

NO. 41634-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

STEVEN WELTY,

Appellant.

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

The Honorable S. Brooke Taylor, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

RCW 10.58.090 IS UNCONSTITUTIONAL BECAUSE IT PERMITS FACTFINDERS TO CONSIDER CHARACTER AS PROOF OF GUILT.

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. The cases upholding the constitutionality of RCW 10.58.090, and the State, in its Brief of Respondent, have failed to appreciate this distinction.

Courts long ago determined that accused persons should be judged on the evidence of the act in question, not on criminal propensity or bad character. See McKinney v. Rees, 993 F.2d 1378, 1380 (9th Cir. 1993) (use of other acts evidence to show character is “contrary to firmly established principles of Anglo-American jurisprudence”). Evidence of prior bad acts was generally suspect because it would naturally incline fact-finders to draw that forbidden inference, to condemn a person based on character, rather than proof of a crime. See, e.g., State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990) (“A juror’s natural inclination is to reason that having previously committed a crime, the accused is likely to have reoffended.”). However, such evidence of past misconduct was not necessarily excluded

from criminal trials, so long as it did 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).

RCW 10.58.090 is a dramatic departure from this general framework. According to United States v. Kelly, 510 F.3d 433 (4th Cir. 2007), Federal Rule of Evidence 414, upon which the Washington statute is based, “allows the admission of evidence for the purpose of establishing propensity to commit other sexual offenses.” Kelly, 513 F.3d at 437. It permits factfinders to consider, as proof of guilt, whether the accused is the type of person who would do such a thing. While the State is correct that the statute does not permit conviction solely on this basis, it does permit the use of character as a tie-breaker when the factfinder is faced with a credibility contest between accuser and accused.

The statute that permits this inference cannot be harmonized with the court rule that forbids it. Thus, the statute must give way under the separation of powers doctrine. See Brief of Appellant at 17-20. The statute also violates the understanding of the right to a fair trial dating back to before

Washington was a state. See Brief of Appellant at 26-27. By permitting the inference of guilt based on propensity, it substantively changes the burden of proof and tilts the playing field in favor of the state, thereby violating the ex post facto provisions of both the United States and Washington constitutions. See Brief of Appellant at 20-26.

The statute's reference to the ER 403 balancing test does not resolve the conflict. ER 403 permits a court to exclude otherwise relevant evidence if its probative value is substantially outweighed by the "danger of unfair prejudice." Under ER 404(b), use of prior bad acts to show guilt based on a criminal propensity is unfair. Under RCW 10.58.090 it is not. RCW 10.58.090 is unconstitutional because it directly conflicts with ER 404(b) and with the centuries old understanding that "a defendant must be tried for what he did, not for who he is." State v. Foskey, 636 F.2d 517, 523 (D.C. Cir. 1980).

- b. The Court Heavily Relied on the Inference of Propensity in Determining Guilt Beyond a Reasonable Doubt and the Admission of Evidence of Past Misconduct Was Not Harmless.

The admission of this evidence was not harmless because the evidence impacted the trial court's decision. The State makes much of defense counsel's agreement that the court was capable of separating the wheat from the chaff. Brief of Respondent at 4, 31, 38. But this was merely

a concession that the court was able to refrain from considering excluded evidence or drawing forbidden inferences. The court did not exclude the evidence of prior bad acts, and RCW 10.58.090 permits the propensity inference. Therefore, there is no reason to think the court did not consider the evidence for this purpose.

On the contrary, the court's oral ruling shows it used it for the purpose described above, essentially, as a tie-breaker to corroborate the word of Welty's accuser. 5RP 11-12. While denying this was essential to its decision, the court noted that this evidence "certainly provides the Court with some comfort that the decision I made in this case is absolutely the correct one . . . it provides this Court with overwhelming corroboration of the accuracy of the victim's testimony." 5RP 11-12.

RCW 10.58.090 violates our state and federal constitutions because it is in direct conflict with ER 404(b) and because it substantively tilts the playing field in favor of the State. The court erred in relying on this unconstitutional statute to consider improper evidence and find Welty guilty in part based on a presumed propensity to commit crime.

B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, this Court should reverse Welty's convictions.

DATED this 20th day of September, 2011.

Respectfully submitted,

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| |) | |
| Appellant. |) | |

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 20TH DAY OF SEPTEMBER, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] STEVEN WELTY
DOC NO. 344050
AIRWAY HEIGHTS CORRECTIONS CENTER
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AIRAWAY HEIGHTS, WA 99001

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF SEPTEMBER, 2011.

x *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

September 20, 2011 - 2:46 PM

Transmittal Letter

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Court of Appeals Case Number: 41634-4

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