

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ROLAND DOUGLAS,

Appellant.

No. 40530-0-II

UNPUBLISHED OPINION

Armstrong, J. — Roland Douglas appeals his conviction of third degree child rape, arguing that his attorney ineffectively represented him by failing to object to testimony offered by each of the State’s witnesses. Douglas also argues that (1) the evidence was insufficient to support his conviction, (2) the trial court erred in admitting his prior sex offense as propensity evidence, (3) the failure to transcribe a sidebar conference deprived him of an adequate record on appeal and violated his right to a public trial, (4) the prosecuting attorney committed misconduct during closing argument, and (5) cumulative error deprived him of a fair trial. We stayed our

decision pending the Washington Supreme Court's decision in *State v. Gresham*, 173 Wn.2d 405, 269 P.3d 207 (2012), and we now reverse, holding that the admission of Douglas's prior sex offense was prejudicial error.

FACTS

After learning from an anonymous phone call that her 14-year-old daughter A.J.S. was having sex with Douglas, C.K. confronted A.J.S. and reported the call to the police. Following interviews with A.J.S., Douglas, and their friend Brandon Pippins, Detective Harry Heldreth arrested Douglas on a charge of third degree child rape.

Before trial, defense counsel moved to bar any reference to Douglas's status as a registered sex offender. The State protested that such a ruling would prohibit C.K.'s testimony about the anonymous phone call, which had described A.J.S.'s relationship with a sex offender. The defense then moved to bar any testimony that the caller had reported that A.J.S. was having sex with a sex offender. The trial court granted the defense motions, ruling that there could be no reference to "the specifics of a telephone call that were said to have alerted [C.K.] that her daughter was having sex with a sex offender." Report of Proceedings (RP) at 74. The trial court also granted the State's pretrial motion to admit Douglas's prior conviction of communicating with a minor for immoral purposes under former RCW 10.58.090 (2008), and it accepted the parties' stipulation to the offense. The parties agreed to a related limiting instruction.

After C.K. testified that she received a phone call about A.J.S., the State asked about her general concerns after receiving the call. C.K. said she was concerned that her daughter was

having sex with someone besides her boyfriend. When the State asked who her daughter was supposedly having sex with, C.K. replied without objection that it was Douglas. A.J.S. testified that she admitted to her mother and to the police that she and Douglas, who was then 21 years old, recently had sexual intercourse. She also directly admitted that she and Douglas had sex. She testified that when she told Douglas that her mother had reported their relationship to the police, he became angry and hit his hand against a post. She also told their friend Brandon Pippins about the incident.

Pippins testified that Douglas told him there were phone calls stating that he was having sex with A.J.S. and that he was being convicted as a result. Pippins acknowledged telling Detective Heldreth that Douglas admitted having sex with A.J.S., but he then denied that Douglas ever made such an admission, explaining that he should have been clearer when talking to the detective. Detective Heldreth testified that Pippins told him that Douglas admitted having sex with A.J.S. Douglas told the detective, however, that he would not admit to having sex with A.J.S. even before Heldreth mentioned any such allegation.. When Detective Heldreth asked whether Pippins and A.J.S. had lied in implicating him, Douglas replied that they were not lying but that he would not make any admission. Douglas told the detective “that last time I said that I had sex with a girl like this, I went to jail.” RP at 145. Douglas knew A.J.S. was 14 and said he injured his hand by punching a post when he was angry.

After the detective testified, the trial court read the stipulation regarding Douglas’s prior conviction to the jury and offered this limiting instruction:

In a criminal case in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense 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 this evidence at all times, the State 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 that is not charged in the information.

RP at 151-52. The defense rested without calling any witnesses, and the jury found Douglas guilty as charged.

ANALYSIS

I. Admission of Douglas's Prior Sex Offense

Douglas challenges the trial court's admission of his prior conviction for communicating with a minor for immoral purposes under former RCW 10.58.090, which allowed evidence of a defendant's prior sex offenses to be introduced to show propensity without the State having to argue that the evidence was admissible under ER 404(b). While this appeal was pending, the *Gresham* court struck down former RCW 10.58.090 as unconstitutional because it violated the separation of powers doctrine. *Gresham*, 173 Wn.2d at 413.

In supplemental briefing, Douglas argues that reversal is required because the untainted evidence is insufficient to sustain his conviction for third degree rape of a child. The State concedes that admitting evidence of Douglas's prior sex offense was harmful. *See Gresham*, 173 Wn.2d at 433-34 (while remaining evidence was not insufficient to warrant conviction, there was a reasonable probability that absent the highly prejudicial evidence of the prior sex offense, the

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jury's verdict would have been materially affected, thereby precluding a finding of harmless error). We agree that there is a reasonable probability that the evidence of Douglas's prior sex offense materially affected the jury's verdict, and we reverse his conviction for third degree child rape.

Because Douglas's remaining issues are unlikely to recur on retrial, if any, we need not address them. We reverse the conviction and remand for further proceedings in accordance with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Hunt, J.

Worswick, A.C.J.