

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	DIVISION ONE
)	
Respondent,)	No. 66926-5-I
)	
v.)	
)	
JERRY DEAN SHIRK,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: July 16, 2012
_____)	

Dwyer, J. — Jerry Shirk was charged with two counts of child molestation in the first degree based upon incidents involving his step-granddaughter. The State sought to introduce the testimony of Shirk’s daughter regarding multiple incidents of sexual molestation committed by Shirk against her when she was a child. The trial court admitted this evidence pursuant to both RCW 10.58.090 and Evidence Rule (ER) 404(b). Shirk was convicted as charged.

Our Supreme Court thereafter ruled that RCW 10.58.090 violates the separation of powers doctrine and, thus, is unconstitutional.¹ However, here, the trial court also admitted the evidence pursuant to ER 404(b), determining that Shirk’s daughter’s testimony was admissible to show a common scheme or plan. Because the trial court properly admitted the evidence pursuant to ER 404(b), and because Shirk does not contend that the evidence was used for any

¹ State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2012).

purpose other than that allowed for ER 404(b) evidence, we affirm.

I

Based upon allegations that he had molested his step-granddaughter, K.M.D., Shirk was charged with two counts of child molestation in the first degree. The State alleged that the first incident had occurred when Shirk “was in bed with K.M.D. at his home after a sleepover one early morning.” On this occasion, Shirk allegedly “pulled down [K.M.D.’s] pants and rubbed his bare penis between her legs.” No one else was in the bedroom when the molestation occurred. Shirk allegedly told K.M.D. “to keep it a secret.” The second incident allegedly involved Shirk “grabbing K.M.D.’s rear end under her clothes and shaking it while she was in her bathing suit at his home.” Both incidents occurred when K.M.D. was seven or eight years old.

Pursuant to both RCW 10.58.090 and ER 404(b), the State moved to introduce evidence of prior sexual misconduct by Shirk against his biological daughter, S.S. The State contended that Shirk had repeatedly molested the daughter, now an adult, when she was a child. From the time that the daughter was six years old until she was twelve, Shirk would allegedly “go into [the daughter’s] bedroom at bedtime when no one else was in the room and fondle her breasts and vagina under her nightgown or pajamas.” He would also allegedly “pull his penis out of his pants and rub it on [his daughter].” Shirk was not alleged to have “penetrated her vaginally, anally, or orally. He then would

tell [the daughter] to keep the abuse a secret.” In 1986, Shirk pleaded “no contest” to sexual battery in Lucas County, Ohio based upon these allegations.

The trial court admitted the evidence of prior sexual misconduct pursuant to both ER 404(b) and RCW 10.58.090. The trial court concluded that “[t]he prior molestation incidents involving [the daughter] in Ohio in the 1970s and 1980s are admissible under ER 404(b) as part of [Shirk’s] common scheme and plan to sexually abuse young girls under his care.” The court further determined that Shirk’s abuse of K.M.D. and his daughter involved “markedly similar acts of misconduct against similar victims under similar circumstances.” The trial court additionally determined that “the probative value of the evidence outweighs its prejudicial effect.” Finally, the trial court found by a preponderance of the evidence that Shirk’s molestation of his daughter had actually occurred.

Following a jury trial at which the daughter testified regarding the prior sexual misconduct, Shirk was convicted as charged of molesting K.M.D.

He appeals.

II

Shirk contends that the trial court erred by admitting his daughter’s testimony pursuant to RCW 10.58.090, which allowed the admission of evidence of prior sexual misconduct to be introduced as propensity evidence. See RCW 10.58.090.² Our Supreme Court recently ruled that RCW 10.58.090 is

² RCW 10.58.090(1) provides that “[i]n 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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unconstitutional. State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2012).

Accordingly, the trial court's admission of the evidence pursuant to that rule was erroneous.

Nevertheless, the trial court also determined that the evidence was admissible pursuant to ER 404(b), which provides an alternative basis for admission, for the purpose of demonstrating a common scheme or plan. Because the daughter's testimony was properly admitted pursuant to this rule, and because Shirk does not contend that the evidence, once admitted, was used for improper purposes at trial, we affirm Shirk's convictions.

ER 404(b)³ categorically bars the admission of evidence of prior misconduct "for the purpose of proving a person's character and showing that the person acted in conformity with that character." Gresham, 173 Wn.2d at 420. However, such evidence may be properly admitted for other purposes. Gresham, 173 Wn.2d at 421. "One proper purpose for admission of evidence of prior misconduct is to show the existence of a common scheme or plan." Gresham, 173 Wn.2d at 421 (citing State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003)). A common scheme or plan "may be established by evidence that the Defendant committed markedly similar acts of misconduct against similar victims under similar circumstances." State v. Lough, 125 Wn.2d 847, 852, 889

³ 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 proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

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P.2d 487 (1995). In such circumstances, the evidence is admissible “because it is not an effort to prove the *character* of the defendant”; rather, “it is offered to show that the defendant has developed a plan and has again put that particular plan into action.” Gresham, 173 Wn.2d at 422. Although “the prior act and charged crime must be markedly and substantially similar, the commonality need not be ‘a unique method of committing the crime.’” Gresham, 173 Wn.2d at 422 (quoting DeVincentis, 150 Wn.2d at 21).

Evidence of prior misconduct is properly admitted where “the prior acts are (1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial.” Lough, 125 Wn.2d at 852. Where the trial court correctly interprets the rules of evidence, our review is for abuse of discretion. Gresham, 173 Wn.2d at 422.

Before admitting evidence of Shirk’s prior sexual misconduct as evidence of a “common scheme and plan to sexually abuse young girls under his care,” the trial court found, by a preponderance of the evidence, that the molestation allegedly committed against his daughter had actually occurred and that the prior misconduct and the alleged molestation of K.M.D. were “markedly similar acts of misconduct against similar victims under similar circumstances.” Numerous similarities between the molestation of the daughter and the allegations regarding K.M.D. demonstrate the existence of a common scheme or

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plan, including that, in each case, the victims were female children of similar age who were in Shirk's care, the molestation included touching of the victims under their clothing and with Shirk's bare penis, and Shirk appealed to his victims to keep the abuse "a secret." Moreover, in neither case was Shirk alleged to have penetrated his victim orally, vaginally, or anally.

The molestation of the daughter and the alleged abuse of K.M.D. include "such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations." DeVincentis, 150 Wn.2d at 19 (quoting Lough, 125 Wn.2d at 860). Based upon these similarities, a reasonable jury could find "that the instances are naturally to be explained as 'individual manifestations' of the same plan." Gresham, 173 Wn.2d at 423 (quoting Lough, 125 Wn.2d at 860). Accordingly, the trial court did not err by determining that the daughter's testimony regarding Shirk's prior sexual misconduct was admissible for the purpose of demonstrating a common scheme or plan. See Gresham, 173 Wn.2d at 420-23; DeVincentis, 150 Wn.2d at 21-22; State v. Sexsmith, 138 Wn. App. 497, 504-05, 157 P.3d 901 (2007) (holding that, in a child molestation prosecution, the testimony of the defendant's adult daughter regarding acts of sexual abuse committed against her when she was a child was admissible to show a common scheme or plan).

Prior to admitting the daughter's testimony, the trial court also determined

that the probative value of this evidence outweighed its prejudicial effect. “The principal factor affecting the probative value of the evidence of the defendant’s prior misconduct is the tendency of that evidence to demonstrate the existence of a common design or plan.” Lough, 125 Wn.2d at 863. “Generally, courts will find that probative value is substantial in cases where there is very little proof that sexual abuse has occurred, particularly where the only other evidence is the testimony of the child victim.” Sexsmith, 138 Wn. App. at 506. Based upon the similarities between the molestation of the daughter and the offense charged herein, the tendency of the daughter’s testimony to demonstrate the existence of a common scheme or plan is strong. Moreover, any prejudicial effect was lessened by the limiting instruction issued by the trial court. This instruction, proposed by Shirk, limited the jury’s use of the daughter’s testimony. The court did not abuse its discretion by determining that the probative value of the evidence outweighed its prejudicial effect. Sexsmith, 138 Wn. App. at 506 (recognizing that we review for abuse of discretion a trial court’s balancing of probative value against prejudicial effect).

The trial court’s admission of evidence of Shirk’s prior sexual misconduct pursuant to RCW 10.58.090 was erroneous, given our Supreme Court’s subsequent determination that the statute is unconstitutional. See Gresham, 173 Wn.2d at 432. However, the trial court properly admitted the daughter’s testimony pursuant to ER 404(b) for the purpose of showing a common scheme

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or plan. Because Shirk does not assert that the daughter's testimony was used for an improper purpose at trial, we affirm his convictions.

Affirmed.

Deuy, J.

We concur:

Becker, J.

Appelwick, J.