

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

**DIVISION II**

STATE OF WASHINGTON,

No. 39648-3-II

Respondent,

v.

SEAN P. STOLL,

UNPUBLISHED OPINION

Appellant.

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Hunt, J. – Sean P. Stoll appeals his two convictions for first degree rape of a child. Stoll argues that RCW 10.58.090 violated 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. Conceding that RCW 10.58.090 is unconstitutional, the State nevertheless asks us to consider whether admission of Stoll’s prior conviction was harmless error. Holding that admission of Stoll’s prior conviction was prejudicial, we reverse.

Facts

In August 2008, then nine-year-old SRJ disclosed to her father and “stepmom” that “about six months”<sup>1</sup> earlier her cousin Sean P. Stoll had put “his hands down her pants in the back”<sup>2</sup> and “put his finger in her rear end and told her that it’d help her do the splits ‘cause she

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<sup>1</sup> Verbatim Report of Proceedings (VRP) at 399.

<sup>2</sup> VRP at 434.

was in cheerleading” over the course of a week. Verbatim Report of Proceedings (VRP) at 399. The next month, child abuse investigator Shelly Stratton conducted a forensic interview of SRJ. SRJ told Stratton that the first time Stoll had touched her had been April 24, 2006, and that Stoll would wake her up between 4:37 and 5:00 a.m. to touch her as part of a routine that lasted for a week. Also in September 2008, advanced registered nurse practitioner Laurie Davis, examined SRJ at a sexual assault clinic. Her physical examination of SRJ did not reveal physical signs of rape.

The State charged Stoll with two counts of first degree child rape for acts from April 24, 2006, to March 31, 2007. Pretrial, after weighing the statutorily prescribed factors, the trial court ruled that Stoll’s prior conviction for communication with a minor for immoral purposes was admissible under RCW 10.58.090.<sup>3</sup> The key factor in the trial court’s admitting Stoll’s prior offense was the necessity for this evidence because

there [was] *no other evidence beyond what the young girl has said* [in the present case]. There’s no scientific or forensic testimony that would also come in in establishing how this occurred.

VRP at 378 (emphasis added).

At trial, the trial court admitted Stoll’s Statement of Juvenile on Plea of Guilty, in which

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<sup>3</sup> In weighing the statutorily prescribed factors under RCW 10.58.090(6), the trial court considered the dissimilarities between the prior act and the charged crime, the presence or lack of intervening circumstances, and the necessity of the evidence beyond the testimony already offered at trial. In addition to focusing on the “necessity” factor, the trial court noted that (1) at the time of the prior offense, Stoll had been 17 or 18 years old and the victim had been 12 years old, compared to the present charge that had allegedly occurred while Stoll was in his 20s with a 6- or 7-year-old victim; and (2) Stoll had been dating the victim of the prior offense, compared to in the present case, where he was living at the victim’s house.

Stoll had stated that, when he was 17 years old, he had sexual intercourse with his 12-year-old girlfriend. Before this testimony about Stoll's prior conviction, the trial court instructed the jury that it could consider Stoll's prior conviction "for its bearing on any matter to which it's relevant," while admonishing that the prior offense on its own was not sufficient to prove Stoll's guilt and that he was not on trial for his prior conviction. VRP at 629. Stoll did not object to this instruction.

Then fourth-grader SRJ testified that Stoll had inappropriately touched her on several occasions for about a week, but she could not remember when this touching had occurred. On cross-examination, SRJ testified that she did not remember telling anyone about having blood in her urine. None of the State's other multiple witnesses, including SRJ's relatives, had seen Stoll touch SRJ inappropriately.

SRJ's father testified about his relationship with Stoll, who lived with the family occasionally, and SRJ's disclosure to him in August 2008. On cross-examination he admitted that SRJ's reputation for truthfulness was "[q]uestionable." VRP at 402.

Davis testified that, although her physical examination of SRJ had not revealed physical signs of rape, only five percent or fewer of sexually abused women show physical signs during examination because of the tissue's healing nature. Davis also related that, during the examination, SRJ said she had pain and blood in her urine "for a couple days." VRP at 606.

Before closing argument, the trial court repeated its earlier limiting instruction that Stoll's prior conviction alone was not sufficient to prove his guilt. In closing argument, Stoll highlighted SRJ's "reputation for untruthfulness" and "inconsistencies in [SRJ's] stories." VRP at 665, 669.

The jury found Stoll guilty of both counts of first degree child rape. Stoll appeals.<sup>4</sup>

#### ANALYSIS

Stoll argues that (1) RCW 10.58.090 violates the separation of powers doctrine; (2) his counsel's failure to properly object to the admission of evidence of his prior sex offense conviction prejudiced him; (3) the trial court's limiting instruction about his prior conviction constituted a directed verdict and a comment on the evidence; (4) his counsel's failure to object to the trial court's limiting instructions prejudiced him; (5) the trial court admitted testimony that constituted impermissible vouching for the victim's credibility; (6) his counsel failed to object to a juror; and (7) his counsel failed "to ask to impeach S.R.J." SAG.

The State concedes that RCW 10.58.090 is unconstitutional under the Supreme Court's recent decision in *State v. Gresham*<sup>5</sup>, and that Stoll's prior conviction would not be admissible for any ER 404(b) purpose. We accept the State's concession. We next address the State's request that we consider whether this error was harmless. As the Supreme Court noted, "When the support of 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. The State concedes that mention of a prior sex offense conviction is highly prejudicial in a sex offense case.

As Stoll correctly notes, the trial court's RCW 10.58.090 instruction allowed the jury to use his prior conviction for any purpose relevant, including, impliedly, whether Stoll had a

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<sup>4</sup> We stayed *Stoll's* appeal until our Supreme Court decided the constitutionality of RCW 10.58.090 in *State v. Gresham*, recently issued in 173 Wn.2d 405, 269 P.3d 207 (2012). At our request, the parties submitted supplemental briefs addressing the effect of *Gresham* on this appeal.

<sup>5</sup> 173 Wn.2d 405, 269 P.3d 207 (2012).

propensity to commit the crime, in violation of ER 404(b).<sup>6</sup> We review evidence admitted in violation of ER 404(b) under the lesser standard of non-constitutional harmless error. *Gresham*, 173 Wn.2d at 433. Non-constitutional error occurs when “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980).

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). Because Stoll’s prior conviction for communication with a minor for immoral purposes was admitted in a child rape case, the potential prejudicial effect was high. Here, the potential for prejudice was acutely high in light of the following: (1) The State’s case was supported only by young SRJ’s own testimony, whose dates were contradictory, and others’ accusations that Stoll had the opportunity to commit the offenses; (2) there were no other eyewitnesses or physical evidence; (3) SRJ’s father testified that she had a reputation for untruthfulness;<sup>7</sup> and (4) the trial court gave the aforementioned RCW 10.58.090 instruction that the jury could consider Stoll’s prior sex conviction for any relevant purpose.

Under these circumstances, we cannot conclude that admission of Stoll’s prior sex offense conviction was 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

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<sup>6</sup> We note that the trial in the case occurred *before* the Supreme Court held this statute, and by implication its implementing jury instruction, unconstitutional.

<sup>7</sup> VRP at 402.

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evidence presented was the victim's testimony and parent's corroboration that the defendant had the opportunity to commit acts). Holding that the RCW 10.58.090 is unconstitutional under *Gresham* and that the admission of Stoll's prior conviction prejudiced him, we reverse.

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.

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Hunt, J.

We concur:

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Worswick, C.J.

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Van Deren, J.