COA No. 67194-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

FREDERICK WILLIAMS,

Appellant.

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

The Honorable Ira J. Uhrig

REPLY BRIEF

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TABLE OF CONTENTS

A. REPLY ARGUMENT 1

B. CONCLUSION 6

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Aaron, 57 Wn. App. 277, 787 P.2d 949 (1990) 1

State v. Barragan, 102 Wn. App. 754, 9 P.3d 942 (2000). 2

State v. Dow, 162 Wn. App. 324, 253 P.3d 476 (2011) 1

State v. Gresham, ___ Wn.2d ___ (No. 84148-9) (2012) 1

State v. Johnson, 40 Wn. App. 371, 699 P.2d 221 (1985) 1

State v. Newbern, 95 Wn. App. 277, 975 P.2d 1041 (1999) 1

State v. Price, 126 Wn. App. 617, 109 P.3d 27 (2005) 2

State v. Savaria, 82 Wn. App. 832, 919 P.2d 1263 (1996) 1

WASHINGTON STATUTES AND COURT RULES

RCW 10.58.090 . . . . . passim

ER 404(b) . . . . . passim

A. REPLY ARGUMENT

RCW 10.58.090 has been invalidated,[1] and the present appeal is now for all practical purposes a very unique ER 404(b) case – involving a trial below where ER 404(b) evidence was admitted, but no limiting instruction, to prevent the jury from engaging in propensity reasoning, was given. This is a recognized prejudicial deficiency in an ER 404(b) case. State v. Savaria, 82 Wn. App. 832, 842, 919 P.2d 1263 (1996); State v. Newbern, 95 Wn. App. 277, 295–96, 975 P.2d 1041, review denied, 138 Wn.2d 1018 (1999); State v. Aaron, 57 Wn. App. 277, 281, 787 P.2d 949 (1990) (it is critical "to stress to the jury that the testimony was admitted only for a limited purpose and may not be considered as evidence of the defendant's guilt"); State v. Johnson, 40 Wn. App. 371, 377, 699 P.2d 221 (1985) (such caution to the jury is both "proper and necessary"); see also State v. Dow, 162 Wn. App. 324, 253 P.3d 476 (Wn. App. Div. 2, June 21, 2011) ("The potentially prejudicial nature of prior conviction evidence makes limiting instructions critically important") (ER 609 case).

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[1] Following the filing of the Appellant's Opening Brief, RCW 10.58.090 was held invalid in State v. Gresham, ___ Wn.2d ___ (No. 84148-9) (Jan. 5, 2012).

It is very important to note that this case is not analogous to one in which counsel failed to request an ER 404(b) limiting instruction, requiring an appellant to allege ineffective assistance and overcome the presumption that counsel made a tactical choice to not request such instruction. See, e.g., State v. Price, 126 Wn. App. 617, 649, 109 P.3d 27 (2005) ("We can presume that counsel did not request a limiting instruction regarding the use of ER 404(b) evidence of prior bad acts because "to do so would reemphasize this damaging evidence" and the choice was therefore tactical) (Emphasis added.) (citing State v. Barragan, 102 Wn. App. 754, 758, 762, 9 P.3d 942 (2000) (failure to request limiter in jury instructions not ineffective because doing so "would reemphasize this damaging evidence").

Rather, the posture of the present case is that Mr. Williams' counsel was effectively denied an ER 404(b) limiting instruction, because had he requested one, it would have been refused – admission of the evidence under the now-invalidated RCW 10.58 (which admitted the evidence specifically for propensity purposes) would have legally required the trial court to refuse an ER 404(b) limiting instruction (which tells the jury to not use the evidence except for the limited, specified purpose).

Therefore, to defeat reversal, the Respondent must at a minimum cite case law examples in which ER 404(b) evidence was admitted at a trial, and an ER 404(b) limiting instruction was denied by the trial court, but the Court of Appeals nonetheless affirmed the convictions.

The Respondent has not cited any such case.

Indeed, even citation of such a case would be wholly inadequate. This is a case in which ER 404(b) evidence was admitted, and not only was there no ER 404(b) limiting instruction, but the jury was affirmatively told that it could use the prior act evidence as proof of propensity to commit child sexual abuse.

Thus indeed, to defeat reversal, the Respondent must in fact cite some case law example in which (1) ER 404(b) evidence was admitted, (2) there was no limiting instruction, at no fault of the defendant or counsel, and (3) the jury, further, was affirmatively encouraged (perhaps by misconduct in closing argument), without objection, that it could and should find the defendant guilty using the prior acts as proof of his criminal disposition and propensity to commit the charged crime.

The Respondent has certainly cited no such case.

The Respondent must therefore convince this Court – in a matter of entirely first impression that would represent a groundbreaking decision -- that it would affirm a conviction in an appeal characterized by the above-listed, unique trial circumstances (1), (2), and (3).

The Respondent has not done so, but instead spends multiple pages in the Brief of Respondent citing case law to the effect that the 'defense attorney must request any desired ER 404(b) limiting instruction.' Brief of Respondent, at pp. 31-34. Yet Respondent surely understands that the trial court must refuse a jury instruction that is contrary to the law that applies at trial. Citation to cases that fault defense counsel for 'failing to request' an ER 404(b) limiting instruction is extraordinarily inapt.

Next, Respondent incorrectly claims that the prosecutor did not encourage the jury to convict based on propensity, and only used the prior convictions for "common scheme" purposes. Brief of Respondent, at p. 32. The argument appears to be that, if the prosecutor did not openly encourage the jury to follow the jury instruction allowing it to use the evidence for propensity, there was 'no harm, no foul.'

It is of course untenable for the Respondent to argue, after the trial prosecutor spent several days of trial court hearings seeking to admit the prior crime under RCW 10.58 (and utterly neglecting any thorough analysis under ER 404(b)), that the prior act evidence was not proffered and elicited in front of the jury for pure propensity purposes.[2] First, the State is incorrect in the factual assertion. In particular, at trial, the State placed great emphasis on the fact of Mr. Williams' prior admissions to his brother Don, who was present in court at Fred Williams' 1992 sentencing hearing, that he had engaged in digital-vaginal intercourse with A.B. 3/16/11RP at 251. Then, in closing argument, the prosecutor repeatedly referred to Mr. Williams' prior admission of this old sex offense, arguing to the jury that the current complainants' allegations "fit" with the defendant's "prior admissions," asking if the girls' accusations were "consistent" with the defendant's "prior admissions," and reminding the jury that the CPS investigator in the current case failed to look into the current allegations adequately,

[2] As a result of the RCW 10.58 ruling sought by the prosecutor, at trial, Officer Landis identified the judgment and sentence and statement of defendant on plea of guilty from Mr. Williams' 1991 conviction. 3/22/11RP at 601-02; Supp. CP ___, Sub # 124 (Trial exhibit list, State's exhibits 1 and 2, not admitted). The officer read Mr. Williams' plea statement to the jury, in which Mr. Williams had written, "I put my finger inside [A. .]'s vagina. We were not married. She was less than 12 years of age. I was more than 48 months older." 3/22/11RP at 603.

because she did not know that Mr. Williams was a high level "registered sex offender." 3/24/11RP at 946, 948, 951.

Second, it does not matter what the trial prosecutor did or did not say about the prior crime and propensity in closing, even if the prosecutor had said nothing about it. The judge told the jury in the court's instructions that it could convict Mr. Williams based on propensity. See CP 53. The prosecutor (who also himself reminded the jury of its duty to read and follow the instructions, 3/24/11RP at 886) does not escape the fact that the court's instructions told the jury it could use the prior crime to convict Mr. Williams based on propensity, simply because the prosecutor did not emphasize that instruction in closing argument, even if that was the case, which it is not.

B. CONCLUSION

For the reasons stated herein and in the Opening Brief, Mr. Williams respectfully requests this Court reverse his convictions.

DATED this 9 day of April, 2012.

Respectfully submitted,

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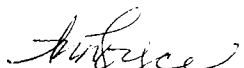
DECLARATION OF MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, a true copy of the **Appellant's Reply Brief** filed under **Court of Appeals No.** 67194-4 to which this declaration is affixed/attached, was mailed or caused to be delivered to each attorney or party or record for ☒ respondent **HILARY A. THOMAS, WHATCOM COUNTY PROSECUTORS OFFICE, 311 GRAND AVE STE. 201, BELLINGHAM WA 98225-4038**, ☐ **appellant** and/or ☐ other party, at the regular office or residence or drop-off box at the prosecutor's office.



ANN JOYCE
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Date: April 9, 2012

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