

FILED
JUL 27 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 28792-1-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

MONTE DEAN JOHNSTON,

Defendant/Appellant.

APPEAL FROM THE WALLA WALLA COUNTY SUPERIOR COURT
HONORABLE DONALD W. SCHACHT

OPENING BRIEF OF APPELLANT

DAVID N. GASCH
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A. ASSIGNMENTS OF ERROR

1. The legislature's enactment of RCW 10.58.090 violates the Separation of Powers doctrine of the state and federal constitutions.

2. The use of propensity evidence to obtain the conviction violated Mr. Johnston's constitutional due process rights to a fair trial.

Issues Pertaining to Assignment of Error

1. Does RCW 10.58.090 violate the separation of powers doctrines of the state and federal constitutions?

2. Did the use of propensity evidence to obtain the conviction violate Mr. Johnston's constitutional due process rights to a fair trial?

B. STATEMENT OF THE CASE

Monte Johnston was charged with second degree child molestation for allegedly touching the breast of his 12-year-old stepdaughter sometime between 12/1/08 and 5/18/09. CP 145-46. Prior to trial, the Court admitted evidence of a prior incident of child molestation that occurred in 1992-93, involving Mr. Johnston and the current victim's older sister. Mr. Johnston pled guilty to that charge in 1994. CP 85-99, RP 175. The evidence submitted to the jury concerning the prior incident included a copy of Mr. Johnston's statement in the Statement of Defendant on Plea of Guilty from 1994, testimony from the alleged victim of the prior incident,

and testimony from the prosecutor who prosecuted the prior incident. RP 150-67, 170-83.

The Court found the evidence admissible under RCW 10.58.090 and ER 404(b). The Court also found the probative value substantially outweighed the danger of unfair prejudice to Mr. Johnston under ER 403. The Court rejected Mr. Johnston's challenges to the constitutionality of RCW 10.58.090 and incorporated a memorandum opinion from Kitsap County Superior Court Judge Jeanette Dalton in its ruling. CP 85-99.

The jury convicted Mr. Johnston of the lesser included offense of fourth degree assault. CP 180. This appeal followed. CP 207.

C. ARGUMENT

1. RCW 10.58.090 VIOLATES THE SEPARATION OF POWERS DOCTRINES OF THE STATE AND FEDERAL CONSTITUTIONS.¹

One of the fundamental principles of the American constitutional system is that the governmental powers are divided among three departments--the legislative, the executive, and the

¹ Division One of the Washington Court of Appeals upheld the constitutionality of RCW 10.58.090 against separation of powers doctrine and due process challenges in State v. Scherner, 153 Wn.App. 621 (2009) and State v. Gresham, 153 Wn. App. 659 (2009). Division III should decline to follow these cases for the reasons stated herein. Petitions for Review were granted in both cases June 1, 2010, and the cases were consolidated under Supreme Court No. 84148-9.

judicial--and that each is separate from the other. Carrick v. Locke, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994) (citing State v. Osloond, 60 Wn.App. 584, 587, 805 P.2d 263, *review denied*, 116 Wn.2d 1030 (1991)). Neither the Washington nor federal constitutions specifically enunciate a separation of powers doctrine, but the notion is universally recognized as deriving from the tripartite system of government established in both constitutions. See, e.g., U.S. Const. Arts. II, III, and IV (establishing the legislative department, the executive, and judiciary); U.S. Const. Arts. I, II, and III (defining legislative, executive, and judicial branches); Carrick, 125 Wn.2d at 134-35. Carrick recognized that although the Washington Constitution contains no specific separation of powers provision “the very division of our government into different branches has been presumed throughout our state’s history to give rise to a vital separation of powers doctrine.” Carrick, 125 Wn.2d at 134-35, (citing Osloond, 60 Wn.App. at 587); In re Juvenile Director, 87 Wn.2d 232, 238-40, 552 P.2d 163 (1976).

The fundamental principle of the separation of powers is that each branch wields only the power it is given. State v. Moreno, 147 Wn.2d.

500, 505, 58 P.3d 265 (2002). Thus, courts have announced the following test for determining whether an action violates the separation of power:

The question to be asked is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.

Carrick, 125 Wn.2d at 135 (quoting Zylstra v. Piva, 85 Wn.2d 743, 750, 539 P.2d 823 (1975)).

Article 4, section 1 of the Washington Constitution vests the Washington Supreme Court with the sole authority to govern court procedures. City of Fircrest v. Jensen, 158 Wn.2d 384, 394, 143 P.3d 776 (2006); State v. Fields, 85 Wn.2d 126, 129, 530 P.2d 284 (1975); “[T]here is excellent authority from an historical as well as legal standpoint that the making of rules governing procedure and practice in courts is not at all legislative, but purely a judicial, function.” State ex rel. Foster-Wyman Lumber Co. v. Superior Court for King County, 148 Wash. 1, 4, 9, 267 P. 770 (1928).

Thus, “when a court rule and a statute conflict, the nature of the right at issue determines which one controls.” State v. W.W., 76 Wn.App. 754, 758, 887 P.2d 914 (1995). “If the right is substantive, then the statute prevails; if it is procedural, then the court rule prevails.” Id.

The legislative notes following RCW 10.58.090 claim the act is substantive. If that is the case, then as argued above the retroactive application of that substantive change violates the *ex post facto* provisions of the federal and state constitutions. In the alternative, if defining the bounds of the admissibility of evidence is a procedural function and one that lies at the heart of the judicial function, then the Legislature's effort to alter the rules of admissibility violates the Separation of Powers doctrine.

Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated.

State v. Smith, 84 Wn.2d 498, 501, 527 P.2d 674 (1974). RCW 10.58.090 does not prescribe societal norms or establish punishments. Instead it alters the mechanism by which substantive rights, a person's guilt of a crime, is effectuated by allowing admission of otherwise inadmissible evidence.

The legislative claim aside, RCW 10.58.090 appears to be a purely procedural statute, one which the legislature lacks the authority to enact. Because the legislature did not have the authority to enact RCW 10.58.090, the statute is void. State v. Thorne, 129 Wn.2d 736, 762, 921 P.2d 514 (1996).

2. THE USE OF PROPENSITY EVIDENCE TO OBTAIN THE CONVICTION VIOLATED MR. JOHNSTON'S DUE PROCESS RIGHT TO A FAIR TRIAL.

The use of propensity evidence to prove a crime can violate due process under the Fourteenth Amendment.² U.S. Const. Amend. XIV; Garceau v. Woodford, 275 F.3d 769, 775 (9th Cir. 2001), *reversed on other grounds* 538 U.S. 202, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003); *see also* McKinney v. Rees, 993 F.2d 1378 (9th Cir. 1993). A conviction based in part on propensity evidence is not the result of a fair trial. Garceau, at 776, 777-778.

Propensity evidence is highly prejudicial, and there are numerous justifications for excluding it:

For example, courts, reasoning that jurors may convict an accused because the accused is a “bad person,” have typically excluded propensity evidence on grounds that such evidence jeopardizes the constitutionally mandated presumption of innocence until proven guilty. The jury, repulsed by evidence of prior “bad acts,” may overlook weaknesses in the prosecution's case in order to punish the accused for the prior offense. Moreover, as scholars have suggested, jurors may not regret wrongfully convicting the accused if they believe the accused committed prior offenses. Courts have also barred admission of propensity evidence on grounds that jurors will credit propensity evidence with more weight than such evidence deserves. Researchers have shown that character traits are not sufficiently stable temporally to permit reliable inferences that one acted in conformity with a character trait. Furthermore, courts have excluded propensity evidence because such evidence blurs the issues in the case, redirecting the

² The U.S. Supreme Court has reserved ruling on this issue. Estelle v. McGuire, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

jury's attention away from the determination of guilt for the crime charged.

Natali & Stigall, "Are You Going to Arraign His Whole Life?": How Sexual Propensity Evidence Violates the Due Process Clause, 28 Loyola U. Chi. L.J. 1, at 11-12 (1996).

In Washington, propensity evidence has traditionally been excluded under ER 404(b), which provides that "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." A trial court "must always begin with the presumption that evidence of prior bad acts is inadmissible." State v. DeVincentis, 150 Wn.2d 11, 17-18, 74 P.3d 119 (2003). ER 404(b)'s *raison d'être* is to exclude propensity evidence.

In 2008, the legislature radically altered the traditional rule, allowing the admission of propensity evidence in prosecutions for sex offenses. *See* RCW 10.58.090. Under the statute, if evidence of other crimes (or uncharged criminal misconduct) is necessary for conviction, such evidence may be admitted as substantive evidence. Such evidence is admitted to show that the accused person has a propensity to commit sexual crimes, regardless of the strength of the evidence presented in a particular case.

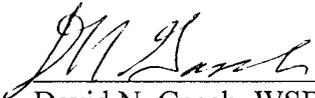
In this case, the prosecutor introduced evidence of prior sexual misconduct to prove Mr. Johnston's guilt. By painting Mr. Johnston as someone with a propensity to commit sex crimes, the state shifted the focus away from evidence of the charged crime, and toward evidence of Mr. Johnston's character. This violated his Fourteenth Amendment right to due process. Garceau, *supra*.

The admission of propensity evidence undermines the presumption of innocence and the beyond-a-reasonable-doubt standard of proof. It enables conviction based on character rather than evidence. Because RCW 10.58.090 violates due process, Mr. Johnston's conviction must be reversed. His case must be remanded to the trial court, with instructions to exclude propensity evidence. Garceau, *supra*.

D. CONCLUSION

For the reasons stated, the conviction should be reversed.

Respectfully submitted July 27, 2010,



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) (RAP 18.5(b))
)
MONTE DEAN JOHNSTON,)
Defendant/Appellant.)

I, David N. Gasch, do hereby certify under penalty of perjury that on July 27, 2010, I mailed to the following as appropriate, by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of Appellant's Brief:

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