

FILED

MAR 14, 2012

Court of Appeals
Division III
State of Washington

No. 289532

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

DIMITRI REY MANDAPAT, Appellant

SUPPLEMENTAL BRIEF OF APPELLANT

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I. Issue Requested To Briefed

On February 13, 2012, this Court directed appellant to file a supplemental brief addressing the applicability of the Washington Supreme Court's holding in *State v. Gresham*, 269 P.3d 207, 2012 WL 19664.

II. Statement of the Case

The pertinent facts are set forth in Appellant's opening brief. Additional facts are noted in the argument below.

III. Introduction

In its review, the *Gresham* Court consolidated two separate sexual assault cases, *State v. Gresham* and *State v. Sherner*. *State v Gresham*, 269 P.3d 207 (2012). Evidence from previously committed or alleged sex offenses was admitted at trial in both cases.

In the *Gresham* matter, the defendant was charged with four counts of child molestation in the first degree. The trial court admitted evidence of a prior conviction for second- degree assault with sexual motivation pursuant to RCW 10.58.090¹. The trial court

¹ RCW 10.58.090(1) provides in pertinent part: In 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 ER 404(b), if the evidence is not inadmissible pursuant to ER 403.

held the State had not proved the existence of a common scheme or plan and that ER 404(b)² therefore barred admission of the evidence of the prior crime. On review, the Washington Supreme Court held that “[b]ecause RCW 10.58.090 irreconcilably conflicts with ER 404(b) and governs a procedural matter, we hold that its enactment violates the separation of powers doctrine and that the statute is accordingly, unconstitutional.” *Id.* at 209. The Court further found that the admission of evidence of Gresham’s prior conviction was not harmless error, reversing his conviction and remanding for further proceedings.

In the *Sherner* case, the trial court, pursuant to RCW 10.58.090, admitted evidence of prior sex offenses and, alternatively, under ER 404(b) to demonstrate the existence of a common scheme or plan. *Id.* at 211.

The trial court there admitted testimony from four alleged prior victims. The testimony demonstrated that Scherner, an adult male, molested girls between the ages of 5 and 13 years old, who were daughters of family friends. The incidents occurred when

² ER 404(b) provides in full: “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.”

either the family spent the night at Scherner's home or during times when Scherner was on vacation with the family. Similar to the case he was being tried for, Scherner's pattern was to sneak into a room where the child was sleeping and sexually molest her while the rest of the family slept. The incidents spanned many years in one case. *Id.* at 210-11.

On review, the Washington Supreme Court found the evidence of the prior offenses inadmissible under RCW 10.58.090, based on its unconstitutionality. It affirmed the admissibility of the prior offenses under ER 404(b) "common scheme or plan", citing admissibility where "an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes." *Id.* at 214 (internal citation omitted). The reviewing Court also acknowledged the State introduced additional evidence of guilt: an audio recording between the alleged victim and Scherner, in which he not only did not deny the allegations, but acknowledged culpability; as well as evidence that he failed to appear for the original trial date and left the state using a false name and carrying a large amount of cash.

In Mr. Mandapat's case, the juvenile court admitted evidence based on RCW 10.58.090 and alternatively, ER 404(b).

However, the holding in *Scherner* does not resolve the issue here on two grounds: First, the trial court's conclusion of admission of evidence under the "common scheme or plan" provision of ER 404(b) was based on an erroneous view of case law; and second, the admitted evidence was used for an improper purpose.

IV. Argument

1. Alleged Prior Acts Were Inadmissible Under RCW 10.58.090.

Similar to the *Scherner* case, the court here admitted evidence of the alleged acts under RCW 10.58.090 and ER 404(b). The Supreme Court's ruling that RCW 10.58.090 is unconstitutional bars admission of any proposed evidence against Mr. Mandapat on that basis.

2. The Court's Admission Of Evidence Under "Common Scheme Or Plan" Was Based On An Erroneous Understanding Of Case Law.

The *Gresham* court reiterated the proper procedure for understanding and applying ER 404(b). It emphasized the burden lay with the proponent to demonstrate a proper purpose for admission of ER 404(b) evidence and the required analysis the

lower court must engage in before admitting proposed ER 404(b) evidence. *Id.* at 213-14. (internal citations omitted). Prior to the admission of misconduct evidence, the court must: (1) find by a preponderance of the evidence the misconduct occurred, (2) identify the purpose of admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect of the evidence. *Id.* at 213.

In the *Scherner* matter, the trial court undertook the proper analysis. In Mr. Mandapat's case, the extent of the court's ER404(b) analysis is as follows:

"But if we look at *State v. Divicentes*, 150 Wn.2d 11, 2003 case, it talks about sex cases in particular and it says the State need only find -- or the trial court need only find that the prior bad acts show a pattern ... -- or plan of marked similarities to the crime to be admissible.... In our cases here, we have that it didn't happen at all but we also have for two of them that the issue is consent and because the issue is consent there is marked similarity here and there's no denial that it occurred for two of these, but the question is whether it's consent or not. And so I think it's admissible under 404(b) as showing common scheme or plan. So I guess either way we look at it, whether it's under 10.58.090

or 404(b) common scheme or plan, the information is admissible.” 9/18/2009 RP 31,33-34.

The requisite analysis by the court for admission under ER 404(b) is virtually nonexistent here.

Moreover, in Washington case law “common scheme or plan” evidence is demonstrated by a detailed, premeditated scheme that is used repeatedly to perpetrate separate but very similar crimes. *Gresham*, 269 P.3d at 214; *See State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995) (paramedic schemed to use drugs to sedate and rape women); *State v. Baker*, 89 Wn. App. 726, 950 P.2d 486 (1997) (prior acts allowed to show a common plan to sexually assault sleeping children); *State v. Krause*, 82 Wn. App. 688, 919 P.2d 123 (1996) (defendant had a systematic pattern of befriending parents with young boys, whom he groomed and later molested); *State v. DiVincentes*, 150 Wn.2d 11, 74 P.3d 119 (2003) (prior acts admitted to show defendant schemed to meet and create trusting relationship with preteen girls, desensitize them to his nudity, and then molest them.)

In Mr. Mandapat’s case, under Washington case law, there is no demonstrated, premeditated scheme or common plan. Further, unlike the facts in *Scherner*, the State did not introduce any

additional evidence of guilt. And significantly, unlike *Schermer*, a grown man preying on little girls, Mr. Mandapat was a high school boy, dating similar aged girls. Each of the complainants here freely spent time with him and engaged in some consensual teenage sexual activity. The admission of evidence under ER 404(b) in this case was error both because the court did not do a proper analysis and because the court was mistaken about case law as it pertains to ER 404(b) common scheme or plan. The latter amounts to an abuse of discretion in allowing the evidence to be presented.

3. Admitted Evidence Was Used For An Improper Purpose.

The *Gresham* court specifically addressed the limits of ER 404(b):

“ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person’s character and showing that the person acted in conformity with that character.” *Gresham*, 269 P.3d at 213.

Here, the State made quite clear, and the court allowed, introduction of other conduct evidence to “play one off the other and use one in order to find guilty to the other.” 8/24/09 RP 9. Each of the three complainants was an active, unproven case. Mr.

Mandapat had a constitutional right to the presumption of innocence. And, as the court pointed out, “If in fact the State can prove one charge by proving the other using 10.58.090 or 404(b), then it just seems to me that the State does not have to prove every element individually because that evidence – evidence of one crime is admissible to prove that the other one occurred. And that’s incredible prejudice.” 8/24/09 RP 9.

Oddly, the court appeared to agree to consider “[e]vidence of each to find guilt based on not only the testimony relevant to one case, but based on the evidence of the other one... combine them for purposes of the evidence while making separate rulings on each case.” 8/24/09 RP 22. This is the essence of inadmissible character evidence and as reasoned in *Gresham*, categorically barred.

V. Conclusion

Based on the foregoing facts and authorities, and because Mr. Mandapat has already served his sentence in JRA, he respectfully requests this court to overturn his convictions and dismiss with prejudice all charges.

Dated this 14th day of March 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marie Trombley, attorney for Dimitri Mandapat, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the supplemental brief was sent by first class mail, postage prepaid on March 14, 2012, to Dimitri R. Mandapat, 4410 S. Rozalee Way, Yakima WA 98901; and by email per agreement between the parties to David B. Trefry, Special Prosecutor, at TrefryLaw@wegowireless.com.

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