

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 66214-7-I
)	
Respondent,)	DIVISION ONE
v.)	
)	UNPUBLISHED OPINION
FRANK RICARDO BORDERS,)	
)	
Appellant.)	FILED: April 16, 2012

Schindler, J. — A jury convicted Frank Ricardo Borders of rape in the second degree of J.P. and S.C. Borders contends the court erred in admitting testimony of a prior uncharged rape under RCW 10.58.090. In State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2012), our supreme court held RCW 10.58.090 is unconstitutional and the nonconstitutional harmless error standard applies. Because the admission of the testimony under RCW 10.58.090 in this case was not harmless, we reverse and remand for further proceedings.

FACTS

Rape of J.P.

In the summer of 2007, J.P. was homeless and spent time at Angeline's Center for Homeless Women. One evening, J.P. went to a wooded area along Interstate 5 to meet some friends and smoke crack cocaine. When she arrived, Frank Ricardo

Borders approached J.P. and invited her to smoke crack cocaine with him. J.P. did not know Borders but accepted his offer and followed him up a trail. Borders stopped at a clearing and told J.P. to take off her clothes. When J.P. refused, Borders grabbed her by the throat and began choking her with both hands. J.P. said that she told Borders she would do whatever he wanted so he would stop choking her. Borders unzipped his pants and told J.P. to give him a "blow job." When Borders was unable to achieve an erection, J.P. pleaded with him to leave. Borders then zipped up his pants and walked away.

Rape of S.C.

In 2007, S.C. was homeless and was staying at Angeline's. On December 7, S.C. spent the night with Arthur Borders at his mother's house. Arthur's sister and his brother Frank also spent the night at the house. The next morning, S.C. left to go to the store. As S.C. was walking near Pratt Park, she saw Frank. Frank asked S.C. if she had a crack pipe. When S.C. said she did not, Frank grabbed S.C. by the throat, dragged her into the men's bathroom, and told her to sit on the toilet. S.C. said that when she tried to push him away, Frank punched her in the head and told her to be quiet. Borders then unzipped his pants and forced his penis into her mouth. As he did so, a bag containing crack cocaine fell out of his pocket. S.C. said that when Borders reached down to pick the bag up, she ran away. S.C. ran to Arthur's mother's house and told Arthur what had happened. Officer Steven Leonard responded to the 911 call.

S.C. told Officer Leonard that Frank Borders choked and raped her in the men's bathroom at Pratt Park. An emergency medical team also responded and transported

S.C. to Harborview. The medical technician did not observe any redness or injuries to S.C.'s neck or head. S.C. told Harborview emergency room physician Dr. Steven Mitchell that her friend's brother choked, slapped, and sexually assaulted her, and that she had neck and back pain. The police located Borders near the park and arrested him.

At Harborview, S.C. told the sexual assault nurse that Borders made her smoke crack and blow on his penis before forcing her to put his penis in her mouth. S.C. told a social worker that as she was walking to the store with Borders, he grabbed her and offered her crack cocaine. S.C. said that when she refused, he punched her in the head and made her smoke crack and blow the smoke on his penis. S.C. said that Borders hit her and choked her before he allowed her to leave, and she felt like killing herself.

S.C. told another social worker, William Bodick, that she was depressed and suicidal. S.C. admitted to Bodick that she had been smoking crack cocaine for two days before the attack.

After S.C. was released from Harborview, the police were unable to locate S.C. for a number of months. In response to a flyer posted at Angeline's in 2009, J.P. contacted the police and identified Borders as the man who attacked her in the summer of 2007 from the booking photo a prosecuting attorney showed her.

The State charged Borders with rape in the second degree of J.P. and rape in the second degree of S.C. Before the first trial, the State moved to admit evidence of two prior sex offenses under RCW 10.58.090: a 1983 conviction of assault in the

second degree of S.G., and the 1980 uncharged rape of M.H. The trial court denied the motion on the grounds that the evidence was more prejudicial than probative.

The defense moved to suppress J.P.'s identification of Borders, and challenged the identification procedure used by the prosecuting attorney. The prosecutor testified that when she met with J.P. and showed her a booking photograph of Borders, J.P. said, "[T]hat's him." The court ruled that the identification procedure was not impermissibly suggestive.

The State called a number of witnesses to testify at trial, including J.P., S.C., police, and the treatment providers. Bodick testified that S.C. had " 'a history of polysubstance abuse with regular use of cocaine,' " and said she had been diagnosed with substance-induced mood disorder. After the jury was unable to reach a verdict on either count, the court declared a mistrial.

Before the second trial, the State filed a motion to reconsider the decision to exclude evidence under RCW 10.58.090 of the prior two sex offenses. The State also sought to introduce an additional uncharged rape of L.M. under RCW 10.58.090. At the pretrial hearing, the State called M.H., L.M., and S.G. to testify.

M.H. testified that Borders raped her in 1980. M.H. said that she reported the rape but the State did not file charges against Borders. L.M. testified that in 2004, she was dating Borders and pregnant with his child. L.M. said that Borders arrived at her apartment intoxicated and vaginally raped her. L.M. testified that she did not report the rape to the police.

S.G. testified that Borders raped her in 1983. S.G. said that she invited Borders

to her apartment to play cards. S.G. testified that Borders lifted her from her wheelchair and carried her to the bed. When S.G. screamed at Borders to stop, he put his hands around her neck and choked her, leaving thumb prints, and then raped her. S.G. testified that Borders then fell asleep and she called the police. The court ruled that the rape of S.G. was admissible under RCW 10.58.090.¹

A number of witnesses testified at the second trial, including the police, medical providers, social workers, J.P., S.C., Arthur Borders, and S.G. J.P. testified that she immediately recognized Borders when she saw the flyer at Angeline's and again when the prosecutor showed her the booking photo. S.C. denied smoking crack cocaine or having a substance abuse problem. S.C. also denied spending the night at Arthur's mother's house. Arthur testified that he and S.C. had been smoking crack cocaine, and that S.C. left the house around the same time as his brother Frank. Arthur also testified that S.C. did not have money to go to the store.

The jury convicted Borders as charged of rape in the second degree of J.P. and S.C.

ANALYSIS

Borders contends the court erred in admitting evidence of the prior rape of S.G. under RCW 10.58.090. In the consolidated cases of State v. Gresham and State v. Scherner, 173 Wn.2d at 432, the supreme court held that RCW 10.58.090 violates the separation of powers and is unconstitutional, and the nonconstitutional harmless error standard applies; that is, whether “ ‘within reasonable probabilities, had the error not

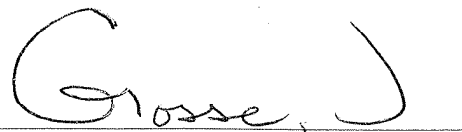
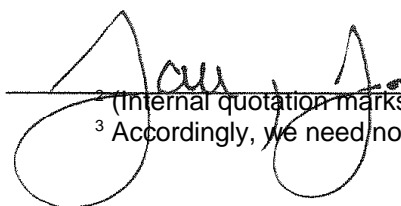
¹ In its RCW 10.58.090 analysis, the court noted that the offenses “would have likely been admissible under the common scheme or plan exception to [ER] 404 B.”

occurred, the outcome of the trial would have been materially affected.’ ” Gresham, 173 Wn.2d at 432-33² (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)).

In Gresham, the court held that the admission of the “highly prejudicial” evidence of Gresham’s prior sexual assault conviction under RCW 10.58.090 was not harmless and reversed. Gresham, 173 Wn.2d at 433-34. In Scherner, the court upheld the admission of prior sexual offenses under ER 404(b) to show a common plan or scheme. Gresham, 173 Wn.2d at 421-22.

Here, the admission of the prior sexual assault of S.G. under RCW 10.58.090 was not harmless. The only direct evidence against Borders was the testimony of J.P. and S.C. The witness credibility was the central issue and critical to the outcome of the trial. S.C. made a number of inconsistent statements the day of the assault and at trial, and the testimony of the social workers, medical providers, and Arthur Borders contradicted her testimony. As in Gresham, we conclude that there is a reasonable probability that the admission of the highly prejudicial evidence of Borders’ prior sex offense against S.G. under RCW 10.58.090 materially affected the outcome of the trial. Gresham, 173 Wn.2d at 433-34. We reverse and remand for further proceedings.³

WE CONCUR:



² (Internal quotation marks and citation omitted.)

³ Accordingly, we need not address the other issues Borders raises on appeal.

