State v. Gresham (Michael)
consol./w *State v. Scherner (Roger)*

No. 84148-9
consol. w/84150-1

MADSEN, C.J. (dissenting)—The majority invalidates RCW 10.58.090 on the ground that it violates the separation of powers doctrine. The majority concludes that the statute is a procedural rule that cannot be harmonized with ER 404(b), an evidence rule promulgated by this court. I dissent because the statute and the court rule do not conflict and, even if a conflict exists, the two can be harmonized and both given effect.

Historically, both the legislature and this court have frequently adopted procedural rules. There is no doubt that this is a legitimate use of legislative power; there is no constitutional mandate prohibiting the legislature from doing so. The only time a true constitutional separation of powers problem arises with respect to procedural rules is when this court has established a rule and the legislature subsequently adopts an irreconcilable statute on the same procedural matter. This case does not present such a situation.

First, the conflict perceived by the majority does not exist. Second, to the extent that the statute and the rule concern the same subject matter, they can be harmonized and

each may be given effect. Third, while the statute involves a rule for admissibility of certain kinds of evidence, it also embodies important public policy that the legislature wishes to advance and this court should, where possible, accede to the legislature's declaration of public policy.

I would hold that the statute does not violate the separation of powers doctrine, and therefore dissent from the majority opinion.[1]

Discussion

The defendants in these cases argue that RCW 10.58.090 is a procedural rule of evidence that is irreconcilable with ER 404(b) and therefore it must be invalidated on the ground that it violates the separation of powers doctrine. The majority agrees. I do not.

Separation of Powers

The separation of powers doctrine, while not explicit in our state constitution, is an important recognition of the separate branches of government and the services they provide. The separation of powers doctrine is a cardinal and fundamental principle of our constitutional system. *Wash. State Motorcycle Dealers Ass'n v. State*, 111 Wn.2d 667, 674, 763 P.2d 442 (1988).

However, the doctrine is not one of rigid boundaries.[2] The doctrine must be

[1] I do not address the ex post fact claims raised by the defendants, but do not believe that they are valid. I would uphold the statute in the face of both constitutional challenges.

[2] In a phrase that is often repeated, but I fear is not actually given effect in this case by the majority, we have explained that fulfillment of the doctrine does not require that our three branches of government be "hermetically sealed off from one another." *E.g.*, *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 504, 198 P.3d 1021 (2009); *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994). Rather, the doctrine ensures that the *fundamental functions* of the

invoked only when there is a true, unavoidable conflict that relates to the court's inherent power as a constitutional branch of government. *City of Spokane v. Spokane County*, 158 Wn.2d 661, 679, 146 P.3d 893 (2006). Otherwise, the doctrine contemplates flexibility and practicality. *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994). Indeed, given the need for government to act responsibly with primary attention given to carrying out those functions necessary to serve the state and its people, it is important that the three branches operate as much as possible in "[h]armonious cooperation." *Zylstra v. Piva*, 85 Wn.2d 743, 750, 539 P.2d 823 (1975); *accord Wash. State Council of County & City Emps., Council 2 v. Hahn*, 151 Wn.2d 163, 168, 86 P.3d 774 (2004).

Accordingly, when it appears that a court rule and a statutory enactment conflict, we try to harmonize the two and give each effect. *Putman v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wn.2d 974, 980, 216 P.3d 374 (2009); *City of Fircrest v. Jensen*, 158 Wn.2d 384, 394, 143 P.3d 776 (2006); *State v. Blilie*, 132 Wn.2d 484, 491, 939 P.2d 691 (1997) (the court is committed to making every effort to harmonize the two provisions). Harmonizing is important to give effect to the authority of the legislative branch of government, and in particular it is important here because both this court and the legislature have authority to adopt rules of evidence. *Jensen*, 158 Wn.2d at 394; *see* 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice Chairman's Intro. to the Wash. Rules of Evidence at V-IX (2d ed. 1982).

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three branches of government remain inviolate. *Hale*, 165 Wn.2d at 504; *City of Spokane v. Spokane County*, 158 Wn.2d 661, 679, 146 P.3d 893 (2006).

The statute and the court rule do not conflict

Looking first to the question whether the statute and the evidence rule conflict, contrary to the majority's view, they do not. ER 404(b) bars the use of evidence of other crimes, wrongs, or acts to prove character and the defendants' actions were in conformity with it, and then lists other purposes for which such evidence may nevertheless be admissible.[3] Thus, despite the general prohibition, past acts evidence can be admitted to prove motive, intent, preparation, plan, knowledge, identity or absence of mistake or accident. ER 404(b).

RCW 10.58.090(1) provides that when a defendant is accused of a sex offense, evidence of the defendant's commission of other sex offenses is admissible, including uncharged conduct, "notwithstanding Evidence Rule 404(b)," provided that the evidence is not inadmissible under ER 403. The statute also contains a list of factors that a trial court "shall" consider to decide if the evidence should be excluded under ER 403. RCW 10.58.090(6).

The majority says that the evidence rule and the statute conflict because the evidence rule contains a categorical bar to introduction of evidence of prior misconduct

[3] ER 404(b) states:

> 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, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

"to prove the character of a person in order to show action in conformity therewith" and the statute authorizes admission of such evidence "notwithstanding Evidence Rule 404(b)." ER 404(b); RCW 10.58.090(1).

Contrary to the majority, ER 404(b) contains a nonexclusive list of issues on which evidence that first appears to be prohibited under the rule is nevertheless admissible if relevant to any fact in issue. Thus, the rule is not as prohibitive as the majority says; it does permit evidence of past bad acts to be admitted for a number of purposes and the list is nonexclusive.

Moreover, the majority's reading of "notwithstanding Evidence Rule 404(b)" in RCW 10.58.090 neglects another interpretation that is not only more plausible, but also serves to avoid the majority's conclusion that the statute is unconstitutional. That is, the statute is readily amenable to the interpretation that an additional purpose is added to the list of nonexclusive purposes for which past acts evidence is admissible "notwithstanding" the general rule stated in ER 404(b). The legislature's use of this language, far from ensuring the statute's unconstitutionality, indicates another exception to the rule. So construed, the statute does not contradict ER 404(b)'s general prohibition against using prior acts evidence to prove character—it does not generally make such evidence admissible.

The statute also incorporates ER 403's balancing test for admissibility as well. RCW 10.58.090(1) and (6)(g) additionally show legislative intent to fit the statute into the

context of ER 403 and ER 404.

The exception carved out by the statute is not incompatible with other exceptions, either. An already recognized exception to the general rule of ER 404(b) is the exception for lustful disposition. Under this exception, the defendant's prior sexual misconduct against the same victim is admissible in order to show the defendant's lustful disposition toward that victim. *E.g.*, *State v. Ray*, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991); *State v. Camarillo*, 115 Wn.2d 60, 70, 794 P.2d 850 (1990). The evidence is admitted to show the lustful disposition of the defendant against the victim, making it more probable that the defendant committed the charged offense. *Ray*, 116 Wn.2d at 547. By enacting RCW 10.58.090, the legislature has in effect expanded the scope of prior sexual misconduct to include individuals who are not the victims of conduct charged in the case where evidence of prior sexual misconduct may be admissible.

I would conclude that the statute and ER 404(b) are not in conflict, unlike the majority.

Even if conflict exists, the court rule and the statute can be harmonized

Next, even if RCW 10.58.090 and ER 404(b) conflict, they can be harmonized. In *Jensen*, we addressed a separation of powers argument with regard to the legislature's enactment of a statute that governed admissibility of blood alcohol content test results in prosecutions for driving under the influence of intoxicants. We determined that the statute, RCW 46.61.506(4)(a), did not violated the separation of powers doctrine, in that

it did not mandate admissibility but rather established reliability standards. A trial court could still assess admissibility under ER 702. *Jensen*, 158 Wn.2d at 397-98. Thus, the statute was permissive, not mandatory, and could be harmonized with the rules of evidence in that a trial court could use its discretion to exclude the test results under the rules of evidence. *Id*. at 399. We held that the statute did not invade the prerogative of the courts or threaten judicial independence, and did not violate the separation of powers doctrine.

The same type of analysis may be applied here. First, if the court does not readily find that the statute states another exception that will always permit admissibility under ER 404(b), the statute can still be harmonized and given effect. RCW 10.58.090 provides that evidence of sex offenses is "admissible" but does not mandate that it be admitted. The statute also contemplates that the trial court will assess the evidence for admissibility under the evidence rules, including ER 404(b). Therefore, a trial court may consider evidence of this type and determine admissibility within the particular context of the individual case. If the evidence is sought to prove a lustful disposition, like the evidence already permitted under a currently recognized exception, for example, the court could admit the evidence for this purpose. But in any case, the trial court would have discretion on admissibility.

Viewed in this way, the statute may be harmonized with ER 404(b). Because admissibility is not mandated, and court discretion is acknowledged, the statute does not

invade the prerogative of the courts or threaten judicial independence, and it does not violate the separation of powers doctrine.

Public policy

RCW 10.58.090 embodies procedural aspects, to be sure. It provides a rule for admissibility of a certain type of evidence, and thus acts as an evidentiary rule addressing admissibility. However, the statute also embodies public policy concerns that are more akin to substantive law.

The goal of giving effect to the authority of both the legislature and the court is not necessarily served by drawing the line between substantive and procedural rules. Although it is often said that the power to adopt procedural rules is the province of the judiciary, and the legislature's to adopt substantive law, *e.g.*, *State v. Smith*, 84 Wn.2d 498, 501, 527 P.2d 674 (1974), this is not strictly true. This court has had occasion to promulgate substantive common law when there is no statute controlling on a subject. For example, we have recognized common law causes of action of loss of consortium. *Ueland v. Pengo Hydra-Pull Corp.*, 103 Wn.2d 131, 691 P.2d 190 (1984) (parental consortium); *Lundgren v. Whitney's, Inc.*, 94 Wn.2d 91, 614 P.2d 1272 (1980) (loss of consortium for wives whose husbands are injured by third party's negligent acts). We have also adopted substantive law respecting ownership of property; for example, we recognized the meretricious relationship doctrine and the principle of a "'just and

equitable'" distribution of property on termination of such relationships. *In re Marriage of Lindsey*, 101 Wn.2d 299, 304, 678 P.2d 328 (1984) (quoting *Latham v. Hennessey*, 87 Wn.2d 550, 554, 554 P.2d 1057 (1976)); *see also Connell v. Francisco*, 127 Wn.2d 339, 348-50, 898 P.2d 831 (1995). Similarly, the legislature has enacted statutes that establish procedure and has done so specifically with regard to rules for admission of evidence. *E.g.*, RCW 5.60.060 (evidentiary privileges); RCW 5.45.020 (business records).[4] Thus, simply making an inquiry according to the substantive-procedural dichotomy will not necessarily resolve the question whether a statute must be invalidated on separation of powers grounds.

The legislature is obviously concerned with the problems posed by offenders who repeatedly commit sexual offenses. Sex offenses have given rise to specialized laws in many contexts. In the arena of sexually violent predators, for example, the legislature has enacted laws governing civil commitment in an effort to both protect the public and to provide for rehabilitation in a specialized environment. The legislature has also enacted special laws regarding sentencing for sex offenders under specified certain circumstances.

Here, it is apparent that the legislature recognizes that prior sex offenses may be relevant in a prosecution for a sex offense and believes that this is information that,

[4] The interplay of legislative and court authority is otherwise evident. As we have often noted, RCW 2.04.190 contains a legislative delegation of power to promulgate procedural rules, including rules for admission of evidence in actions in superior and district courts. *E.g.*, *State v. Fields*, 85 Wn.2d 126, 128-29, 530 P.2d 284 (1975); *Jensen*, 158 Wn.2d at 394. This delegation is additional to the court's inherent judicial power under article IV of the Washington State Constitution to govern court procedures.

within the trial court's discretion, is important for the jury to know. It seems certain that the legislature believes that just as sexually violent predators may be inclined to recidivism, individuals committing sex offenses may have a "lustful disposition" that can extend to people other than the current victim of a sex offense.

Insofar as RCW 10.58.090 manifests public policy by furthering the legislative purpose to deal with the problems of repeat sex offenders, it is substantive in nature. This conclusion should not mean that there is no need to consider the separation of powers problem raised by the defendants; the statute still concerns admissibility of evidence.

The public policy expressed in the statute, however, is of great consequence to resolution of the separation of powers argument. Determining public policy and giving it effect are generally the province of the legislature. *Sedlacek v. Hills*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001). If the court intends to yield to the legislature its authority to make public policy, as we should, the goal of harmonizing ER 404(b) and the statute should be pursued much more vigorously than the majority does. Because it is possible to harmonize RCW 10.58.090 and ER 404(b), even if one believes they conflict, and so permit the legislature's policy to be given effect, this is what the court should do.

Conclusion

RCW 10.58.090 can be easily construed so that it does not conflict with ER 404(b). The court should do so, and avoid the necessity of invalidating the statute as

unconstitutional. Even if a conflict is perceived, however, the statute and the court rule can be harmonized and both given effect. The statute does not mandate that evidence of sex offenses *must* be admitted; it only provides that such evidence *may* be permitted, leaving to the courts the discretion necessary for preservation of core judicial functions. The statute should be upheld, not only because the legislature did not encroach on the judiciary's fundamental functions, but also to allow implementation of the public policy advanced by the legislature through the statute.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR: