

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL LOPEZ,

Appellant.

No. 41256-0-II

UNPUBLISHED OPINION

Johanson, A.C.J. — Michael Lopez appeals his two convictions for second degree child molestation. Lopez argues that former RCW 10.58.090 (2008) violates the separation of powers doctrine, and, therefore, the trial court erroneously admitted evidence of his prior conviction for communication with a minor for immoral purpose under that statute.<sup>1</sup> We agree with Lopez and because admission of Lopez’s prior sex offense conviction was not harmless error, we reverse and

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<sup>1</sup> Lopez argues that the record does not support the costs and fees imposed by the trial court at sentencing. Also, in his Statement of Additional Grounds (SAG), Lopez argues that he suffered implied bias during jury selection because one of the prospective jurors was a family member of the prosecutor’s wife. RAP 10.10(a). Because we reverse on other grounds, we do not reach these issues.

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remand.

## FACTS

L.M.,<sup>2</sup> a 12-year-old girl, told a classmate that she was having an issue with Lopez, her stepfather. L.M. alleged that when she asked Lopez if she could go to McDonald's, he replied "you know what to do" and he made her touch his penis. 2 Verbatim Report of Proceedings (VRP) at 219. L.M. also alleged that on a separate occasion, she asked Lopez if she could have ice cream; in response, he instructed her to take off her shirt and then he touched her breast.

The State charged Lopez with two counts of second degree child molestation contrary to RCW 9A.44.086. Pretrial, the State moved to admit evidence of Lopez's prior conviction of communicating with a minor for immoral purposes under former RCW 10.58.090.<sup>3</sup> The State argued that the evidence was necessary because the expected trial testimony would be simply the testimony of a 12-year-old girl against her stepfather, Lopez. The State argued that "this is exactly the type of case that [former RCW] 10.58.090 was designed [to address]." 1 VRP at 42. The State noted the practical necessity of using Lopez's prior conviction because there were no other scientific, forensic, medical, or psychological witnesses available. Lopez objected to admitting evidence of his prior conviction, noting the 16-year period between his prior conviction for communication with a minor for immoral purposes and the current allegations. Lopez also objected on the basis that former RCW 10.58.090 violated the separation of powers doctrine. In response, the State told the trial court that although evidence of Lopez's prior conviction was certainly prejudicial, it would not be more prejudicial than probative, particularly if accompanied

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<sup>2</sup> We use initials to protect the privacy interests of child witnesses in sex crime cases.

<sup>3</sup> This conviction is at least 16 years old and did not involve the same victim. Therefore it was likely not admissible under ER 404(b).

by a limiting instruction.

The trial court noted that the evidence was necessary because of the lack of admissible hearsay evidence or witnesses to the alleged acts. The trial court also noted that the danger of unfair prejudice was “probably a very significant factor” in this case, but found that because only one prior conviction was involved, it would be less prejudicial. 1 VRP at 59. After reviewing all the former RCW 10.58.090 factors, the trial court ruled that the State could offer evidence of Lopez’s prior conviction of communicating with a minor for immoral purposes under former RCW 10.58.090. The trial court accepted Lopez’s stipulation to the prior sex offense conviction.

L.M.’s mother testified that Lopez lived in the household with L.M. but also testified that she did not notice suspicious behavior. L.M.’s friend testified that L.M. told her about her allegations against Lopez. L.M. also testified at trial. After the parties presented their case, the trial court issued a limiting instruction regarding Lopez’s prior conviction:

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 not charged in the Information.

Clerk’s Papers (CP) at 46 (Jury Instruction No. 8).

The jury convicted Lopez on both counts of second degree child molestation. Lopez appeals.

## ANALYSIS

Lopez argues that former RCW 10.58.090 violates the separation of powers doctrine, therefore, the trial court erroneously admitted evidence of his prior conviction for communication with a minor for immoral purpose under that statute. Lopez is correct.

### I. Standard of Review

Our Supreme Court recently held that former RCW 10.58.090 violates the separation of powers doctrine and is therefore unconstitutional. *State v. Gresham*, 173 Wn.2d 405, 433, 269 P.3d 207 (2012). The *Gresham* court noted, “When the support of [former] RCW 10.58.090 is removed, we are simply left with evidence admitted in violation of ER 404(b).” *Gresham*, 173 Wn.2d at 433. Therefore, we review evidence admitted solely under former RCW 10.58.090 the same way we review evidence admitted in violation of ER 404(b), which is the lesser standard of nonconstitutional harmless error. *Gresham*, 173 Wn.2d at 433. Nonconstitutional error occurs when “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, 780, 725 P.2d 951 (1986)). Our Supreme Court has recognized that “in sex cases . . . the prejudice potential of prior acts is at its highest.” *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982).

### II. Admission of Lopez’s Prior Sex Offense

Lopez 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). The Supreme Court has struck down former RCW 10.58.090 as unconstitutional because it violates the separation of powers doctrine. *Gresham*, 173 Wn.2d at 413. Accordingly, admission of this evidence under former RCW 10.58.090 was error and we next address whether this error was harmless. *See Gresham*, 173 Wn.2d at 432.

The trial court's jury instruction relating to former RCW 10.58.090 allowed the jury to use Lopez's prior conviction for any purpose relevant, including, impliedly, whether Lopez had a propensity to commit the crime, in violation of ER 404(b).<sup>4</sup> Because the trial court admitted Lopez's prior conviction for communication with a minor for immoral purposes in a child molestation case, the potential prejudicial effect was high. *Saltarelli*, 98 Wn.2d at 363. Here, the potential for prejudice was particularly high because: (1) The State's case was supported by only 12-year-old L.M.'s testimony, and witnesses repeating what L.M. told them about the allegations; (2) there were no other eyewitnesses or physical evidence; and (3) the trial court gave the aforementioned former RCW 10.58.090 instruction that the jury could consider Lopez's prior sex conviction for any relevant purpose.

Under these circumstances, admission of Lopez's prior sex offense conviction is not harmless error. *Gresham*, 173 Wn.2d at 417, 433-34 (admission of evidence of prior sexual offenses is not harmless error in a child molestation case when the only other evidence presented was the victim's testimony and parent's corroboration that the defendant had the opportunity to commit acts). We conclude that, "within reasonable probabilities, had the error not occurred, the

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<sup>4</sup> Because our Supreme Court held former RCW 10.58.090 unconstitutional, by implication its implementing jury instruction is also unconstitutional.

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outcome of the trial would have been materially affected.” *Gresham*, 173 Wn.2d at 433 (quoting *Smith*, 106 Wn.2d at 780). Therefore, we hold that the admission of Lopez’s prior conviction prejudiced him, and we reverse 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 in accordance with RCW 2.06.040, it is so ordered.

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Johanson, A.C.J.

We concur:

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Quinn-Brintnall, J.

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Van Deren, J.