IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TYSON WESLEY GREGG, Appellant.	No. 40681-1-II UNPUBLISHED OPINION

Johanson, J. — Tyson Wesley Gregg appeals his jury trial convictions of four counts of first degree child molestation and one count of second degree child molestation. He argues that the trial court erred in admitting evidence of his prior incest adjudication under RCW 10.58.090, asserting that RCW 10.58.090 violates the separation of powers doctrine and that application of the statute violated the ex post facto clauses of the state and federal constitutions.[1] Because our Supreme Court recently held in *State v. Gresham*, 173 Wn.2d 405, 269 P.3d 207 (2012), that RCW 10.58.090 violates the separation of powers doctrine, we hold that admission of the prior sex offense evidence here without the benefit of an appropriate limiting instruction was not harmless; we reverse and remand for further proceedings.[2]

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[1] On August 17, 2011, we stayed this matter pending our Supreme Court's review of *State v. Scherner*, 153 Wn. App. 621, 225 P.3d 248 (2009), and *State v. Gresham*, 153 Wn. App. 659, 223 P.3d 1194 (2009). We lifted the stay on February 6, 2012, after our Supreme Court issued *State v. Gresham*, 173 Wn.2d 405, 269 P.3d 207 (2012), which reversed the Court of Appeals's *Gresham* and reversed in part *Scherner*.

[2] Because we reverse on the separation of powers issue and none of Gregg's pro se issues are likely to occur on remand, we do not address Gregg's other constitutional issues or the issues that

FACTS

I. Charges and Admission of Prior Sexual Offense Under RCW 10.58.090

The State charged Gregg with four counts of first degree child molestation and one count of second degree child molestation occurring between December 1997 and December 2002. The victim for each count was Gregg's younger cousin, A.D.

Before trial, the State moved in limine to present evidence that Gregg had a prior conviction for first degree incest under RCW 10.58.090.[3] The State emphasized that RCW

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he raises in his pro se Statement of Additional Grounds for Review.

[3] RCW 10.58.090 provides in part:

> (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 Evidence Rule 403.
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> (2) In a case in which the state intends to offer evidence under this rule, the attorney for the state shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
>
> (3) This section shall not be construed to limit the admission or consideration of evidence under any other evidence rule.
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> . . . .
>
> (6) When evaluating whether evidence of the defendant's commission of another sexual offense or offenses should be excluded pursuant to Evidence Rule 403, the trial judge shall consider the following factors:
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> (a) The similarity of the prior acts to the acts charged;
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> (b) The closeness in time of the prior acts to the acts charged;
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> (c) The frequency of the prior acts;
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> (d) The presence or lack of intervening circumstances;
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> (e) The necessity of the evidence beyond the testimonies already offered at trial;
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> (f) Whether the prior act was a criminal conviction;
>
> (g) Whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; and

10.58.090 allowed for admission of a prior sex offense, without the trial court also finding the evidence admissible under ER 404(b). But the State asserted that the evidence was likely also admissible under ER 404(b) as evidence of "a common scheme or plan or MO type of evidence." 7 Verbatim Report of Proceedings (VRP) at 50. The State noted that (1) both victims were young (the incest victim was 8 at the time of the incest and A.D. was between 9 and 12 at the time of the current incidents); (2) the offenses took place at about the same time (the incest occurred in December 2000; the current incidents occurred between December 1997 and December 2002); (3) the incidents both occurred during "play situations"; (4) both victims were Gregg's relatives; (5) the incest and the current offenses all occurred when Gregg was alone with the victims; (6) "in both cases he was not essentially touching the young females, but he was having them touch him," although one involved "oral sexual activity," while the other involved "digital manipulation or masturbation"; and (7) in both cases Gregg "use[d] his relative age and size" to force the victims to act and to make them feel they could not tell anyone about the incidents. 7 VRP at 50-52.

Gregg objected, arguing that the admissibility of the prior sex offense hinged on whether this evidence was more prejudicial than probative and asserting that the evidence was overly prejudicial. The trial court admitted the evidence under RCW 10.58.090 over Gregg's objection.

(h) Other facts and circumstances.

II. Trial

At trial, A.D. testified that Gregg, her older[4] and larger cousin, had repeatedly forced her to manually masturbate him when she was between the ages of 8 and 12. She asserted that the sexual contact had occurred when they were at their mutual grandfather's residence, often while the numerous grandchildren were playing hide-and-seek outside the home. A.D. also testified that (1) around the time of the incidents, she had disclosed to Gregg's half brother that Gregg "was doing something [sexual]" to her; (2) she later disclosed the abuse to a high school boyfriend; (3) still later, she disclosed the abuse to her current boyfriend; and (4) about a year before the trial, when A.D. was about 20 years old, her current boyfriend finally told A.D.'s mother about the abuse and A.D.'s mother reported it to law enforcement. 8 VRP at 179. A.D. stated that she had not told her mother or another adult about the abuse earlier because she was afraid of what they would think and did not know what would happen. But she finally talked to her current boyfriend about the sexual abuse because she had discovered that Gregg had had a daughter and she did not want Gregg to hurt his child.

After A.D. testified, the trial court read the following stipulation to the jury

> "The parties have agreed that the following evidence will be presented to you. Tyson Wesley Gregg has a prior juvenile adjudication (conviction) for incest in the first degree from 2001. Then sixteen-year-old Tyson Wesley Gregg had his then eight-year-old half sister perform oral sex on him on multiple occasions. This is evidence that you will evaluate and weigh with the other evidence."

8 VRP at 193.

[4] Gregg was almost four years older than A.D. (Gregg was born February 14, 1985) (A.D. was born December 5, 1988).

A.D.'s current boyfriend,[5] her high school boyfriend,[6] and her mother[7] corroborated A.D.'s testimony about her disclosures of the abuse. Gregg's half brother, however, denied that A.D. had ever disclosed any abuse.

The State's witnesses, including A.D.'s grandfather, Gregg's half brother, and Gregg, disputed A.D.'s claim that she had been at her grandfather's home nearly every weekend during the charging period and that Gregg had almost always been present. Although many of the State's witnesses characterized Gregg as having been a "bully" towards the other grandchildren during the charging period, they disputed A.D.'s claim that she was often alone with Gregg. 8 VRP at 201, 212, 230.

Gregg admitted the prior incest offense, stating that that he had forced his younger half sister to perform oral sex on him on three occasions when she was seven or eight years old. He also testified that he had taken responsibility for his actions and that he had received sex offender treatment following his incest adjudication. He denied, however, having had any sexual contact with A.D., and he stated that if he had had such contact with A.D., he would have taken

[5] A.D.'s current boyfriend testified that early in their relationship, he had noticed that "something was wrong" sexually in their relationship and that after they had dated for a while, he had "force[d]" her to talk to him about her behavior. 7 VRP at 88. A.D. finally disclosed to him that Gregg had sexually abused her. During this disclosure, A.D. was crying and appeared scared or traumatized.

[6] Her high school boyfriend testified that A.D. had disclosed the abuse to him when they were dating and had asked him not to tell anyone.

[7] A.D.'s mother testified that A.D.'s current boyfriend had called her about a year before the trial, that he had told her about A.D.'s disclosures, and that she had called 911 to report the abuse.

responsibility for it because he "kn[e]w the pain that [he had] put [his] sister through and no one deserves that." 8 VRP at 229-30. Gregg acknowledged that when they were children, he did not "get along with" A.D., stating that "[s]he was a tattletale, so most of us didn't want to be around her." 8 VRP at 230.

The State also questioned Gregg's and A.D.'s grandfather about the prior incest offense. The grandfather admitted that even after the incest was disclosed, Gregg still had contact with the other grandchildren when they were at his home, but he asserted that Gregg was "well supervised" during that contact. 8 VRP at 208.

After the parties rested, the trial court gave the jury jury instruction 5, which stated:

> In a criminal case in which the defendant is accused of a sex offense, *evidence of the defendant's commission of another sex offense 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 any crime charged in the Information. Bear in mind as you consider this evidence that at all times the State has the burden of proving that the defendant committed each of the elements of each offense charged in the Information. The defendant is not on trial for any act, conduct, or offense not charged in the Information.

CP at 24 (Jury Instruction No. 5) (emphasis added).

In its closing argument, the State specifically discussed jury instruction 5:

> Another piece is an interesting piece of evidence that comes in in cases like this, is instruction No. 5, and it talks about if—if some evidence is brought into the case about a prior sex offense, and that that is allowed in sex offense cases that *you can use that for whatever relevant purpose you think it—it bears, in any way that you think it bears on this case*.
>
> What's important, however, and it is very important, is that *you can't use it as the exclusive basis, you can't say because someone did something in the past they necessarily did something in the present.* It—it just cannot mean that in the law.
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> But it does have some very specific things you can use it for, and very specific things that I suggest to you as the prosecutor in this case, you look at it

> and you say, well, what's—what's relevant about that prior sex offense that was read to you into the record at the end of the State's case?
>
> Well, in that case, what did the defendant admit to doing, what was that conviction of? You heard that it was the defendant making his then eight-year-old half sister perform oral sex on him. Defendant would have been sixteen.
>
> Now, what's consistent with that in terms of a unique pattern of behavior on the part of the defendant in this case? I suggest to you that that is the defendant using his power, his control, his position with these young girls to have them perform a sexual act on him.
>
> It's not the other way around, he's not performing on them, he is using his strength, his power, his bullyness to get an act performed on him. It's incredibly consistent.
>
> The ages of the defendant and the girls [are] incredibly consistent.
>
> *So these factors weigh heavily towards that being important information in determining the credibility of [A.D.] and what she's telling you from the stand.*
>
> *And I'd suggest that it would be crucial to use it in that way.*
>
> *It's not to be used to say because he committed an act in the past that that means he committed this act.*
>
> *It is to be used to show that he has a unique pattern of behavior, and this pattern fits both cases I'd suggest to you virtually perfectly*.

8 VRP at 278-80 (emphasis added).

Gregg also mentioned the incest adjudication in his closing argument. He noted that he had admitted to what he had previously done to his half sister and that he had taken responsibility for these actions; he argued that there was no reason he would not have also taken responsibility for anything he might have done to A.D. He also argued that the fact that he did not take responsibility for any inappropriate contact with A.D. meant that he did not do what she accused him of doing.

The jury found Gregg guilty as charged. Gregg appeals.

ANALYSIS

Gregg argues that the trial court erred in admitting the prior sex offense evidence under RCW 10.58.090 and that this error was not harmless. Our Supreme Court recently held in *Gresham*, that RCW 10.58.090 violates the separation of powers doctrine and is therefore unconstitutional. RCW 10.58.090 allows prior sex offenses to be used to show the defendant's character, in direct conflict with the protections afforded under ER 404(b) which provides that evidence of prior sex offenses is not admissible to prove the character of a person in order to show action in conformity therewith. ER 404(b) requires that prior sex offenses be admitted for a proper purpose and that a trial court must weigh the probative value versus the prejudicial effect of such evidence. *Gresham*, 173 Wn.2d at 413, 432. Accordingly, we agree that admission of this evidence under RCW 10.58.090 was error and address whether this error was harmless. *See Gresham*, 173 Wn.2d at 432. We hold that it was not harmless in this instance.

Assuming without deciding that the trial court could have admitted this same evidence under ER 404(b), we must still determine whether the trial court's admission of the uncharged sexual misconduct evidence without an appropriate limiting instruction would have been prejudicial. *See Gresham*, 173 Wn.2d at 423-24. In making this determination, *Gresham* dictates that we apply "the lesser standard for nonconstitutional error" and determine whether, "'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" *Gresham*, 173 Wn.2d at 433 (quoting *State v. Smith*, 106 Wn.2d 772, 725 P.3d 951 (1986)).

> If evidence of a defendant's prior crimes, wrongs, or acts is admissible for a proper purpose, the defendant is entitled to a limiting instruction upon request.

> An adequate ER 404(b) limiting instruction must, at a minimum, inform the jury of the purpose for which the evidence is admitted and that the evidence may not be used for the purpose of concluding that the defendant has a particular character and has acted in conformity with that character.

Gresham, 173 Wn.2d at 423-24 (footnote and citations omitted).

In *Gresham*, the court held that the evidence of Gresham's co-appellant's, Scherner's, prior molestations of four additional victims was admissible for the purpose of showing a common scheme or plan and that the trial court erred in failing to give a limiting instruction related to that evidence. *Gresham*, 173 Wn.2d at 423-25. After holding that RCW 10.58.090 was unconstitutional, the court concluded that the lack of a limiting instruction was harmless because there was "overwhelming evidence of Scherner's guilt" apart from the ER 404(b) evidence. *Gresham*, 173 Wn.2d at 425. This "overwhelming evidence" included "[the victim's] detailed testimony, evidence of Scherner's flight from prosecution, the jury's opportunity to assess Scherner's credibility, and, perhaps most damning, [a] recorded phone conversation in which Scherner all but admits his molestation of [the victim]." *Gresham*, 173 Wn.2d at 425.

In contrast, when addressing Gresham's conviction, the court held that the admission of the prior sex offense evidence was not harmless. *Gresham*, 173 Wn.2d at 434. The court emphasized that without the prior sex offense evidence, the only evidence was the victim's testimony, the victim's parents' corroboration that Gresham had had the opportunity to molest the victim, and an investigating officer's testimony. *Gresham*, 173 Wn.2d at 433. The court further noted that there was no eyewitness testimony and that the prior sex offense evidence was "highly prejudicial." *Gresham*, 173 Wn.2d at 433. And, unlike in Scherner's case, there was no

admission by the defendant. *See Gresham*, 173 Wn.2d at 433.

Here, there was no additional "overwhelming evidence." The sole evidence against Gregg was A.D.'s allegations. There was no physical evidence, no additional eyewitness testimony, and no admission by the defendant. Additionally, the prior sex offense evidence was highly prejudicial.

The State's closing argument attempted to advise the jury that the prior sex offense evidence should not be used as propensity evidence. However, jury instruction 5 instructed that the jury could "consider[ ] [this evidence] *for its bearing on any matter to which it is relevant*." CP at 24. Because jurors are directed to follow the court's instructions, which here, were rendered erroneous under *Gresham*, the State's argument did not ameliorate the prejudicial effect of the jury instruction. Without a proper ER 404(b) limiting instruction from the court, it is unlikely that the jury would have understood that the prior sex offense evidence could be considered only for purposes allowed under ER 404(b), such as common scheme or plan or intent. Given that this case hinged on the victim's credibility, the fact there was little evidence other than the victim's statements, and the potentially prejudicial nature of prior incest adjudication because it involved sexual contact with a child, we cannot say, within reasonable probabilities, that had the error not occurred the outcome of the trial would have been materially different. Thus, we hold that admission of the prior sex offense evidence without a limiting

instruction was not harmless. Accordingly, we reverse Gregg's convictions and remand for further proceedings.

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 pursuant to RCW 2.06.040, it is so ordered.

Johanson, J.

We concur:

Hunt, J.

Worswick, C.J.