

NO. 67111-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN BETTYS,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SKAGIT COUNTY

The Honorable David R. Needy, Judge

BRIEF OF APPELLANT

ANDREW P. ZINNER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENT OF ERROR

The trial court erred by admitting the underlying facts of two 1993 child rapes solely under RCW 10.58.090, because that provision has been held to be unconstitutional.

Issue Pertaining to Assignment of Error

The trial court admitted evidence that resulted in two 1993 convictions for first degree child rape under RCW 10.58.090. The court expressly found the evidence was inadmissible under ER 404(b). Because RCW 10.58.090 has been found unconstitutional, and because the evidence was prejudicial, must appellant John E. Bettys' conviction for first degree child molestation be reversed?

B. STATEMENT OF THE CASE

John E. Bettys was a registered sex offender, having pleaded guilty to two counts of first degree child rape in 1993. The complaining parties were his nephews, Daniel King and Michael ("Bacca") Bettys. 8RP 103-04; 11RP 42-43, 56-57, 116-18, 119-21; 12RP 18-21.¹

¹ In this brief, the verbatim report of proceedings is cited as follows: 1RP – 10/1/2010; 2RP -- 12/16/2010; 3RP – 12/22/2010; 4RP – 1/6/2011; 5RP – 2/16/2011; 6RP -- 2/18/2011; 7RP -- 4/28/2011; 8RP -- 5/4-5/6/2011; 9RP – 5/5/2011; 10RP – 5/6/2011; 11RP – 5/9/2011; 12RP – 5/10-5/11/2011; 13RP – 6/9/2011; 14RP – 7/20/2011.

King married his wife, Andree, in 2007. 12RP 81, 93. At that time, Andree's son, M.F., was in foster care. 8RP 45, 71, 93. Andree's family had been very close to the Bettys' family for a long time. The family matriarchs, Deeann Thomas and Sylvia Bettys, had been "almost like sisters" when they were younger. 8RP 28-29, 91-92, 101-02. Andree and other members of her family knew about Bettys' sex offenses. 8RP 29, 100, 12RP 94-95, 102.

Andree had a close relationship with her mother, Laurie Ferrell, before she married King. Andree saw much less of her mother, however, in the years after the marriage. 12RP 87-88. Much to Ferrell's chagrin, King and Andree kept Bettys in their lives. 8RP 50; 12RP 89-90, 94. Ferrell acknowledged that Bettys' continued presence caused "friction" between the families. 8RP 50.

Deeann Thomas was Laurie Ferrell's mother. She believed King and his family manipulated Andree. 8RP 103. Thomas was surprised King had a relationship with Bettys. 8RP 103, 04. Thomas came to dislike Andree's relationship with King. 8RP 104.

Andree obtained full custody of M.F. in early 2008, when the boy was four years old. 8RP 23-24, 45, 80; 12RP 93. She was expecting a child by King at the time. 8RP 90-91, 102. About a year later, in March

2009, Andree, King, and the children moved into Thomas' residence. 8RP 26-27, 90-91. They also spent a lot of time at the Bettys' property, primarily to visit with Sylvia. 12RP 69-70, 81-82, 89-90, 94. Sylvia lived in the main house. Bettys and his wife, Marissa, as well as Bacca, lived in separate trailers on the property. 8RP 93-95; 12RP 67-68, 93-95, 124-26.

M.F. spent the night five times with Marissa and John at their trailer. 12RP 70, 77, 89-90. Marissa was there each of those times. 12RP 70-71. At the time, M.F. wore diaper-like underwear called "Pull Ups" because he was a nighttime bed wetter. 12RP 71, 77, 90-91, 99.

Andree arranged to have Bettys drive M.F. to school. 12RP 91. Marissa usually accompanied him, but there were a few times when Bettys drove M.F. alone. 8RP 98-99, 107; 12RP 92, 94-96. Thomas questioned the wisdom of this arrangement and cautioned Andree about permitting M.F. to be alone with Bettys. 8RP 107. Andree knew Thomas was available to drive M.F. but nevertheless chose Bettys as the driver. 8RP 107.

By July 2009, Sylvia was too ill to care for children. 8RP 32, 128; 12RP 55-56. M.F. was staying at the Bettys' house at the time. 8RP 32; 12RP 61-62, 96. Bettys' sister was a nurse and tended to Sylvia twice a day. 8RP 58-59. She notified Ferrell and Ferrell's sister that M.F. was

likely being cared for by others, including Bettys and Marissa. 8RP 31-33, 128. Bettys' sister expressed caution, explaining that leaving M.F. alone with Bettys was like leaving a person with an addiction alone with his drug of choice. 8RP 32; 12RP 62-63.

Bettys' sister also wanted the child taken away because Bettys was more vulnerable to sexual abuse allegations because of his history. 12RP 63-64. Ferrell's sister, aware of Bettys' history, arranged to have M.F. taken away from the Bettys' property and returned to Thomas' house that afternoon. 8RP 129; 12RP 96.

Later that afternoon, Bettys and Bacca showed up at Thomas' house and stood in the yard talking with King, who was there to help fix a plumbing problem. 8RP 35-37, 51, 75. M.F. ran out of the house and hugged Bacca. 8RP 37-38. Ferrell immediately went outside and grabbed the boy because she did not want him around Bettys. 8RP 38, 51. Ferrell picked M.F. up and while she walked toward the house, M.F. grabbed her crotch area and laughed. 8RP 38-39, 51-52. Ferrell placed M.F. down in the kitchen and told him he could not touch people in that area. 8RP 38-39. She said if anyone touches him in that area he should tell his parents or an adult. 8RP 53-54.

An embarrassed M.F. went berserk. He screamed, threw things around, and tipped over furniture. 8RP 39, 54-55. He asked, "Why does everyone ask me that?" 8RP 56. Ferrell then brought the child outside to talk and calm him down. 8RP 39-40, 55-56. She asked M.F. whether anyone ever touched him there, and the boy said "no." 8RP 56. She continued to ask about the subject and M.F. looked down, said he was nervous, and then declared, "John poked me in my penis." 8RP 40, 57.

Ferrell asked no more questions. M.F. said he wanted to talk with Ferrell's boyfriend, who was nearby. 8RP 42, 77. M.F. told the boyfriend John was touching him down there. Then he touched his private area with his finger and said, "[P]oke, poke, poke." 8RP 77-78. M.F. disclosed it happened a couple times, but did not specify when the touching occurred. 8RP 78.

Ferrell brought M.F. into the house so he could speak with his mother and King. Andree recalled M.F. was "ecstatic," "jumping up and down," and "happy." 12RP 83. The child announced, "Mom, Uncle John poked my penis. Let's go talk to the cops." 12RP 83-84. Andree and King sat M.F. down and sought clarification of what he said. 12RP 83-84. M.F. said nothing more than Bettys poked his penis. 12RP 84. King and Ferrell then spoke to M.F. for about 10 minutes. King emphasized M.F.'s

disclosure could get Bettys in a lot of trouble if it was not true. 12RP 84-85. Ferrell yelled at King and spoke to him in a way that made Andree feel "hurt, angry." 12RP 85. Andree told Ferrell to stop. 12RP 85.

Ferrell recalled the conversation differently. She said Andree and King began yelling at M.F. King called M.F. a liar and said he was going to go to jail. 8RP 42. Ferrell told King that M.F. was not going to go to jail. 8RP 42. King then interrogated M.F., asking him when and where the incident occurred. M.F. said it happened at Sylvia's home. The child was upset and crying. 8RP 42. Andree and King then took M.F. to the police station to report the disclosure. 8RP 43, 86. M.F. was five years old at the time. 12RP 93.

Detective Michael Hansen received the case the following day. 11RP 75. A few days later, M.F. spoke with a child interview specialist. 11RP 13, 28. Hansen watched and listened to the interview through a one-way mirror. 11RP 76-77, 102.

M.F. divulged that he and Bettys were watching television in Sylvia's living room. Bettys snuck over to him and told him he wanted to do something. M.F. said no, but Bettys touched his penis two times over his clothes with his finger. 11RP 19-22, 31. The touch felt "warm and soft." 11RP 21. Bettys told M.F. not to tell anyone about the touching

because he would get in trouble for telling. 11RP 19-20. Bacca was in the kitchen during the incident. 11RP 20, 27.

M.F. told the interviewer the touching made him mad and "his body angry." 11RP 22. He said he was frustrated, made a punching motion, and said "he was about ready to make a hole through the floor." 11RP 22. The boy also said he did not want to see Bettys again because he did want it to happen to him again. 11RP 23.

Hansen called Bettys, who agreed to speak with him a few days after the child interview. 11RP 78. Bettys described his relationship to M.F. as fairly distant, with no physical contact between the two. 11RP 82. He was never left alone with M.F. because of his history with children. 11RP 82-83.

Another officer, Glen Hutchings, then interviewed Bettys. 11RP 86-87. Hutchings took a different tack, suggesting any touching of M.F. could have happened during play or when taking on a parental-type task, such as checking to see if the child wet his pants. Bettys maintained he did not touch M.F. 11RP 88-90.

Hutchings then repeatedly accused Bettys of not being candid and of withholding information. Bettys then said he once helped King discipline M.F. by putting his hands on the boy's thighs and holding him

down on the couch where he was seated. 11RP 91-92. After telling Bettys it was imperative he tell Hansen about the incident, Hutchings ended the interview. 11RP 92.

Hansen then returned and Bettys told him about the disciplining incident. 11RP 95. Bettys also disclosed incidents where he wrestled with and tickled M.F. along with Marissa. And he noted M.F. hugged him twice with other people around and "climbed all over him." 11RP 97-98. When asked, Bettys also told Hansen he drove M.F. to school. 11RP 96-98. Even after Hansen accused Bettys of not being forthcoming, Bettys said he never touched M.F. in the groin area and would never have had a chance to do that because of constant monitoring by family members. 11RP 99-100.

Bettys came back for another interview about two weeks later. He told Hansen that M.F. had been staying at his residence and spent one night there. During this and the first interview, Bettys said he had an ongoing relationship with Andree and King and spoke with them about M.F.'s allegations. 11RP 100-01. Hansen never mentioned M.F.'s assertion that Bacca was nearby when Bettys improperly touched him. 11RP 103. Bettys insisted he never touched M.F. in the groin area under any circumstances. 11RP 104.

About six months later, the State charged Bettys with two counts of first degree child molestation committed over the course of more than two years. CP 1-2. In an amendment, the State narrowed the charging period to about eight months. CP 52-53. After contested pretrial hearings, the trial court found M.F. competent to testify 3RP 36-37. The court also found the child's hearsay statements were admissible under the statutory child hearsay exception. 3RP 61-64. Finally, the court found evidence of Bettys' 1993 rapes was admissible under RCW 10.58.090, but inadmissible under ER 404(b) as propensity evidence. 3RP 93-94

In addition to the above testimony, the Skagit County Superior Court jury heard the following evidence. M.F. testified Bettys touched him. 8RP 138. He drew a picture depicting Bettys touching his "private" with his hand. 8RP 141-42, 172. M.F. said Bettys did it once and it made him sad. 8RP 142. It happened in the living room inside Bettys' trailer when he was visiting. 8RP 144, 147, 153. He and Bacca had been playing a video game. Bacca stepped outside for a moment, and then Bettys "[p]oked me, touched me." 8RP 155-56, 161.

Bacca was aware of this allegation, but was not present at the time. 11RP 123-24. He did, however, recall playing video games with M.F. at Bettys' trailer. 11RP 127.

The jury also heard evidence leading to Bettys' 1993 child rape convictions. Bacca testified that Bettys sexually abused him from the time he was between five and seven years old to the time he was 12. 11RP 119. Bettys was about 11 when the abuse began. 11RP 122-23. According to Bacca, the abuse began with over-the-clothes touching and eventually became mutual fellatio. 11RP 120-22. Bacca said he also served as lookout while Bettys abused King in similar fashion. 11RP 121.

King testified Bettys sexually abused him as well. He recalled nothing about the details of the abuse, except that it ended when he disclosed it. King spoke about the incidents with then-detective James Coapstick in 1993. 11RP 116-18; 12RP 19-20. King was seven years old at the time. Coapstick testified King told him that he and Bettys engaged in multiple instances of mutual fellatio. King told Coapstick it happened every time he went to Bettys' house. 12RP 19-20.

Coapstick spoke with Bettys the same day he spoke with King. 12RP 19-20. Bettys was 18 years old at the time. 8RP 21. Bettys confessed to the mutual fellatio with Bacca and King, stating it happened numerous times. 12RP 19.

The jury found Bettys guilty of one count of first degree child molestation and not guilty of the second. CP 214-217. The trial court,

finding the conviction was a second "strike" under the two-strike provision of the Persistent Offender Accountability Act, sentenced Bettys to life in prison without parole. CP 446-455.

C. ARGUMENT

THE TRIAL COURT'S ADMISSION OF EVIDENCE UNDER RCW 10.58.090 REQUIRES REVERSAL.

The trial court admitted evidence leading to Bettys' 1993 child rape convictions solely under RCW 10.58.090. That statute has been invalidated as a violation of the separation of powers. State v. Gresham, 173 Wn.2d 405, 432, 269 P.3d 207 (2012). Because the trial court did not find the evidence was also admissible under ER 404(b), and because its admission was not harmless, this Court should reverse Bettys' conviction and remand for a new trial.

In a pretrial motion, Bettys' counsel requested the trial court preclude admission of evidence leading to a 1989 indecent liberties conviction against his niece and 1993 convictions for first degree rape of a child against King and Bacca. CP 35-45.² Counsel argued RCW

² Bettys filed many pro se motions and letters during the course of his case. The trial court explained to Bettys it normally did not allow a represented defendant to file pro se pleadings. 3RP 5-6. The court later directed Bettys to rely on his counsel and declined to hear motions Bettys filed pro se. CP 148-49; 7RP 45-48.

10.58.090 was unconstitutional. CP 37-40. Alternatively, counsel maintained the evidence was inadmissible under the factors listed in that provision. CP 40-43. Finally, counsel contended the evidence was inadmissible under ER 404(b). CP 43-45.

The trial court rejected counsel's argument in part and admitted the evidence of the 1993 cases under RCW 10.58.090(1). 3RP 94. The court specifically rejected the State's argument the evidence was also admissible under ER 404(b), because "the only real purpose would be to show that – acted in conformity therewith" 3RP 94.

Well after the trial court's ruling, our Supreme Court found in Gresham that RCW 10.58.090 is unconstitutional. Gresham controls here.

The Gresham opinion addressed the consolidated appeals of Scherner and Gresham. Gresham, 173 Wn.2d at 417. The trial court in Scherner's case admitted evidence of earlier sex abuse against four different individuals under RCW 10.58.090 and, alternatively, as establishing a common scheme or plan under ER 404(b). Id., 173 Wn.2d at 415-16. The Supreme Court upheld the trial court's admission of the evidence under ER 404(b). Id. at 422-23.

In Gresham's case, the trial court found the State failed to prove evidence of a prior child sexual abuse established the existence of a

common scheme or plan under ER 404(b). Id. at 418. The court did find, however, that the same evidence was admissible under RCW 10.58.090. Id.

After finding RCW 10.58.090 unconstitutional, the Supreme Court was left to determine whether admission of the prior evidence was harmless. Id. at 432. The Court first determined the nonconstitutional harmless error test applied. Id. at 433. Under that standard, reversal is required unless a reviewing court can say there was no reasonable probability the error affected the verdict. State v. Furman, 122 Wn.2d 440, 453, 858 P.2d 1092 (1993).

The Gresham Court could not conclude the erroneous admission of evidence of Gresham's prior conviction was harmless error. The Court found that without that evidence, the State was left with the complaining witness' testimony that Gresham molested her, her parents' corroboration that Gresham had the opportunity to do so, and the investigating officer's testimony. The Court noted, "There were no eyewitnesses to the alleged incidents of molestation." Gresham, 173 Wn.2d at 433. Citing State v. Saltarelli³ for the proposition that the prejudice caused by prior acts evidence is at its highest in sex cases, the Court concluded there was a

³ 98 Wn.2d 358, 363, 655 P.2d 697 (1982).

reasonable probability that without this "highly prejudicial evidence of Gresham's prior sex offense," the verdict would have been materially affected. Gresham, 173 Wn.2d at 433-34.

Bettys' case is analogous to Gresham's and the Supreme Court's decision compels the same result here. M.F. testified only that Bettys once "poked" or touched his penis outside his clothing. 8RP 138-42, 156, 160, 165-66. Other witnesses repeated M.F.'s accusation, but repetition is generally not a valid test for determining veracity. See State v. Perez, 137 Wn. App. 97, 107, 151 P.3d 249 (2007) ("[M]ere repetition does not make something true.").

Moreover, none of the witnesses observed any misconduct or suspicious behavior on Bettys' part. There were other weaknesses in the State's case as well. Although Ferrell's boyfriend and the child interview specialist testified M.F. told them the touching happened two times, 8RP 78; 11RP 19, the jury found Bettys not guilty of the second molestation count. CP 215.

In addition, Ferrell testified that M.F. spent about a week with her at some point after his disclosure. The child presented with a serious skin rash that required attention. While Ferrell attended to the rash, M.F.

volunteered the following statement: "I don't know why John is in trouble. All he did was put cream on me." 8RP 64-66.

Finally, a prosecutor increases the prejudicial effect of improper evidence by commenting on it in closing argument. State v. Padilla, 69 Wn. App. 295, 301, 846 P.2d 564 (1993); see State v. Kennard, 101 Wn. App. 533, 543, 6 P.3d 38 (2000) ("Moreover, the fact that the State did not emphasize the bankruptcy evidence in closing argument cuts against a finding of prejudice.").

In Betty's trial, the prosecutor repeatedly exploited the admission of the child rape evidence during closing argument:

The facts that have come to light over the last week has [sic] shown the fact that the Defendant has a temptation for younger boys; that he has an inability to control this temptation for younger boys, and that he had an inability to control this temptation for [M.F.], who was 5 years old at the time this happened.

You have heard through the course of the testimony in this case that the Defendant has a problem. This has happened before in the past. He has previously abused his two nephews, [King] and [Bacca], when they themselves were approximately 5 or 6 years of age; that continued for a period of time before these children disclosed. And that this is by no means, even though this occurred back in 1993, left in the past; that this is something that the defendant has an ongoing problem with.

12RP 117.

So you establish this grooming, fostering relationship, start slowly, touching over clothing. We heard testimony from [Bacca] that's how it started with him and then progressed to that. It's a test. If I

start by just touching the child over clothing what will he do? Will he tell? If he does I can explain it away or deny it ever happened. If he doesn't, great, move on from there. We know that's what happened with [King] and [Bacca]. [They] started off with touching over clothes, to rubbing, then to full on fellatio.

12RP 120.

When all is said and done, this went on for years, because neither of them came forward to tell until [Bacca] was 12 years old. Finally in 1993 he came forward to tell. This had been going on with him when he was age 5 to 7 to age 12, so many, many, years. So it progresses. It doesn't just start off at the very end result. So it's a grooming relationship.

12RP 120-21.

And what is more concerning, again, is the fact that this happened before; that there is a pattern of abuse; that this is a common scheme or plan; that the Defendant has an MO, modus operandi, as to how he offends, how he touches little boys at the property . . . that are about 5 years of age and that it starts with over the clothes touching.

12RP 128.

For these reasons, the improper admission of evidence of the 1993 rapes was not harmless. Under Gresham, therefore, this Court should reverse Bettys' conviction and remand for a new trial.

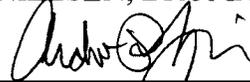
D. CONCLUSION

For the above reasons, Bettys respectfully requests this Court to reverse his conviction and remand for a new trial.

DATED this 30 day of March, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



ANDREW P. ZINNER

WSBA No. 18631

Office ID No. 91051

Attorneys for Appellant

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DIVISION ONE**

STATE OF WASHINGTON)	
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Respondent,)	
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v.)	COA NO. 67111-1-I
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JOHN BETTYS,)	
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Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF MARCH 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ERIK PEDERSEN
SKAGIT COUNTY PROSECUTOR'S OFFICE
COURTHOUSE ANNEX
605 S. THIRD
MOUNT VERNON, WA 98273

[X] JOHN BETTYS
DOC NO. 711306
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF MARCH 2012.

x. Patrick Mayovsky