

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2011 FEB 28 P 12:49

SUPREME COURT NO. 84148-9-1

84148-9

BY RONALD R. CARPENTER
IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CLERK

STATE OF WASHINGTON,

Respondent,

Vs.

MICHAEL GRESHAM,
AND ROGER SCHERNER,

Petitioners.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR KING COUNTY
The Honorable Richard D. Eadie

SECOND SUPPLEMENTAL BRIEF OF
PETITIONER ROGER SCHERNER

Lindell Law Offices, PLLC
By: Eric W. Lindell
Attorney for Petitioner Scherner

Address:

4409 California Ave. S.W., Suite 100
Seattle, WA 98116
(206) 230-4922

TABLE OF CONTENTS

| | | |
|-------------|--|-----------|
| I. | NATURE OF THE CASE | 1 |
| II. | ISSUES PRESENTED FOR REVIEW..... | 1 |
| III. | STATEMENT OF THE CASE..... | 1 |
| IV. | ARGUMENT | 1 |
| | A. The unconstitutional sections of RCW 10.58.090 cannot be severed from the constitutional sections .. | 1 |
| | B. Evidence admitted pursuant to RCW 10.58.090 from four witnesses who testified they had been molested by the Petitioner decades earlier was not harmless error..... | 3 |
| | C. Failure to give a limiting instruction was not harmless Error | 8 |
| V. | CONCLUSION | 10 |

TABLE OF AUTHORITIES

Washington Cases

| | |
|---|------|
| <i>City of Bellevue v. Lorang</i> , 140 Wn.2d 19, 992 P.2d 496 (2000) | 4 |
| <i>In re Detention of Pouncy</i> , 168 Wn.2d 382, 229 P.3d 678 (2010) | 4 |
| <i>State v. Aaron</i> , 57 Wn. 277, 281, 787 P.2d 949 (1990) | 9 |
| <i>State v. Abrams</i> , 163 Wn.2d 277, 285-286, 178 P.3d 1021 (2008) | 2 |
| <i>State v. Anderson</i> , 81 Wn.2d 234, 236, 501 P.2d 184 (1972) | 2 |
| <i>State v. Coe</i> , 101 Wn.2d 772, 780 684 P.2d 668 (1984) | 4 |
| <i>State v. Damon</i> , 144 Wn.2d 686. 693, 25 P.2d 418 (2001) | 3 |
| <i>State v. Ferguson</i> , 100, Wn. 2d 131, 134, 667 P. 2d 68 (1983) | 10 |
| <i>State v. Golladay</i> , 78 Wn. 2d 121, 142, 470 P. 2d 191 (1970) | 10 |
| <i>State v. Irby</i> , ___ Wn. 2d ___, (82665-0, 1-27-2011) | 3 |
| <i>State v. Lough</i> , 125 Wn.2d 847, 862-863, 889 P.2d 847 (1995) | 8 |
| <i>State v. Saltarelli</i> , 98 Wn.2d 358, 362, 655 P.2d 697 (1982) | 4, 9 |
| <i>State v. Smith</i> , 148 Wn.2d 122, 139, 59 P.3d 74 (2002) | 4, 7 |
| <i>State v. Williams</i> , 144 Wn.2d 197, 212-213, 26 P.3d 890 (2001) | 2 |
| <i>State v. Wilson</i> , 144 Wn. App. 166, 177 (2008) | 8 |

OTHER CASES

| | |
|---|---|
| <i>McKinney v. Rees</i> , 993 F.2d 1378, (9th Cir. 1993) | 4 |
| <i>State of Iowa v. Cox</i> , 781 N.W. 2d 757 (Iowa Sup. Ct. 4-30-2010) | 5 |

OTHER AUTHORITIES

ER 404(b) 1, 2, 8, 9, 10
RCW 10.58.090. 1, 2, 3, 4, 5, 6, 9, 10
Senate Bill Report re: RCW 10.58.090 p. 3. 3, 10
House Bill Report, SB 6933, 3-5-08, p.4 3

MISCELLANEOUS

Brief of Respondent, Court of Appeals, p. 45, 6-18-09. 5
Supplemental Brief of Petitioner Roger Scherner 1

I. NATURE OF CASE

Petitioner Roger Scherner challenges evidence of prior acts of sexual misconduct admitted pursuant to RCW 10.58.090 and used by the prosecutor to argue at trial that Scherner acted in conformity with those prior acts and was therefore likely guilty of molesting his granddaughter.

II. ISSUES PRESENTED FOR REVIEW

On February 16, 2011, the Court requested that the parties in *Scherner* provide supplemental briefing on the following issues: (1) “the question of severability as it relates to the challenged sections of RCW 10.58.090;” (2) “the application of harmless error to the admission of the challenged evidence;” and, (3) “harmless error as it relates to the failure to give a limited instruction.”

III. STATEMENT OF THE CASE

See Supplemental Brief of Petitioner Roger Scherner.

IV. ARGUMENT

A. The unconstitutional sections of RCW 10.58.090 cannot be severed from the constitutional sections.

Roger Scherner challenged RCW 10.58.090¹ as constitutionally invalid. Section 10.58.090(1) is so “intimately connected” to the

¹ “In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant’s commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to ER 403. RCW 10.58.090(1); See, also, Supplemental Brief of Petitioner Roger Scherner.

legislative purpose behind the statute that severing that section renders the remainder of the statute useless.

The test for severability of legislation is,

whether the constitutional and unconstitutional provisions are so connected...that it could not be believed that the legislature would not have passed one without the other; or where the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purpose of the legislature.

State v. Abrams, 163 Wn.2d 277, 285-286, 178 P.3d 1021 (2008)

(citations omitted).

In applying that test the court examines whether or not the statute at issue contains a “severability clause.” A severability clause offers “the court’s necessary assurance that the remaining provisions would have been enacted without the portions which are contrary to the constitution.” See, *State v. Anderson*, 81 Wn.2d 234, 236, 501 P.2d 184 (1972). RCW 10.58.090 does not contain a “severability clause.”²

Furthermore, the legislature’s purpose in passing RCW 10.58.090 was to alter ER 404(b) so that evidence of prior sexual misconduct would

² By comparison, RCW 9A, Washington’s Criminal Code, broadly declares if any of its provisions are found invalid, the remaining provisions are severable. RCW 9A.04.010(4). See, also, e.g., *State v. Williams*, 144 Wn.2d 197, 212-213, 26 P.3d 890 (2001) (wherein the statute at issue, RCW 9A.46.020, contained its own specific severability clause). Although RCW 10.01 contains a provision addressing the survival of fees and crimes existing when a statute is repealed or amended by a new statute, that section is limited to statutes, not court rules, and does not address severability..

be admissible in sex crime trials in the hope that prosecutors could then win more convictions against defendants charged with sex offenses.³ Eliminating section 1 of RCW 10.58.090 as unconstitutional would make the statute useless in accomplishing the legislature's purpose.

B. Evidence admitted pursuant to RCW 10.58.090 from four witnesses who testified they had been molested by the Petitioner decades earlier was not harmless error.

The admission of evidence, pursuant to RCW 10.58.090, that Mr. Scherner had a propensity to molest children violated Mr. Scherner's constitutional rights and was not harmless error.⁴

Admitting evidence in violation of the constitutional rights of the accused requires reversal unless the prosecutor proves beyond a reasonable doubt that the error was harmless. *State v. Damon*, 144 Wn.2d 686, 693, 25 P.2d 418 (2001); see also, *State v. Irby*, ___ Wn.2d ___, (82665-0, 1-27-2011). "A harmless error is an error which is trivial, or formal or merely academic and was not prejudicial to the substantial rights

³ "We need to allow for admission of evidence that did not result in conviction because the nature of [sex] offenses often result in no charges being filed and no convictions". House Bill Report, SB 6933, 3-5-08, p .4. "In the recent trial in King County of *State v. Darboe*, the jury could not reach a verdict after a trial where the judge, under ER 404(b), excluded evidence of prior sexual misconduct that was similar to that for which he was charged. This is an example of why ER 404(b) should be changed as it applies to trials of sex offenses". Senate Bill Report, SB 6933, 3-5-08, p. 3.

⁴ See, Supplemental Brief of Petitioner Roger Scherner, for discussion of how admission of evidence pursuant to RCW 10.58.090 deprived Mr. Scherner of a fair trial and therefore violated his constitutional right to Due Process and how the statute also violates the Separation of Powers and the constitutional prohibition against Ex Post Facto laws.

of the party assigning it and in no way affected the outcome of the case.” *In re Detention of Pouncy*, 168 Wn.2d 382, 391, 229 P.3d 678 (2010) (citation omitted); see also *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). In other words, unless the prosecution here establishes beyond a reasonable doubt that in Mr. Scherner’s trial the evidence untainted by RCW 10.58.090 was *so overwhelming* that it *necessarily* led to a finding of guilt, Mr. Scherner’s conviction must be reversed. See, *State v. Smith*, 148 Wn.2d 122, 139, 59 P.3d 74 (2002) (emphasis added). The prosecutor cannot meet that burden in Mr. Scherner’s case.

Before reaching the particular evidence in Mr. Scherner’s case we should recognize that for centuries our legal system has excluded propensity evidence, especially in sex offense cases, because that evidence, in and of itself, has such a highly prejudicial and inflammatory effect on jurors. See, *State v. Coe*, 101 Wn.2d 772, 780, 684 P.2d 668 (1984); *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982); *McKinney v. Rees*, 993 F.2d 1378, 1380-81 (9th Cir. 1993) (the rule against using character evidence to show propensity has persisted since at least 1684). Nothing in Mr. Scherner’s case exempted his jury from the inflammatory effects our courts have historically acknowledged that propensity evidence has had on other juries.

In Mr. Scherner's case, four witnesses testified in great detail about decades old sexual acts involving Mr. Scherner.⁵ Without that testimony it is unlikely Mr. Scherner would have been convicted. There was such a heavy reliance on the testimony from the RCW 10.58.090 witnesses that the trial prosecutor spent more time on direct eliciting testimony from the four prior misconduct witnesses than she did eliciting testimony from M.S., the actual victim Mr. Scherner was accused of molesting.⁶

Consistent with the vital role the misconduct witnesses played against Mr. Scherner at trial, the prosecutor acknowledged to the Court of Appeals that the prosecution case against Mr. Scherner rested "on the testimony of M.S.," noting there was no scientific or medical evidence, no eyewitnesses, and there were questions about M.S.'s credibility. Brief of Respondent, Court of Appeals, p. 45, 6-18-09. The trial court reached the

⁵ The four witnesses described various acts including fondling, digital penetration, and oral sex. The frequency in acts ranged from once to so often that one witness couldn't put a number on how many times over a 15 year period that she was molested. RP 911, 915. By comparison, the court in *State v. Cox*, 781 N.W. 2d 757 (Iowa 2010), wherein the Iowa Supreme Court found Iowa's version of RCW 10.58.090 an unconstitutional Due Process violation, concluded that the admission of evidence from just two witnesses who described a total of seven acts to be of sufficient volume and variety that admitting testimony about those acts could not be harmless error.

⁶ Compare direct of M.S., RP 460-500, 507-509 with direct of Williamson, RP 654-672, Odacado 674-688, Spillane 903-918, 927-29, and Kahn 618-633.

same conclusion, declaring that “the necessity [to the prosecutors case] of the challenged evidence was high” RP 111.

In addition to hearing detailed testimony about several decades old acts of child molestation involving persons other than M.S., pursuant to RCW 10.58.090, Mr. Scherner’s jury was presented with a broad range of emotionally compelling evidence relating to the four prior misconduct witnesses.⁷

The importance to the prosecutor of the testimony from the four misconduct witnesses became even more obvious when M.S. admitted to jurors that, when describing what happened between her and Mr. Scherner, she lied to the police (RP 555), she lied to the prosecutor (RP 556), and that she also lied to defense counsel (RP 554).

Although evidence at trial independent of the prior misconduct witnesses provided some support for conviction, that evidence was far from being “so overwhelming that it necessarily” would result in

⁷ In addition to detailed descriptions of the molestations, the prosecutor, pursuant to RCW 10.58.090, admitted highly prejudicial evidence about the four prior wrongs witnesses including, but not limited to, photographs of how the four women looked decades earlier when they were children (RP 65), how different members of Mr. Scherner’s extended family referred to him in the past as a “pedophile” (RP 622), the emotions some of prior misconduct witnesses experienced after learning Mr. Scherner was accused of molesting M.S. or after hearing that others claimed that they had been molested by Mr. Scherner as children (RP 631, RP 683-684), and, whether or not it had been difficult decades earlier for the prior misconduct witnesses to inform boyfriends or husbands they had been molested by Mr. Scherner (RP 667).

conviction. In recognizing that fact, the trial court evaluated the evidence aside from the testimony of the four misconduct witnesses, and concluded that the need to the prosecutor for the testimony from the misconduct witnesses was "high." RP 111. For example, although there was a surreptitiously recorded phone conversation between Mr. Scherner and M.S., the trial court found that the statements Mr. Scherner made in the recording were "equivocal" and did not constitute a clear confession. RP 8-6-2008, p. 109, 123. Further, after the prosecution rested, the defense moved to dismiss for insufficient evidence. Although the trial court denied the defense motion, the court did not deny the motion because of overwhelming evidence guilt, but instead indicated that the case depended on a credibility determination, and that the court was not going to take such a determination from the jury. RP 931-932.

The prosecutor cannot establish beyond a reasonable doubt that, without testimony from the four prior sexual misconduct witnesses, the remaining evidence was so overwhelming, that it necessarily would have resulted in conviction. See, *State v. Smith*, 148 Wn.2d 122, 139, 59 P.3d 74 (2002). Accordingly, admission of the challenged evidence was not harmless error.

C. Failure to give a limiting instruction was not harmless error.

The trial court in Mr. Scherner's case alternatively admitted evidence from the four sexual misconduct witnesses to demonstrate "common scheme or plan" pursuant to ER 404(b).⁸ The trial court then refused the defense request to provide Mr. Scherner's jury with an instruction limiting the purpose for which the challenged evidence can be considered to common scheme or plan. RP 611-615. After rejecting the limiting instruction proffered by the defense the trial court rejected the defense offer to amend and re-submit another limiting instruction. *Id.*⁹

The trial court committed error by failing to provide Mr. Scherner's jury with a limited use instruction. ER 105, *State v. Lough* 125 Wn.2d 847, 862-863, 889 P.2d 847 (1995); *State v. Wilson*, 144 Wn. App.

⁸ The defense does not waive its argument that admission of the prior misconduct evidence as "common scheme or plan" was itself error.

⁹ The trial court did provide the jury with an instruction proffered by the prosecutor that was designed to apply to prior misconduct evidence admitted pursuant to RCW 10.58.090, not ER 404(b). Consistent with RCW 10.58.090, that instruction did not limit the purpose for which the prior misconduct evidence could be used. The instruction provided: "In a criminal case in which the defendant is accused of an offense of sexual assault or child molestation, evidence of the defendant's commission of another offense or offenses of sexual assault or child molestation *is admissible and may be considered for its bearing on any matter to which it is relevant.* However, evidence of a prior offense on its own is not sufficient to prove the defendant guilty of the crime charged in the Information. Bear in mind as you consider the evidence at all times, the government has the burden of proving that the defendant committed each of the elements of the offense charged in the Information. I remind you that the defendant is not on trial for any act, conduct, or offense not charged in the Indictment." (Emphasis added) CP 263, RP 617.

166, 177 (2008); *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982); *State v. Aaron*, 57 Wn. 277, 281, 787 P.2d 949 (1990) (once requested, a limiting instruction is mandatory).

If this court concludes that RCW 10.58.090 is constitutional, and that the prior misconduct evidence was properly admitted pursuant to that statute, the trial court's errors regarding ER 404(b) are likely moot.

On the other hand, if this court finds RCW 10.58.090 invalid but finds that the prior sexual misconduct evidence was properly part of a "common scheme or plan," then the trial court's refusal to provide Scherner's jury with a limiting instruction would not be harmless error. In that circumstance it would be impossible for the prosecutor to meet its burden and establish that Mr. Scherner's jury didn't use the misconduct evidence for the very purpose prohibited by ER 404(b) and advocated for by the trial prosecutor – to show that Mr. Scherner was likely guilty of molesting M.S. because he had a propensity to molest children. See, RP 1021-22, RP 1011; see also p. 4 above. ¹⁰

¹⁰ Nor can the misconduct evidence in Scherner's case be construed as a type of "lustful disposition." While "lustful disposition" has long been recognized as one of the "other purposes" for which evidence of prior sexual misconduct can be admitted under ER 404(b), our courts have expressly and repeatedly stated that that evidence may not be admitted to show sexual proclivity or lustful inclination towards anyone but the victim. See, *State v. Ferguson*, 100, Wn. 2d 131, 134, 667 P. 2d 68 (1983); *State v. Golladay*, 78 Wn. 2d 121, 142, 470 P. 2d 191 (1970).

V. CONCLUSION

The judicial branch opposed the legislature amending ER 404(b), noting specifically that such a significant change to the rules of evidence should pass through the court rule making process and that there wasn't enough time remaining in the legislative session to carefully consider the matter. See, p. 3, Senate Bill Report 6933 Re: RCW 10.58.090. Instead the legislature passed RCW 10.58.090. Rather than severing provisions of the statute and struggling to find that the constitutional and procedural error created by the statute is harmless, the legislature should be made to draft a statute that will pass constitutional muster and comport with the longstanding and historical evidentiary prohibitions upon which ER 404(b) rests.

RESPECTFULLY SUBMITTED this 28th day of February, 2011.



ERIC W. LINDELL WSBA# 18972
Attorney for Petitioner Scherner