

FILED
Apr 11, 2012
Court of Appeals
Division III
State of Washington

28792-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

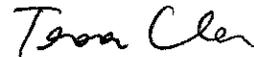
MONTE DEAN JOHNSTON,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S SUPPLEMENTAL BRIEF

Respectfully submitted:



by: Teresa Chen, WSBA 31762
Deputy Prosecuting Attorney

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I. SUPPLEMENTAL ARGUMENT

In *State v. Gresham*, 173 Wn.2d 405, 428, 269 P.3d 207 (2012), the Washington Supreme Court consolidated the cases of defendants Gresham and Scherner. The court held that RCW 10.58.090 violates the separation of powers doctrine. However, the court affirmed Scherner's convictions and reversed Gresham's conviction. *State v. Gresham*, 173 Wn.2d at 434-35.

In Scherner's case, the defendant was charged with three counts of counts of first degree child molestation against a single victim. *State v. Gresham*, 173 Wn.2d at 414. The superior court admitted the testimony of four individuals who claimed that the defendant molested them as little girls. *State v. Gresham*, 173 Wn.2d at 415. The superior court determined that the testimony was admissible **both** under RCW 10.58.090 and under ER 403 and ER 404(b). *State v. Gresham*, 173 Wn.2d at 415-16, 422. The supreme court held that there was no abuse of discretion in admitting the evidence under the evidentiary rule. *State v. Gresham*, 173 Wn.2d at 422-23. "Thus, even without RCW 10.58.090, the evidence was admissible in his trial." *State v. Gresham*, 173 Wn.2d at 434.

In Gresham's case, the defendant was charged with four counts of first degree child molestation of a single victim. *State v. Gresham*, 173 Wn.2d at

417. It was the defendant's second offense and would have resulted in a life sentence. *State v. Gresham*, 173 Wn.2d at 418. The superior court admitted the testimony of the earlier victim regarding the prior offenses, but *only* under RCW 10.58.090, finding that it would have been inadmissible under ER 404(b). *State v. Gresham*, 173 Wn.2d at 418, 433. Because the supreme court overturned RCW 10.58.090, there was no basis to admit the testimony. The court found that the admission of the prior offense was not harmless error. *State v. Gresham*, 173 Wn.2d at 434.

In the instant case, the superior court ruled that evidence of the Defendant's misconduct resulting in the previous conviction was admissible under RCW 10.58.090, ER 403, *and* ER 404(b). CP 85-99, 197-98. The court did not abuse its discretion in this ruling. The victim in the previous offense and the victim in the current offense are sisters. The previous victim W.J. was molested when she was between the ages of about three to seven years old. RP 151, 155-58. The Defendant pled guilty to an offense of molestation against W.J., committed when she was seven or eight years old. RP 155-58, 174-75. Although the victim in this case, K.J., was older at the time of the offense, she had the appearance of being only about six or seven years old. RP 186. During the alleged acts of sexual assault, both girls claim

that the Defendant approached them with proclamations of romantic love. RP 156-57, 189, 194. Although the offenses against W.J. went much further (CP 8-9; RP 156-58), both girls alleged that the Defendant touched them on their breasts. RP 158, 189. Both describe alcohol being a factor. RP 156, 189. There was a common motive, opportunity, intent, and plan.

In Scherner's case, the supreme court also determined that failing to give a limiting instruction was harmless error. *State v. Gresham*, 173 Wn.2d at 423-25. In the instant case, the jury received the limiting instruction crafted by the court of appeals in *State v. Scherner*, 153 Wn.App. 621, 225 P.3d 248 (2009), *review granted* 168 Wn.2d 1036, 233 P.3d 888 (2010). CP 174-75; RP 139-44, 149-50, 272-73, 285-86. The jury heard the instruction before the witnesses testified and again before deliberating. RP 149-50, 285-86.

The State maintains the arguments made in section A of the Respondent's Brief. The constitutionality of RCW 10.58.090 has no bearing on this case (1) where the evidence was admitted under ER 404(b) and (2) where RCW 10.58.090 regards evidence admitted for the purpose of proving sexual offenses, rather than the simple assault for which the Defendant was convicted. Respondent's Brief at 8-9. The Defendant's case is particularly

hard to make where it was defense counsel's closing argument that the Defendant *was guilty* of the lesser offense, which is the only crime of conviction. *See* Respondent's Brief at 6-7.

II. CONCLUSION

The State respectfully requests this Court affirm the Appellant's conviction.

DATED: April 10, 2012.

Respectfully submitted:



Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney

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

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 28792-1-III
)	
v.)	DECLARATION OF MAILING
)	
MONTE DEAN JOHNSTON,)	
)	
Appellant.)	
)	

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the Appellant (Monte Dean Johnston, 10542 School Land Road SW, Rochester, WA 98579) and to the attorney of record (David N. Gasch, Gasch Law Office, PO Box 30339, Spokane, WA 99223-3005) for the Appellant containing a Respondent's Brief in the above entitled matter.

DATED: April 11, 2012.



Teresa Chen