

02669-8

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NO. 62669-8-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RICKY HORNE,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY RAMSDELL

SUPPLEMENTAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>SUPPLEMENTAL ISSUE PRESENTED</u>	1
B. <u>SUPPLEMENTAL STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	2
1. THE ADMISSION OF HORNE'S PRIOR RAPE WAS HARMLESS	2
D. <u>CONCLUSION</u>	7

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Carleton, 82 Wn. App. 680,
919 P.2d 128 (1996)..... 2

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

State v. Sexsmith, 138 Wn. App. 497,
157 P.3d 901 (2007)..... 3

Statutes

Washington State:

RCW 10.58.090..... 1, 2

Rules and Regulations

Washington State:

ER 404 2

A. SUPPLEMENTAL ISSUE PRESENTED

1. Whether the admission of defendant Ricky Horne's prior sex offense was harmless.

B. SUPPLEMENTAL STATEMENT OF THE CASE

The substantive and procedural facts are set forth in the Brief of Respondent. In October of 2008, Horne was convicted of the second-degree rape of L.M. At trial, pursuant to RCW 10.58.090, the trial court admitted evidence of Horne's prior rape of another woman. On May 3, 2010, this Court affirmed Horne's conviction.

Horne's petition for review was stayed pending the Washington Supreme Court's decision in State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2012). In January of 2012, the Supreme Court issued Gresham and held that RCW 10.58.090 was unconstitutional. The Supreme Court then remanded Horne's case to this Court for reconsideration in light of Gresham. This Court has now ordered supplemental briefing on the impact of Gresham on the issues in this case.

C. ARGUMENT

1. THE ADMISSION OF HORNE'S PRIOR RAPE WAS HARMLESS.

In light of Gresham, the evidence of Horne's prior rape was improperly admitted.¹ In Gresham, the Washington Supreme Court held that the erroneous admission of evidence under RCW 10.58.090 must be analyzed under the lesser standard for nonconstitutional error. 173 Wn.2d at 433. While the Supreme Court acknowledged that evidence of a prior sex offense is highly prejudicial, it reaffirmed that the erroneous admission of such evidence requires reversal only if it is reasonably probable that the outcome of the trial would have been materially different if the error had not occurred. Id.

In State v. Carleton, 82 Wn. App. 680, 687, 919 P.2d 128 (1996), this Court has held that the erroneous admission under ER 404(b) of the defendant's commission of another sex crime was harmless error. In so holding, the Court examined the strength of the evidence that the defendant committed the charged offense.

¹ At Horne's first trial (which ended in a mistrial), the trial judge held that evidence of the prior rape was not admissible under ER 404(b). 1RP 62-65. At the second trial, the State asked the court to reconsider admissibility under ER 404(b), but the trial court admitted the evidence only under RCW 10.58.090 and did not address whether the evidence was also admissible under ER 404(b). CP 169-74; 7RP 24-25, 63-65.

Id.; see also State v. Sexsmith, 138 Wn. App. 497, 506, 157 P.3d 901 (2007) (holding that any error in admitting evidence that defendant had molested another child was harmless given the untainted evidence of the defendant's guilt).

In this case, in light of the strong evidence of Horne's guilt, this Court can conclude that it is not reasonably probable that the verdict would have been different if evidence of Horne's prior rape had not been admitted. The evidence overwhelmingly established that Horne had sexual intercourse with L.M. DNA analysis established that Horne's semen was on L.M.'s vaginal and anal swabs. 11RP 53-65. At trial, Horne admitted that he had intercourse with L.M., but he claimed that it was consensual. 10RP 37; 13RP 11-21, 102.

Accordingly, the only contested issue in this case was whether L.M. *consented* to sexual intercourse with Horne. Horne claimed that L.M. initiated sex, that he initially resisted her, and that he ultimately gave in. 13RP 1-21. Horne's consent defense was rebutted by the significant and contemporaneous injuries to L.M. and the circumstances behind L.M.'s disclosure of the rape.

After the rape, L.M.'s left eye was purple and swollen shut. 10RP 90; 12RP 43-45, 132; Ex. 5 and 10. She had scratches on

her back and dirt on her face, hands, and ears. 12RP 43-49.

There was black dirt all over her vulva. 12RP 63. She was missing her upper dentures. 10RP 98; 11RP 118-19, 140. Two witnesses confirmed that before L.M. walked off with Horne, she did not have these injuries and she still had her upper dentures. 11RP 104-12, 131-34.

The circumstances behind L.M.'s disclosure were completely inconsistent with an effort to falsely accuse Horne of rape. After the rape, she went back to her Morrison Hotel apartment where her friend Darlene Fields was waiting. 11RP 135-36; 12RP 124-25. Fields could tell that L.M. had been crying, saw the black eye and asked her what was wrong. 11RP 136-37. Fields had to repeatedly ask L.M. what had happened; L.M. did not want to say. 11RP 136-37. L.M. slowly disclosed that Horne had given her the black eye and raped her. 11RP 137-39; 12RP 125. Fields told L.M. that she had to tell the police and led her to Martha Roberts, a Morrison Hotel counselor. 10RP 142-44; 11RP 141-42. According to Roberts, L.M. appeared sad and visibly shaken. 10RP 148-50. When the police arrived, L.M. was still shaking and crying. 10RP 89.

At trial, Horne could not even suggest an alternate cause for L.M.'s injuries, or why she would have fabricated the rape allegation. In fact, he insisted that she initiated sexual intercourse. 13RP 19-22. He further claimed that, hours after having sex with her, she approached him in Pioneer Square and showed him her black eye, and a few minutes later the police arrested him. 13RP 24-25. In Horne's testimony and in the defense counsel's closing argument, no explanation was offered as to why L.M. would falsely accuse Horne. 13RP 101-16.

Horne will likely argue that the fact of the jury's deadlock at the first trial establishes that the admission of the prior rape evidence was not harmless. Such an argument assumes that the presentation of evidence and argument were otherwise identical at the two trials. However, in any retrial, the parties present their cases somewhat differently, each having perceived vulnerabilities in each other's case during the original trial. For example, at the first trial, Horne offered an explanation for L.M.'s injuries; he testified that L.M. told him that two guys jumped her, beat her up, and took her cell phone. 5RP 533-34. At the second trial, the prosecutor made a hearsay objection before Horne could so testify, and the jury did not hear this testimony. 11RP 24. In addition, at

the second trial, the State impeached Horne with inconsistencies between his testimony at the first trial and his testimony at the second trial. 13RP 47-55.

Moreover, at the second trial, in rebuttal, the State called a new witness, Horne's Community Corrections Officer, Christopher Ervin, whose testimony provided yet further reason to doubt Horne's credibility. 13RP 81-82. In December of 2007, at a Department of Corrections hearing that was audio-recorded, Horne had talked about L.M. and the rape allegation. CP 152; 13RP 56-60. During his cross-examination at the second trial, Horne acknowledged that at this earlier hearing, he did not mention many of the details about his interactions with L.M., that he testified about at the second trial. 13RP 57-64. In an effort to explain these inconsistencies, Horne claimed that, during the DOC hearing, the taping was stopped and he was told that there were certain things that he could not say. 13RP 60. In rebuttal, the State called CCO Ervin, who testified that the tape recorder was never turned off and that Horne was never instructed that he could not provide his account of the events on the day of the rape. 13RP 83.

This additional evidence was directly relevant to Horne's credibility and provided further reason to reject Horne's claim that

he had consensual sex with L.M. In light of the limited contested issue and the powerful evidence that Horne raped L.M., this Court should conclude that it is not reasonably probable that the outcome of the trial would have been materially different if the error had not occurred.

D. **CONCLUSION**

For the reasons set forth above, the State respectfully requests that this Court affirm Horne's conviction and sentence.

DATED this 2nd day of May, 2012.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David Donnan, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the SUPPLEMENTAL BRIEF OF RESPONDENT, in STATE V. RICKY HORNE, Cause No. 62669-8-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U. Branno
Name
Done in Seattle, Washington

5/2/12
Date