

FILED

SEP 23 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

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 BRIEF

Respectfully submitted:



by: Teresa Chen, WSBA 31762
Deputy Prosecuting Attorney

P.O. Box 40
Soap Lake, Washington 98851
(509) 237-1744

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. Where the jury acquitted the Defendant of the sex offense, does the Defendant have any basis to challenge RCW 10.58.090?
2. Does RCW 10.58.090 violate the separation of powers doctrine?
2. Did the admission of evidence of a prior sex abuse conviction violate the Defendant's due process right to a fair trial?

IV. STATEMENT OF THE CASE

The Defendant Monte Johnston was charged with child molestation in the second degree of K.J.. CP 145-46. At the time of the offense, K.J. was a twelve year old with some developmental delays, which gave her the appearance of being much younger than her age. RP 184-86, 235. She had never accused anyone else of sexual assault. RP 221. She testified that while

she was trying to sleep and wearing only panties, the Defendant came into her bedroom at night smelling of beer and under the ruse of checking on his cat. RP 188-89, 194. He then lay down beside her and touched her bare breast over her repeated objection while telling her how beautiful she was. RP 188-90.

K.J.'s mother testified that she woke up to see the Defendant coming out of K.J.'s room and read K.J.'s expression as meaning "how dare you come into my room." RP 212. K.J. also looked frightened and upset. RP 213. She told her mother that the Defendant had told her was falling in love with her and then touched her breast. RP 214.

K.J.'s mother and sister observed that K.J., who had previously been affectionate with the Defendant, then began to avoid him. RP 155, 222.

The Defendant told Detective Mike Boettcher that he had been watching television when he noticed that K.J. had rolled out of bed and was lying undressed on the floor of her room. RP 245-47. He could see her from his seat on the couch. RP 247. He said he wanted to cover her up, move her to her bed, and close the door so that the television did not disturb her. RP 245-47. He inadvertently touched K.J.'s breast with his arm when he moved her to her bed. RP 236-37. Initially, the Defendant described picking up K.J., then clarified that he steered her by her wrist and shoulder while she

crawled groggily to her bed. RP 242, 245. He said that her breast brushed against his arm when she went to lie back down. RP 243.

The Defendant is a registered sex offender. CP 147. He used to be married to Christine Johnston, who is the mother of K.J. and W.J.. RP 151, 208. In 1993, the Defendant pled guilty to the first degree child molestation of W.J. CP 36; RP 170.

The prosecutor gave notice of intent to offer evidence of the crime against W.J. in the trial for the offense against K.J. CP 6-67. This issue was thoroughly debated. CP 74-84, 100-36; RP 1-36.

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 K.J. was older at the time of the offense, she has 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.

The 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 provided the jury with an additional instruction on use of the evidence of the prior sex offense, modeled after an instruction used 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.

W.J. testified as to the Defendant's previous assault on her. RP 155-58. The prosecutor who handled the previous charge regarding W.J. testified that the Defendant pled guilty to child molestation in the first degree for one of the acts committed against W.J. when she was seven or eight years old. RP 170, 174-75. During this testimony, the Defendant's guilty plea statement was admitted into evidence. RP 170-71.

In closing argument, defense counsel thoroughly explained the limitations of the evidence of the prior molestation.

You also have the difficult circumstance which is given to you in the instruction -- instruction -- the last instruction or almost the last, Instruction Number 16, having to do with the fact that he was convicted of this kind of offense approximately 20 years ago, back in 1992-93. You can't ignore that. But on the other hand, that alone is not sufficient to convict somebody of this crime. It is admitted to show

whether he had a propensity for sexual abuse. But this case is to be decided like any other kind of case. You swore to do that.

If somebody was convicted 20 years ago of theft, is he going to be a thief the rest of his life and never – you know, every time an accusation is made, no matter how weak, he is to be convicted? If he lied at some point in his life, is he to always be a liar and everything he ever said to anybody is to be regarded as a lie? That's what she would argue or that is the argument in using this very old evidence. You are instructed not to do that. It's a factor to consider, but that fact alone is not sufficient to return a verdict of guilty.

So whatever did or did not happen with Wendy isn't sufficient in and of itself to return a verdict of guilty in this case. It's one factor to consider. And you should consider it. I wouldn't want you to do otherwise. But you need to be careful in considering that evidence. Do people change? Can things change? If somebody makes a mistake one time in their life, does a terrible crime, any kind of crime, does engage in some misconduct, are they forever and ever to be treated differently than other people? I don't know if you believe in once tar brushed always tar brushed but that's not the law. So if that's what you believe, please read the instructions and please apply the instructions as a fair and impartial juror in the case.

And I also point out to you that when it happened before, he admitted it. He is now before you because he has denied the allegations. That's why he is here.

RP 304.

The State charged the Defendant with child molestation only. CP 145-46. The State vigorously objected to the giving of an instruction on the lesser included offense of assault in the fourth degree. CP 152-54; RP 270-72. It was the Defendant's theory alone that an assault was committed. The

prosecutor argued:

... none of the evidence that's been presented in this case supports an inference that assault fourth degree occurred instead of the greater offense. It was either an accident and no crime at all, no assault fourth and no molestation; or it was done intentionally and purposefully for his sexual gratification. And it was a molestation. There really in the State's view, there's no middle ground.

RP 272. The court granted the Defendant's request for the lesser included offense instruction. RP 273-76, 283-84.

In closing, defense counsel admitted over and over that his client was guilty of an assault in the fourth degree. RP 297, 302.

And one of the things the case is not about is our claim this was just a big accident and that he didn't deliberately touch her. Of course he deliberately touched her. He told everybody who asked that. You have the statements here to Boettcher, you have his letters that you will get a chance to read. You have the statements he made to the Correctional Officer.

An assault in the fourth degree is an intentional touching. Intentional means you want to commit a crime. That is assault in the fourth degree. And the person you touch finds it offensive. Now, I think it would be a lot better if on this occasion he had gone in and hit her on the feet and said move on inside the door. That would have been a better circumstance, no question about it. But that's not what he did and that's not what he ever told anybody he did.

RP 297.

He had no right to touch the girl. Let's be real clear about that. It's an assault. This isn't a case of whether it was accidental or intentional.

RP 302.

I don't want to get up here and argue to you on something that you know is not true because I would do nothing but damage to my client.

But I'm telling you that an assault is an intentional touching of another person that is harmful or offensive. And I asked the girl. Did you find the touching offensive? And she said yes. And that's why I asked.

So I am not arguing he's not guilty of assault in the fourth degree because I think he is.

RP 303.

I'm conceding right now, I don't think he should have touched her. That's an assault in the fourth degree.

RP 304.

And then he called her a name in this letter. I am not going to apologize for that and deny he touched her.

RP 306.

The jury agreed with the Defendant and convicted him of assault in the fourth degree, acquitting him of the child molestation charge. CP 180, 199-206.

On appeal, the Defendant renews his challenge to the statute on constitutional grounds.

V. ARGUMENT

A. THE CONSTITUTIONALITY OF THE STATUTE HAS NO BEARING ON THE DEFENDANT'S CONVICTION FOR ASSAULT IN THE FOURTH DEGREE.

The Defendant makes two challenges in this appeal: (1) that RCW 10.58.090 violates the separation of powers doctrine and (2) that RCW 10.58.090 violates the due process clause. Because RCW 10.58.090 played no part in his conviction, the question of its constitutionality has no bearing on his case.

The purpose of the statute is for use in sex offense trials, not simple assault cases. RCW 10.58.090(1). The evidence of a prior sex offense may be offered after the court's consideration of the similarity and proximity of the offenses. RCW 10.58.090(6). When the Defendant challenged the admission of the evidence of his prior sex offense, he complained that its admission was unduly prejudicial (suggesting the law was contrary to the rules of evidence and due process):

I'll tell you my response is if I was on a jury, I'm sitting there and evidence comes in that there was sexual misconduct with a very young child 16 or 17 years ago involving sexual intercourse and now he is out and now he is accused of doing it again, and I don't know why the courts -- as a juror -- why did the Court ever let that man go free? That would be my reaction. And now he is accused of doing it again.

It is not going to take me very long to go in the courtroom

having listened to the State say he is what he is and come back with a verdict. The prejudicial value of this is extreme.

... It's highly prejudicial. If it comes in, as a juror sitting there, listening to the evidence, I'm only going to come to one conclusion. He should never have got out in the first place. Now he's out and he's accused of doing it again. I really don't care what the evidence is. He is what he is. He shouldn't have been out. Those judges let the people out when they shouldn't. And I'm going to put him back in where he belongs.

That's the power that you are going to be giving the State if you admit this evidence.

RP 11-12.

Despite the Defendant's alarmist predictions, the jury did no such thing. The jury acquitted the Defendant of the charged crime and convicted him only of the crime, which he put forward as an alternate verdict and which he admitted over and over in closing argument.

This being the case, there can be no argument that the Defendant was prejudiced in any way by the statute. Any error in RCW 10.58.090 is harmless beyond a reasonable doubt.

B. RCW 10.58.090 DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE.

The Defendant claims that RCW 10.58.090 violates the separation of powers doctrine. Appellant's Brief at 6.

The constitutionality of a criminal statute is a question of law that the

court reviews *de novo*. *State v. Jenkins*, 100 Wn.App. 85, 89, 995 P.2d 1268 (2000). The courts presume the constitutionality of statutes and should construe the language in order to uphold their constitutionality wherever possible. *State v. Lanciloti*, 165 Wn.2d 661, 667, 201 P.3d 323 (2009); *City of Seattle v. Ivan*, 71 Wn.App. 145, 155, 856 P.2d 1116 (1993). Every presumption is indulged in favor of upholding a statute, which bears a reasonable and substantial relation to the promotion of public health, safety, morals, or welfare. *State v. Melcher*, 33 Wn.App. 357, 359, 655 P.2d 1169 (1982).

The burden is on the party challenging the constitutionality of a statute to prove its invalidity beyond a reasonable doubt. *State v. Thorne*, 129 Wn.2d 736, 769-70, 921 P.2d 514 (1996); *State v. Aver*, 109 Wn.2d 303, 306-07, 745 P.2d 479 (1987).

Two recent cases have held that RCW 10.58.090 does not violate the separation of powers doctrine. *State v. Gresham*, 153 Wn. App. 659, 223 P.3d 1194 (2009), *review granted* 168 Wn.2d 1036, 233 P.3d 888 (2010); *State v. Scherner*, 153 Wn.App. 621, 225 P.3d 248 (2009), *review granted* 168 Wn.2d 1036, 233 P.3d 888 (2010).

1. The Defendant has not met his burden.

Although the burden is on the Defendant, his argument is perfunctory.

He claims that RCW 10.58.090 is a procedural statute, because “it does not prescribe societal norms or establish punishments,” but “alters the mechanism by which substantive rights [] are effectuated.” Appellant’s Brief at 9. This is contrary to the authority relied upon in the creation of the law. RCW 10.58.090 notes (2008). The Washington Supreme Court has long held that rules of evidence are substantive law. *State v. Pavelich*, 153 Wash. 379, 279 P. 1102 (1929).

The Defendant concludes that, if the statute is procedural, it violates the separation of powers and is void. Appellant’s Brief at 9. However, the Court of Appeals has rejected this claim in regard to RCW 10.58.090. *State v. Gresham*, 153 Wn. App. 659; *State v. Scherner*, 153 Wn.App. 621. And the Washington Supreme Court has rejected claims that the legislature’s enactment of evidentiary rules violates the separation of powers. *City of Fircrest v. Jensen*, 158 Wn.2d 384, 399, 143 P.3d 776 (2006) (SHB 3055 on the admissibility of breath test results); *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984) (RCW 9A.44.120 on the admissibility of child hearsay).

The test is not merely whether a statute is substantive or procedural, but whether it “threatens the independence or integrity” of another branch of government. *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994). The Defendant has not addressed the full test or explained how the precedent

is in error, and, therefore, he has not met his burden.

2. There is no conflict between the rule and the statute in the instant case, where the prior bad act evidence is admissible under ER 404(b) to rebut the Defendant's claim of mistake or accident.

The Defendant argues that when a court rule and a statute conflict, the statute prevails only if the right is substantive. Appellant's Brief at 8, *citing State v. W.W.*, 76 Wn. App. 754, 758, 887 P.2d 914 (1995). This argument begins with a faulty premise. The Defendant has not shown that the statute and rule conflict. In fact, the trial court held that the evidence was admissible in the instant case, not despite ER 404(b), but *under* ER 404(b). CP 88.

ER 404 allows for the admission of evidence of other bad acts for purposes *other than* proving action conforming to character. Specifically, the evidence is admissible to show that there was an absence of mistake or accident. ER 404(b). And in this case, the Defendant had told the detective that he had brushed the child's breast accidentally, not intentionally. RP 236-43. The court held that the evidence was admissible under ER 404(b).

If there is no conflict, there can be no attack by one branch on the other's integrity or independence. There is no violation of the separation of powers doctrine.

3. RCW 10.58.090 can be harmonized with ER 404, so that neither can be read as challenging the authority of the other.

The trial court adopted the decision of Kitsap County Judge Jeanette Dalton in *State v. Romero*, No. 08-1-01319-5. CP 88. Judge Dalton found “persuasive the distinction which has been accepted in several states that a statute expanding the scope of permissible evidence, as RCW 10.58.090 surely does, does not fall within the judiciary’s inherent rulemaking authority because it does not principally regulate the operation or administration of the courts.” CP 92-93, *citing Horn v. Oklahoma*, 204 P.3d 777 (Okla. Crim. App. 2009); Allen L. Lanstra, Jr., *McDougall V. Schanz: Distinguishing the Authorities of the Michigan Legislature and the Michigan Supreme Court to Establish Rules of Evidence*, 2000 L. REV. MICH. ST. U. DET. C.L. 857 (2000); Michael P. Dickey, *The Florida Evidence Code and the Separation of Powers Doctrine: How to Distinguish Substance and Procedure Now that it Matters*, 34 STETSON L. REV. 109 (2004); Sara Sun Beale, *Prior Similar Acts in Prosecutions for Rape and Child Sex Abuse*, 4 CRIM. L.F. 307 (1993). *See also People v. Pattison*, 741 N.W.2d 558, 562 (Mich. Ct. App. 2007).

The Court of Appeals has sanctioned this result. *State v. Scherner*, *supra*; *State v. Gresham*, *supra*. These decisions are accorded deference under the principles of stare decisis. *State v. Baldwin*, 150 Wn.2d 448, 460,

78 P.3d 1005 (2003). Other state courts have arrived at the same conclusion. *People v. Pattison*, 741 N.W.2d 558, 562 (Mich. Ct. App. 2007); *State v. McCoy*, 682 N.W.2d 153,160-61 (Minn. 2004).

Like Judge Dalton's decision (CP 90), these recent decisions of the Court of Appeals begin by citing standards from *City of Fircrest v. Jensen*, 158 Wn.2d 384, 393, 143 P.3d 776 (2006).

The inquiry we must make 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."

State v. Scherner, 153 Wn.App. at 643, citing *City of Fircrest v. Jensen*, 158 Wn.2d 384, 393, 143 P.3d 776 (2006). See also *State v. Gresham*, 153 Wn. App. at 667. The three branches of government are not hermetically sealed, but function with overlap of their powers. *City of Fircrest v. Jensen*, 158 Wn.2d 384, 393-94, 143 P.3d 776 (2006).

Both the courts and the legislature have the authority to enact evidentiary rules. *Scherner*, 153 Wn.App. at 644.

As a historical matter in Washington, the legislature and the courts have shared the responsibility for enacting rules of evidence. Prior to the enactment of the Rules of Evidence in 1979, the trial courts applied rules of evidence based upon statutes and common law. See generally 5 R. Meisenholder, *Washington Practice* (1965). A Judicial Council Task Force, which included representatives of both the legislature and the judiciary drafted the rules of evidence. 5 K. Tegland,

Washington Practice, Evidence Law and Practice, at V-IX (2d ed. 1982). To this day, numerous statutes supplement the Rules of Evidence on various issues.

n.10 *See e.g.* RCW 5.45.020 (business records); RCW 5.46.010 (copies of business and public records; RCW 5.60.060 (evidentiary privileges); RCW 5.66.010 (admissibility of expressions of apology, sympathy, fault).

Brief of Respondent at 30, *State v. Scherner*, 153 Wn.App. 621, 225 P.3d 248 (2009), *review granted* 168 Wash.2d 1036, 233 P.3d 888 (2010) (No. 62507-1-I). And, in fact, the Washington Supreme Court has acknowledged that its own authority to enact rules of evidence comes from a *legislative* delegation in RCW 2.04.190. *Fircrest*, 158 Wn.2d at 394.

Whenever possible, apparent conflicts between a court rule and statute should be harmonized and both given effect if possible. *State v. Ryan*, 103 Wn.2d at 178. RCW 10.58.090 creates a narrow exception to ER 404(b) and directs the trial court to use discretion after applying balancing factors under ER 403. Because the exception is narrow, they can be harmonized. *State v. Scherner*, 153 Wn.App. at 644-45.

ER 404(b) does not ban any admission of prior bad acts. There are several explicit exceptions and a catch-all exception, “for other purposes” than proving action in conformity with character. ER 404(b). RCW 10.58.090 merely adds another exception to the list. *State v. Scherner*, 153

Wn.App. at 645-46. This exception is consistent with the exceptions for “lustful disposition.” “common scheme or plan,” unique modus operandi, and to rebut a claim that the offense was accidental. *State v. Scherner*, 153 Wn.App. at 646-47.

ER 404 is not an unequivocal ban on all propensity evidence, and RCW 10.58.090 does not require admission, but only allows a court to weigh its admission. *State v. Scherner*, 153 Wn.App. at 647-48. Because neither the rule nor the statute are too broad or inelastic, there is certainly room to harmonize them.

Accordingly, there is no violation of the separation of powers doctrine.

C. RCW 10.58.090 AND THE COURT’S ADMISSION OF EVIDENCE OF THE PRIOR SEX OFFENSE DOES NOT VIOLATE DUE PROCESS.

The Defendant argues that the use of propensity evidence, admitted under RCW 10.58.090, “can” violate due process. Appellant’s Brief at 10. The same argument was made in *State v. Scherner*, 153 Wn. App. at 651 (defendant arguing that the admission of propensity evidence undermines the presumption of innocence and permits convictions on less than proof beyond a reasonable doubt). However, the Court of Appeals rejected this claim. *State v. Scherner*, 153 Wn. App. at 651-56.

Judge Dalton's decision, adopted by the trial court, held that because RCW 10.58.090 mandates an ER 403 analysis, the law does not implicate any "fundamental fairness right" recognized in Due Process jurisprudence. CP 95. Federal courts have found the same. CP 95, *citing United States v. Castillo*, 140 F.3d 874 (10th Cir. 1998). *See also United States v. LeMay*, 260 F.3d 1018, 1025-26 (9th Cir. 2001)("there is nothing fundamentally unfair about the allowance of propensity evidence under FER 414" as long as ER 403 remains in place).

Under RCW 10.58.090, the test for admissibility is still relevance and a balancing test under ER 403. *State v. Scherner*, 153 Wn. App. at 653. While ER 404(b) is a limitation on relevant evidence, it does not prohibit all prior misconduct. *Id.* Courts have historically allowed evidence of prior sex offenses to prove identity, unique modus operandi, common scheme or plan, lustful disposition, or to rebut a claim of accident, so that RCW 10.58.090 is not a significant addition to Washington state law. *State v. Scherner*, 153 Wn. App. at 653-54.

The failure of Defendant's due process argument is particularly clear in the outcome of this case. So little did the prior offense evidence prejudice the Defendant that the jury acquitted him. The statute did not violate his due process rights so as to deny him a fair trial and force a conviction on

insufficient evidence.

The statute does not violate due process.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: September 22, 2010.

Respectfully submitted:



Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney

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STATE OF WASHINGTON
By: _____

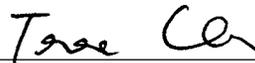
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

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, #955442, Umatilla County Jail, 4700 NW Pioneer Place, Pendleton, OR 97801) 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: September 22, 2010.



Teresa Chen