IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. BERNARD RIALS, Appellant. In re Personal Restraint Petition of: BERNARD RIALS, Petitioner.	)	No. 27962-6-III Consolidated with No. 30304-7-III UNPUBLISHED OPINION

Brown, J. • In 2010, we stayed Bernard Rials' appeal concerning his first degree child molestation conviction to await *State v. Gresham*, 173 Wn.2d 405, 269 P.3d 207 (2012). Mr. Rials contends the trial court erred in admitting testimony of a prior molestation under RCW 10.58.090. The *Gresham* court decided that RCW 10.58.090 is

unconstitutional and the nonconstitutional harmless error standard applies. Applying *Gresham* to our facts, the trial court erred in admitting prior molestation evidence and we cannot say the admission of the prior molestation was harmless. Thus, we reverse Mr. Rials' conviction. Therefore, we do not reach his other issues presented by his counsel or in his pro se statement of additional grounds for review. Because we reverse his conviction, we necessarily dismiss his consolidated personal restraint petition (PRP) as moot.

FACTS

Angel Rettig met Mr. Rials in 2004 through drug associations. In April 2004, she was arrested. Upon release, Ms. Rettig's seven-year-old daughter, M.R., told her Mr. Rials had touched M.R. between her legs one night while she helped him clean his car. Ms. Rettig did not report the incident immediately because she was using drugs and had outstanding warrants. Soon after, M.R. was placed in foster care and a social worker reported the above incident. Mr. Rials was sanctioned because at the time, he was on community supervision. He was ordered to complete a drug/alcohol treatment program in the Benton County jail. Chemical dependency professional, Manuel Valenzuela, interviewed Mr. Rials in June 2005. Mr. Rials gave admissions challenged by Mr. Rials that did not specifically tie him to M.R. that we do not need to further elaborate upon.

On August 23, 2005, the State charged Mr. Rials with first degree child

molestation. Mr. Rials raised a public trial issue, which we do elaborate upon because of another dispositive issue, that the facts next raise.

The State presented evidence of Mr. Rials' 1996 first degree child molestation conviction that the court admitted pursuant to RCW 10.58.090 over a defense objection. The 1996 victim testified that when she was seven years old, Mr. Rials climbed into her bed while she was sleeping, told her to be quiet, removed her clothes, touched her nipples and penetrated her vagina with his hand. She ran from her room and told her mother, who removed Mr. Rials from the home. The mother explained she had met Mr. Rials at a bar, he came to her home that night with a group of other people, and after she went to bed, Mr. Rials returned to the home and molested her daughter.

Defense expert and child psychologist, Dr. Gregory Wilson, testified about problems with M.R.'s interview, including no audio or video recording, leading questions, the detective introduced some concepts to the child rather than having an open-ended narrative, and no clarification of the child's perception of time. The court denied Mr. Rials' pretrial request to allow Dr. Wilson to conduct a separate interview with M.R. (Mr. Rials already interviewed the child while acting pro se). Dr. Wilson was, however, permitted to be in the courtroom during M.R.'s testimony and consult with defense counsel before cross-examination.

The court then instructed the jury that it could consider Mr. Rials' previous

conviction for purposes of the current charge. The following instruction was given over defense objection:

> 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 at 208 (Jury Instruction 10).

The jury found Mr. Rials guilty as charged. The court sentenced him to life in prison without possibility of release since this incident constituted his second qualifying sex offense. Mr. Rials appealed.

ANALYSIS

The issue is whether the trial court constitutionally erred in allowing prior molestation evidence under RCW 10.58.090. This question was answered for Mr. Rials in the consolidated cases of *State v. Gresham* and *State v. Scherner*. There, the Supreme Court held RCW 10.58.090 violates the separation of powers doctrine and is unconstitutional, and the nonconstitutional harmless error standard applies. *Gresham*,

173 Wn.2d at 432. In *Gresham*, the court reasoned the admission of the "highly prejudicial" evidence of Mr. Gresham's prior sexual assault conviction under RCW 10.58.090 was not harmless and reversed. *Id.* 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. Applying *Gresham*, we hold the trial court erred in allowing evidence under RCW 10.58.090.

The remaining inquiry is whether the error was harmless. If a reasonable probability exists of an error materially affecting the trial outcome, then the error is not harmless. *Gresham*, 173 Wn.2d at 433 (citing *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). In *Gresham*, all that remained after excluding the erroneously admitted evidence was "[the child's] testimony that Gresham had molested her and her parents' corroboration that Gresham had had the opportunity to do so, along with the investigating officer's testimony. There were no eyewitnesses to the alleged incidents of molestation." *Id.* at 433. The court held, "[T]here is a reasonable probability that absent this highly prejudicial evidence of Gresham's prior sex offense . . . the jury's verdict would have been materially affected." *Id.* at 433-34. The court held, "[W]e cannot say that the erroneous admission of the evidence of Gresham's prior conviction was harmless error." *Id.* at 434.

Our facts are similar to those in Mr. Gresham's case. The sole direct evidence

against Mr. Rials was M.R.'s testimony. Dr. Wilson testified about problems with M.R.'s interview as detailed in the facts. Mr. Rials admitted during a psychological assessment that he had touched young girls, but did not specifically link himself to the incident with M.R. The strength of the State's case against Mr. Rials centered on the prior conviction. By comparison, in *Scherner*, the defendant confessed to the crime in a recorded conversation with the victim, the victim's testimony about the assault was very detailed, and Mr. Scherner had attempted to escape prosecution by absconding to Florida with a large amount of cash. The court held, "[T]he remaining overwhelming evidence of Scherner's guilt persuades us that the outcome of his trial would not have been materially affected." *Gresham*, 173 Wn.2d at 425. Because the RCW 10.58.090 testimony admitted against Mr. Rials was not harmless, we reverse his conviction.

Because this issue is dispositive, we do not reach the other issues raised by Mr. Rials through counsel and pro se. *See State v. Young*, 152 Wn. App. 186, 188 n.3, 216 P.3d 449 (2009) (courts need not reach additional issues when holding on other grounds is dispositive). Finally, Mr. Rials' PRP is now moot and is dismissed.

Reversed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Brown, J.

WE CONCUR:

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Siddoway, A.C.J.

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Sweeney, J.