

FILED
JUNE 28, 2012
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

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MONTE DEAN JOHNSTON,)	UNPUBLISHED OPINION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

Brown, J. • Monte D. Johnston appeals his fourth degree assault conviction on the grounds RCW 10.58.090 unconstitutionally allowed evidence of prior sexual assault evidence. We stayed his case to await resolution of this issue in *State v. Gresham*, 173 Wn.2d 405, 269 P.3d 207 (2012). While the *Gresham* court decided RCW 10.58.090 was unconstitutional, we affirm because in *Gresham*'s consolidated case, *State v. Scherner*, the court held, as we do here, that the evidence was additionally and properly admitted under ER 404(b)—here, to rebut Mr. Johnston's accidental-touching defense.

FACTS

The State charged Mr. Johnston with second degree child molestation for allegedly

touching the breast of his 12-year-old stepdaughter. Mr. Johnston claimed the touching was accidental. Before trial, the court allowed and the jury considered evidence of a prior sexual offense occurring in 1992-1993, involving Mr. Johnston and the current victim's older sister. The court found the evidence admissible under RCW 10.58.090. The court additionally found the evidence admissible under ER 404(b) to show lack of accident. The court rejected Mr. Johnston's challenges to the constitutionality of RCW 10.58.090.

The jury found Mr. Johnston guilty of the lesser included offense of fourth degree assault. He appealed.

ANALYSIS

The issue is whether admission of prior sex offense evidence amounted to reversible error. Mr. Johnston contends allowing evidence under RCW 10.58.090 warrants a new trial.

In the consolidated cases of *State v. Gresham* and *State v. Scherner*, the Supreme Court held RCW 10.58.090 violates the separation of powers doctrine and is unconstitutional, and the nonconstitutional harmless error standard applies. *Gresham*, 173 Wn.2d at 432. In *Gresham*, the court held the admission of the "highly prejudicial" evidence of Mr. Gresham's prior sexual assault conviction under RCW 10.58.090 was not harmless and reversed. *Gresham*, 173 Wn.2d at 433-34. However, as to *Scherner*, the

court upheld the admission of prior sexual offenses under ER 404(b) to show a common plan or scheme. *Id.* at 421-22. The court noted the evidence was admitted in Mr. Scherner’s case on alternative grounds and that, “the admissibility of evidence of his prior sex offenses under the Washington Rules of Evidence is dispositive.” *Id.* at 419.

Applying the *Gresham* and *Scherner* principles here, the trial court erred in allowing the evidence under RCW 10.58.090, but did not err in additionally allowing the evidence under ER 404(b). ER 404(b) provides, “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, such as . . . absence of mistake or accident.” We review the trial court’s decision to admit or exclude evidence of prior bad acts for abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). Discretion is abused if it is exercised without tenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Before admitting evidence of an act under any of ER 404(b)’s other purposes,¹ the trial court must (1) find a preponderance of the evidence shows the acts occurred, (2) state for what purpose the evidence is being admitted, (3) find the evidence is relevant for

¹ The *Gresham* court noted the other purposes of admitting evidence under ER 404(b) should not be considered “exceptions” rather; there is “one improper purpose [for admitting evidence under ER 404(b)] and an undefined number of proper purposes.” *Gresham*, 173 Wn.2d at 421.

that purpose, and (4) balance the probative value of the evidence against any unfair effect. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). Here, the trial court ably considered these factors before allowing the jury to hear the evidence about the prior offenses, and Mr. Johnston does not object to the court’s analysis.

Mr. Johnston claimed an accidental touching. ER 404(b) allows evidence of other crimes to show absence of accident or mistake. Thus, the trial court had tenable grounds to allow the evidence. As to *Scherner*, the court held, as we hold here, “even without RCW 10.58.090, the evidence was admissible in his trial.” *Id.* at 434-35. Here, like in *Scherner*, the evidence was admissible.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, J.

WE CONCUR:

Siddoway, A.C.J.

Sweeney, J.