

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,) No. 67194-4-I
)
 Respondent,) DIVISION ONE
)
 v.) UNPUBLISHED OPINION
)
 FREDERICK J. WILLIAMS,)
)
 Appellant.) FILED: December 17, 2012

Grosse, J. — In the consolidated cases of State v. Gresham and State v. Scherner, our state Supreme Court held that RCW 10.58.090, allowing admission of evidence of prior sex offenses in a sex offense prosecution, is unconstitutional.¹ Thus, the trial court’s admission of a prior sex offense under this statute was error. And when, as here, the trial court also admitted the prior offense under ER 404(b) but failed to give a limiting instruction and the untainted evidence of guilt was not overwhelming, admission of the prior offense amounts to reversible error. Accordingly, we reverse.

FACTS

The State charged Frederick Williams with multiple counts of rape of a child and child molestation alleged to have been committed against his nieces, E.W. and M.W., during 1999 to 2003 and 2006 to 2008. Williams was a registered sex offender at the time, having pleaded guilty in 1991 to a charge of first degree rape of a child, committed against his five-year-old niece.

Following his release from prison on the child rape charge, Williams lived in a trailer on a property on Blaine Road where his brother Donald Williams (Don) also lived

¹ 173 Wn.2d 405, 432, 269 P.3d 207 (2012).

with his wife, their son R.W., and two daughters M.W. and E.W. In November 2005, Don and his family were forced to vacate the Blaine Road property and moved in with his sister briefly. The sister eventually asked them to leave and in February 2006, the family moved in with Williams for a few weeks and lived in his trailer, which he had moved to Peace Portal Way. The family then moved into a house on F Street, where the family was still living at the time of trial.

The current charges arose when in October 2009, the Blaine police received a referral from Child Protective Services (CPS) involving M.W. According to the referral, M.W. had disclosed to a friend that her uncle had been touching her inappropriately and the friend told the school counselor. Officer Jonathan Landis then met with a CPS worker at M.W.'s high school and they interviewed the school counselor and M.W. M.W. disclosed that Williams had sexually abused her. Officer Landis also interviewed M.W.'s older sister, E.W., who similarly disclosed that she had been abused by Williams.

After the interviews, police arrested Williams at his trailer and told him he was going to be charged with rape of a child. Williams initially denied any wrongdoing, but when he was later taken to the police station and informed that the charges involved M.W. and E.W., Williams broke down in front of Officer Landis and asked him to shoot him or give him his gun so he could shoot himself.

The State charged Williams with two counts of second degree child molestation alleged to have occurred from September 2006 through August 2008 with M.W. (counts I and II); two counts of second degree rape of a child alleged to have occurred

September 2006 through August 2008 with M.W. (counts III and IV); five counts of first degree rape of a child alleged to have occurred from February 1999 through February 2003 with E.W. (counts V, VI, VII, VIII, and IX) and five counts of first degree molestation alleged to have occurred from February 1999 through February 2003 with E.W. (counts X, XI, XII, XIII, XIV).

At trial, E.W. testified that Williams started abusing her when she was eight years old after he moved into the trailer on the Blaine Road property. She testified that it started by Williams offering to give her money if she would take off her clothes for him and then it progressed to kissing and touching. She said that he eventually digitally and orally penetrated her vaginally and told her not to tell anyone. She further testified that he took pictures of her vagina and showed her pictures on the computer of naked girls.

M.W. testified that the abuse started when she was in sixth grade and occurred at the house on F Street. She testified that the first incident involved Williams removing her clothes, touching her breasts and vagina, digitally penetrating her vagina, and attempting to penetrate her vagina with his penis. He also took a video camera that was connected to his television and pointed it at her vagina so she could see what it looked like, but told her he was not filming anything because that part of the camera did not work. She also testified about another incident when she was almost 13, when she was giving his dog a bath at her house. She said she called for help to get the dog into the bathtub and Williams came to help her. Williams then closed the door, pulled her top down, and fondled her breasts. She testified about several other incidents

when Williams fondled her breasts and touched her vagina while she was in his car and at home when her parents were not there.

Don testified that after Williams was released from the Department of Corrections' (DOC) supervision on his child rape conviction, Don allowed him to live in a trailer on the Blaine Road property. Don said he did so because Williams was his younger brother who had no place else to go, Williams promised it would never happen again, and Don felt he could keep an eye on him if he lived close by. Don also told his children about Williams' sex offense and told Williams in front of his children that if he were to touch his children, he would kill him, and that the children were to report to him if anything happened. He also told Williams that he was not allowed in the family house if he, his wife, or son were not in the house and that he was not to be around the children alone. Don further testified that Williams came to the F Street house frequently, even when he and his wife were not there. Don testified that one time he found Williams sitting on the couch watching television with M.W. and E.W. when he got home and another time he found Williams and M.W. sitting on the couch with a blanket over them. In all, he testified that he found Williams at the house approximately four to five times during 2008 and 2009, when he and his wife were not home.

Williams called as a witness a CPS worker who interviewed the family while they lived with Williams for those few weeks in 2006. The worker had contacted the family because there had been a report about an incident that caused the family to move from the sister's home and in with Williams, who was a registered sex offender. According

to the CPS worker, E.W. told her that she knew her uncle had been in prison but said she was not having any difficulties with him. The worker also testified that Don, his wife, and their son all told her that the girls were never alone with Williams while they were living with him in his trailer. Williams also called another CPS worker to testify about an interview she had with E.W. in 2001. According to this worker, E.W. denied being afraid at home, but admitted that her parents yelled and that made her sad.

Williams also called as an expert witness Dr. John Yuille, a forensic psychologist. He testified that the interview Officer Landis conducted with E.W. and M.W. at the high school was improper because many questions were overly suggestive and could have affected the girls' memories. Williams also elicited evidence that M.W.'s disclosure arose only after a friend disclosed to M.W. that she had been sexually abused. Williams did not testify.

The jury also heard evidence about Williams' prior conviction for child rape involving his other niece. The trial court admitted this evidence under RCW 10.58.090 and under ER 404(b), as evidence of a common scheme or plan. The trial court instructed the jury that "evidence of the defendant's commission of another sex offense may be considered for its bearing on any matter to which it is relevant," but did not give a limiting instruction that under ER 404(b) it could not be used as propensity evidence.

During trial, upon defense motion and agreement by the State, four counts (counts IV, VIII, IX and XIV) were dismissed for insufficient evidence. The jury found Williams guilty of the remaining counts. The trial court determined that Williams was a persistent offender and imposed a sentence of life without the possibility of parole on

counts III, V, VI, VII, X, XI, XII and XIII and a standard range sentence of 116 months' confinement on counts I and II.

ANALYSIS

Williams contends that the trial court erred by admitting evidence of his prior sex offense under RCW 10.58.090. He further contends that the trial court's admission of it under ER 404(b) was also error and even if properly admitted under ER 404(b), the trial court's failure to give a proper limiting instruction was error. We agree.

In Gresham, the Supreme Court determined that RCW 10.58.090 violates the separation of powers doctrine and is therefore unconstitutional. Accordingly, the trial court erred by admitting Williams' prior sex offense under this statute. The trial court further erred by admitting it as evidence of a common scheme or plan under ER 404(b) and allowing the jury to consider it as propensity evidence.

As Williams correctly notes, when the court admits evidence of prior acts under ER 404(b), the defendant is entitled to a limiting instruction that tells the jury for what purpose it may properly consider the evidence of prior misconduct.² An adequate 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 as a basis to conclude that the defendant has a particular character and has acted in conformity with that character.³ Williams contends that not only was this instruction not given here to limit the jury's consideration of the evidence, the instruction relating to RCW 10.58.090 that was given allowed the jury to consider Williams' prior sex offense "for its bearing on

² State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

³ Gresham, 173 Wn.2d at 423-24.

any matter to which it is relevant,” which included whether Williams had a propensity to molest young girls. Thus, he contends that absent a proper limiting instruction, admitting the prior conviction under ER 404(b) was error.

In Scherner, the trial court admitted evidence of prior child molestation offenses under both the statute and ER 404(b) to show a common scheme or plan. Scherner proposed an ER 404(b) limiting instruction, but the trial court refused to give it because it was an incorrect statement of the law. On appeal, Scherner argued that it was reversible error to admit the evidence to show a common scheme or plan without a limiting instruction. The court concluded that the trial court had a duty to give a correct limiting instruction because Scherner proposed a limiting instruction, albeit a flawed instruction.⁴ But the court held that failure to give a limiting instruction in that case was harmless error, concluding that “the remaining overwhelming evidence of Scherner’s guilt persuades us that the outcome of his trial would not have been materially affected.”⁵ The court noted that even if the jury had been prohibited from considering the prior sex offense, the jury still had before it the detailed testimony of the victim, evidence of Scherner’s flight from prosecution, Scherner’s credibility in light of his trial testimony, and “most damning” of all, evidence of a recorded telephone conversation with the victim, in which Scherner essentially admitted to the molestation.⁶

While the State notes that Williams failed to request an ER 404(b) limiting instruction, such an instruction was unnecessary at the time as this was an alternative basis for admission of the prior conviction. The court had already admitted it under the

⁴ Gresham, 173 Wn.2d at 424.

⁵ Gresham, 173 Wn.2d at 425.

⁶ Gresham, 173 Wn.2d at 425.

statute and gave the appropriate instruction about its admission under the statute.

The State nonetheless contends that the failure to give an ER 404(b) limiting instruction here was harmless error because the jury was given another instruction that sufficiently cautioned the jury against placing too much weight on the prior misconduct evidence. The instruction to which the State refers is the one discussing the statutory basis for admission of the prior sex offense which, as noted above, allows the jury to consider it “for its bearing on any matter to which it is relevant.” The State points to additional language in that instruction that evidence of the prior offense “on its own is not sufficient to prove the defendant guilty of any crime charged,” and that “[t]he defendant is not on trial for any act, conduct, or offense not charged in the Information,” and argues that this instruction, coupled with the prosecutor’s argument that the prior misconduct was relevant as evidence of a common scheme or plan, sufficiently informed the jury that it was offered for this limited purpose. We disagree. As discussed above, by allowing the jury to consider this evidence “for its bearing on any matter to which it is relevant,” this instruction impermissibly permitted the jury to consider it as evidence of Williams’ propensity to act in conformity with this past misconduct.

Thus, we turn to the harmless error analysis, which requires us to determine whether “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.”⁷ In Gresham, the court concluded there was a reasonable probability that absent the “highly prejudicial evidence” of

⁷ Gresham, 173 Wn.2d at 433 (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)).

Gresham's prior sex offense, the outcome of trial would have been different.⁸ In that case, excluding the erroneously admitted evidence of a prior sex offense left the remaining evidence of the child victim's testimony about the abuse and witnesses' corroboration of the defendant's opportunity to commit the alleged acts.

Here, we cannot say that the admission of Williams' prior child rape conviction, in conjunction with an instruction allowing the jury to consider the evidence for propensity purposes, was harmless. As in Gresham, absent evidence of the highly prejudicial evidence of the prior conviction, there is a reasonable probability that the outcome of the trial would have been different. The evidence of guilt presented at trial hinged on witness credibility. Williams denied the allegations and the only direct evidence of his guilt was the testimony of two child victims about events that occurred several years ago. While such evidence was sufficient to support Williams' conviction, we cannot say that it amounted to overwhelming evidence of guilt. There were inconsistencies in the girls' testimony as well as conflicts in testimony about Williams' access to the girls and the motivation of the initial disclosure. The lack of overwhelming evidence of guilt is further demonstrated by the dismissal of several counts for insufficient evidence. Because the trial court's admission of evidence of the prior child rape conviction under RCW 10.58.090 was not harmless, we reverse. Accordingly, we need not reach the remaining issues raised in Williams' appeal.⁹

⁸ Gresham, 173 Wn.2d at 433.

⁹ Williams also assigns error to the trial court's denial of his motion to sever and the sentence imposed based on the trial court's determination that he was a persistent offender.

Grosse, J

WE CONCUR:

Leach, C. J.

Garvin, J.B.