden inference, rather than merely widening the scope of permissible evidence. State v. Scherner, 153 Wn. App. 621, ___ P.3d ___, 2009 WL 4912703 at *6 (2009) (“Scherner’s more troubling argument is that sex offense evidence is propensity evidence that reduces the quantum of evidence the State must produce in order to convict.”). However, the court went on to conclude there was no ex post facto violation because the statute does not permit the jury to find guilt *solely* based on propensity. Id.

Schauer respectfully disagrees with this analysis. Certainly, if the statute did permit conviction solely based on the inference of propensity based on unrelated past misconduct, that substantive change would violate ex post facto principles. However, even when the propensity inference is not alone sufficient, permitting that previously forbidden inference to play a significant part in the jury's deliberations is also a substantive change violating ex post facto principles.

The State also argues there is no substantive change reducing the quantum of evidence because the "lustful disposition" exception to ER 404 is already a permissible propensity inference. Brief of Respondent at 19-20. Schauer also disagrees with this mischaracterization of the lustful disposition exception. Under that exception, guilt may be inferred based on the defendant's lust or desire for the specific victim of the charged crime. State v. Ferguson, 100 Wn.2d 131, 134, 667 P.2d 68 (1983). The inference does not depend on a general propensity for crime, or even for a particular type of crime. It depends on a demonstrated motive specific to the victim of the crime charged. The lustful disposition exception is far more akin to the already recognized exceptions to ER 404(b) such as intent and motive than it is to the now permitted (under RCW 10.58.090) inference that because a criminal defendant had previously committed a sex offense, he or she is more likely to be guilty of the current sex offense.

Changing the rules of evidence to permit the formerly forbidden inference that a defendant is guilty based on unrelated crimes that show a propensity to commit crimes of a similar type is a substantive change in the law that tilts the playing field in favor of the state. Such a dramatic shift implicates ex post facto principles. City of Seattle v. Ludvigsen, 162 Wn.2d 660, 671, 174 P.3d 43 (2007).

2. WASHINGTON'S CONSTITUTION PROVIDES GREATER EX POST FACTO PROTECTION THAN ITS FEDERAL COUNTERPART.

The State points to Marley v. State, 747 N.E.2d 1123 (Ind. 2001), and argues that the Indiana constitution (on which Oregon's and Washington's constitutions are based) does not provide greater protection than the federal Ex Post Facto clause. Brief of Respondent at 24. But this modern analysis is irrelevant to Schauer's argument.

In State v. Fugate, 332 Or. 195, 26 P.3d 802 (2001), Oregon's supreme court held that its constitution imported the understanding of ex post facto that existed in both Indiana (as indicated by Strong v. State, 1 Blackf. 193 (Ind. 1822))) and the federal courts (as indicated by Calder v. Bull, 3 U.S., (3 Dall.) 386, 1 L. Ed. 648 (1798)) at the time, rather than the way ex post facto doctrine has evolved in federal courts in the intervening years. More modern interpretations by the Indiana courts, such as Marley, are not relevant to the framers' perception of what the Indiana Constitution

stood for at the time the Oregon and Washington Constitutions were written and adopted. When deciding to emulate Indiana, the framers of the Oregon Constitution were not looking at 2001 case law. They were looking at Strong.

The fact that Washington's framers borrowed heavily from the Oregon Constitution indicates a similar intent by Washington's framers to incorporate the protection embodied in Strong. "The plain and obvious meaning of this prohibition is that the Legislature shall not pass any law, after a fact done by any citizen . . . to retrench the rules of evidence, so as to make conviction more easy." Strong, 1 Blackf. at 196.

3. RCW 10.58.090 CANNOT BE HARMONIZED WITH ER 404(B).

For the reasons discussed in section A.1., supra, RCW 10.58.090 cannot be harmonized with ER 404(b). As noted above, this statute is not merely an additional exception to ER 404(b)'s prohibition on evidence of past misconduct. It does away entirely with ER 404(b)'s complete ban on using other wrongs to show a propensity to commit crime. The other exceptions to ER 404(b), as well as the "lustful disposition" exception, are exceptions precisely because they permit evidence of past misconduct for some purpose other than mere propensity. ER 404(b); Ferguson, 100 Wn.2d

at 134. By permitting the inference of guilt based on propensity, RCW 10.58.090 stands in direct conflict with ER 404(b).

The State does not appear to dispute that when a court rule and a statute are in conflict, the nature of the right at issue governs. State v. W.W., 76 Wn. App. 754, 758, 887 P.2d 914 (1995) (citing State v. Smith, 84 Wn.2d 498, 501-02, 527 P.2d 674 (1974)). If the right is substantive, then the statute prevails; if it is procedural, then the court rule prevails. Id. Thus, if RCW 10.58.090 is substantive, then it violates ex post facto protection as argued above. If, on the other hand, it is procedural, then in this conflict, ER 404(b) should control and the statute violates separation of powers.

4. RCW 10.58.090 VIOLATES THE WASHINGTON CONSTITUTION'S FAIR TRIAL GUARANTEE.

The State appears to misunderstand Schauer's argument based on the Washington Constitution's fair trial guarantee. It is already established that the Washington Constitution is more protective of the right to a jury trial than its federal counterpart. City of Pasco v. Mace, 98 Wn.2d 87, 96 653 P.2d 618 (1982). Specifically, article 1, section 21 incorporates not current federal jury trial jurisprudence, but instead the understanding of the right to jury trial that existed when Washington's constitution was adopted. Id.

Schauer cites to McKinney v. Rees, 993 F.2d 1378 (9th Cir. 1993), for purely historical purposes, rather than legal precedent. According to

McKinney, the ban on inferring guilt from a criminal propensity has existed at least since 1684. Id. at 1381. Thus, that ban was part of the understanding of a fair jury trial at the time Washington's constitution was adopted and is, therefore, part of what constitutes a fair trial under article 1, section 21 of Washington's constitution. In eliminating the ban on the inference of guilt based on propensity, RCW 10.58.090 violates the Washington Constitution's guarantee of a fair jury trial.

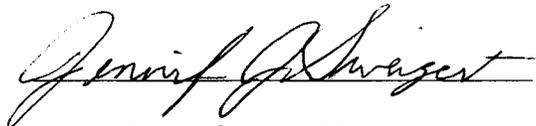
D. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Schauer requests this Court reverse his convictions, and remand for a new trial.

DATED this 26th day of March, 2010.

Respectfully submitted,

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