

FILED
June 06, 2013
Court of Appeals
Division III
State of Washington

NO. 312372-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

CHARLES BEN SLOCUM, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 11-1-00977-1

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

ANITA I. PETRA, Deputy
Prosecuting Attorney
BAR NO. 32535
OFFICE ID 91004

7122 West Okanogan Place
Bldg. A
Kennewick WA 99336
(509) 735-3591

TABLE OF CONTENTS

I.	STATEMENT OF FACTS.....	1
II.	ARGUMENT.....	4
1.	THE COURT PROPERLY ADMITTED MR. SLOCUM’S PREVIOUS ACTS OF SEXUAL ABUSE AS EVIDENCE OF A COMMON SCHEME OR PLAN	4
A.	preponderance of the evidence demonstrates that the prior wrongs occurred	5
B.	Mr. Slocum utilized a common plan in sexually assaulting his stepdaughter, niece-in-law, and step-granddaughter	6
C.	The evidence was highly relevant to prove the crime	9
D.	The evidence, while possibly prejudicial, had probative value outweighing any prejudicial effect.....	11
2.	MR. METRO WAS NOT INEFFECTIVE IN ELECTING TO NOT OBJECT TO THE TESTIMONY IDENTIFIED BY THE DEFENDANT IN HIS BRIEF	15
3.	THE STATE NEVER ALLEGED ANY RECENT FABRICATION	22
4.	MR. SLOCUM’S ARGUMENT ABOUT THE AWARD OF COSTS IS NOT RIPE	24
5.	MR. SLOCUM IS NOT AN ‘AGGRIEVED PARTY’ AS PER RAP 3.1	27

6.	MR. SLOCUM IS LIKELY TO HAVE THE CAPACITY TO REPAY HIS LEGAL FINANCIAL OBLIGATIONS	28
III.	CONCLUSION	29

TABLE OF AUTHORITIES

WASHINGTON CASES

<i>Erickson v. Robert Kerr, M.D., P.S., Inc.</i> , 125 Wn.2d 183, 883 P.2d 313 (1994).....	14
<i>Nordstrom Credit, Inc. v. Department of Revenue</i> , 120 Wn.2d 935, 845 P.2d 1331 (1993).....	28
<i>State v. Blank</i> , 131 Wn.2d. 230, 930 P.2d 1213 (1997).....	25, 26
<i>State v. Crook</i> , 146 Wn. App. 24, 189 P.3d 811 (2008)	25, 26
<i>State v. DeVincentis</i> , 150 Wn.2d 11, 74 P.3d 119 (2003).....	7, 8, 9, 13
<i>State v. Fuller</i> , 169 Wn. App. 797, 282 P.3d 126 (2012)	5
<i>State v. Gresham</i> , 173 Wn.2d 405, 269 P.3d 207 (2012)	4
<i>State v. Hunter</i> , 29 Wn. App. 218, 627 P.2d 1339 (1981).....	21
<i>State v. Krause</i> , 82 Wn. App. 688, 919 P.2d 123 (1996).....	10
<i>State v. Lough</i> , 125 Wn.2d 847, 889 P.2d 487 (1995).....	11, 12
<i>State v. Madison</i> , 53 Wn. App. 754, 770 P.2d 662 (1989)	20
<i>State v. Michael</i> , 160 Wn. App. 522, 247 P.3d 842 (2011).....	5, 6
<i>State v. Perez</i> , 137 Wn. App. 97, 151 P.3d 249 (2007)	23
<i>State v. Smits</i> , 152 Wn. App. 514, 216 P.3d 1097 (2009)	27
<i>State v. Taylor</i> , 150 Wn.2d 599, 80 P.3d 605 (2003)	27
<i>State v. Tharp</i> , 27 Wn. App. 198, 616 P.2d 693 (1980)	15
<i>State v. Wimbs</i> , 68 Wn. App. 673, 847 P.2d 8 (1993)	26
<i>State v. Zeigenfuss</i> , 118 Wn. App. 110, 74 P.3d 1205 (2003).....	25

WASHINGTON STATUTES

RCW 10.01.16028
RCW 9.94A.753.....28

COURT RULES

ER 40314
ER 404(b).....4, 5
ER 41023
ER 801(d)(1).....20, 23
RAP 3.127

I. STATEMENT OF FACTS

Tonya Nash, mother of W.N., the victim in both charges in this case, was the daughter of Jane Slocum and Jimmy Morgan. (09/11/12, RP 25). They were married at the time Tonya was born, but later divorced when Tonya was seven years old. (09/11/12, RP 25). Tonya Nash's mother married Charles Slocum, the defendant in this matter, when Tonya was nine years old. (09/11/12, RP 25).

When Tonya Nash was 12 years old, Charles Slocum touched her inappropriately, removing her shirt, removing her bra, and rubbing her breasts. (09/11/12, RP 30). At around the same age, he touched Tonya Nash again; he asked her to sit in his recliner with him and he rubbed her vagina over her clothes for 15-20 minutes. (09/11/12, RP 31). Tonya Nash's mother discovered what had occurred, and upon speaking with her husband, believed that her daughter was exaggerating the abuse. (09/11/12, RP 31-32). Despite her mother's unwillingness to believe her, Tonya's disclosure to her mother marked the end of any sexual abuse from Charles Slocum perpetrated on her.

Miss Holly Vaughn was the younger sister of Calvin Nash, Tonya Nash's husband. (09/12/12, RP 47). Holly would visit Calvin and Tonya every summer. (09/12/12, RP 47). When Holly Vaughn was 12 years old, she too was touched inappropriately by Mr. Slocum. (09/12/12, RP 48).

Holly Vaughn was at Mr. Slocum's home, intending to swim in his swimming pool. (09/12/12, RP 48). Mr. Slocum approached Holly, and indicated that he would apply sunscreen to her back. (09/12/12, RP 48). He then slid his hands under her bathing suit, and rubbed her breasts. (09/12/12, RP 48).

W.N. is the victim in this case, and the daughter of Tonya Nash. (CP 87-88). The defendant first touched W.N. inappropriately when she was three or four years old, insisting on wiping her vagina bare handed after she had just urinated. (09/12/12, RP 121). This incident occurred at Mr. Slocum's home, and the inappropriate touching continued throughout W.N.'s childhood. (09/12/12, RP 121-22). The defendant took W.N. into a recliner, and touched W.N.'s vagina and breasts. (09/12/12, RP 122). The defendant would rub W.N. both under and over her clothes. (09/12/12, RP 122-23). Mr. Slocum penetrated W.N. digitally. (09/12/12, RP 129).

W.N. decided to disclose the abuse first to an athletic coach, as she was an adult W.N. felt she could trust. (09/12/12, RP 131). W.N.'s coach immediately informed the counselor and W.N.'s mother. (09/12/12, RP 132). W.N. then told her mother of the abuse, her mother breaking down crying at the word "Charles." (09/12/12, RP 132).

W.N. then spoke to Mari Murstig. (09/12/12, RP 133). Ms. Murstig is a forensic crime investigator specializing in the interviewing of minors, employed by the Benton County Prosecuting Attorney's Office. (09/12/12, RP 111). W.N. disclosed the abuse to Ms. Murstig. (09/12/12, RP 117).

The defendant was charged with Child Molestation in the First Degree, and Rape of a Child in the Third Degree. (CP 87-88). The defendant entered a guilty plea to Child Molestation in the First Degree. (CP 6-16).

The defendant later moved for leave to withdraw that guilty plea. (CP 30-35). That motion was granted. (5/10/12, RP 14). The defendant then elected to proceed to trial. Prior to trial, the State moved to be allowed to present Mr. Slocum's previous abuse of Tonya Nash and Holly Vaughn as evidence of a common scheme or plan. (CP 89-108). The judge ruled in favor of the State on that motion. (9/11/12, RP 15). Mr. Slocum wished to enter a previous statement by himself at trial, which was denied. (09/13/12, RP 7). Mr. Slocum elected to take the stand. (09/13/12, RP 29). During his closing, Mr. Slocum's representative argued a number of reasons why W.N. might be falsifying her testimony. (09/13/12, RP 76). The jury found Mr. Slocum guilty of Child

Molestation in the First Degree, and Rape of a Child in the Third Degree. (09/13/12, RP 81). The defendant now appeals that verdict. (CP 220).

II. ARGUMENT

I. THE COURT PROPERLY ADMITTED MR. SLOCUM'S PREVIOUS ACTS OF SEXUAL ABUSE AS EVIDENCE OF A COMMON SCHEME OR PLAN.

ER 404(b) bars all use of prior crimes or wrongs to prove that the individual who committed those crimes or wrongs is the type of person who commits those crimes. For instance, the State would not be allowed to enter evidence that an individual accused of arson had committed previous acts of arson, in order to prove that he was the type of person who commits arson. However, ER 404(b) does not prevent such evidence for being used for any other purpose imaginable.

Properly understood, then, 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. Critically, there are no "exceptions" to this rule. Instead, there is one improper purpose and an undefined number of proper purposes.

State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012).

This is not to argue that a trial court can, or should take the question of whether ER 404(b) is to be admitted lightly. Such evidence is to be presumed inadmissible, and any doubts as to its admissibility

resolved in favor of the defendant. *State v. Fuller*, 169 Wn. App. 797, 829, 282 P.3d 126 (2012).

The court is instructed to conduct a four-factor analysis on any evidence of prior wrongs or bad acts, in order to determine if it is admissible. Before admitting the evidence, the court must:

(1) find by a preponderance of the evidence the misconduct actually 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 828-829.

The court here performed that exact analysis. (RP 9/11/12, 15). “We review a trial court's decision to admit or deny evidence of a defendant's past crimes or bad acts under ER 404(b) for an abuse of discretion.” *Id.* at 828.

A. A preponderance of the evidence demonstrates that the prior wrongs occurred.

The defendant makes no argument as to the first factor of the test. The only evidence that the court heard was the clear testimony of Holly Vaughn and Tonya Nash that they had been abused. Mr. Slocum did not elect to put on any evidence to rebut their accusations, nor did he take the stand himself. The total sum of the evidence indicated that the abuse had occurred. “Preponderance of the evidence means that you must be

persuaded, considering all of the evidence in the case, that it is more probably true than not true.” *State v. Michael*, 160 Wn. App. 522, 527, 247 P.3d 842 (2011). In light of all the evidence presented by the State, there was no way the court could not have been convinced the abuse occurred. In light of the fact that the defendant has made no argument, the analysis will now proceed on the assumption that Mr. Slocum sexually assaulted his stepdaughter and his step-daughter’s sister-in-law, and analyze whether the remaining three factors demonstrate that admission of the prior instances of sexual assault was proper.

B. Mr. Slocum utilized a common plan in sexually assaulting his stepdaughter, niece-in-law, and step-granddaughter.

The purpose of admitting the evidence was to show a common scheme or plan. The defendant indicates the only common scheme or plan identified by the State was to simply “molest children.” The State agrees that if that was the entirety of the similarities, then admission would have been improper. However, that was not the case. Mr. Slocum had a clear plan, intended to satisfy his sexual desires in a specific manner. Holly Vaughn, Tonya Nash, and W.N. were primarily molested at the same time of their life, 12-13 years old. The defendant targeted girls he had a familial connection to, utilizing his inherent authority over them to influence them to not fight him, and to be reticent in reporting the abuse,

as well as relying upon the families reaction to contain the results of any reporting. The defendant sexually abused them in the same way, rubbing their vagina and breasts, always doing so in a way that he could claim it was simple roughhousing or some other such easy reason for his criminal activity. The defendant performed the abuse in his home, or on his property, in an area where he could be assured privacy as he sexually assaulted the girls. The defendant always sexually assaulted them when they were alone with him, and when his wife was out of the house. Mr. Slocum never took action to get the girls alone with him, preferring to wait for opportunities for such to arise. This avoided arousing any suspicions on the part of other adults in the girls' lives.

This plan is far more than simply "molesting children." Mr. Slocum was highly systematic, targeting children who fulfilled a specific sexual need, and whom would be unlikely to have repercussions upon him for assaulting them. The defendant assaulted them in highly-similar ways, in much the same location, and made sure that the girls were isolated before he assaulted them. The defendant makes an error when he asserts that the facts that make the cases must be specific or unqie. "*Dewey* reflects a misreading of *Lough* because our analysis in *Lough* requires similarity of the acts, not uniqueness." *State v. DeVincentis*, 150 Wn.2d 11, 20, 74 P.3d 119 (2003).

The trial court explained that “the evidence involving [V.C.] is relevant to show that the defendant had devised a scheme to get to know young people through a safe channel, such as a friend of his daughter, or ... as a friend of the next-door neighbor girl...” This led to “greater familiarity occurring in his own home...” This plan allowed DeVincentis to bring the children into “an apparently safe but actually unsafe and isolated environment so that he could pursue his compulsion to have sexual contact with these ... prepubescent or pubescent girls.” The girls were both between 10 and 13 years old.

Other similarities that the trial court noted included walking around his house in an unusual piece of clothing—bikini or g-string underwear. On both occasions, the trial court found that DeVincentis “indicated he ... intended by the casual wearing of almost no clothes to reduce the children's natural discomfort or negative reaction to such behavior...” With both girls, DeVincentis “asked for a massage or gave [a] massage, asked or directed the child to a secluded spot such as a bedroom, directed or asked that clothes be taken off...” Finally, in both instances, he had the girls masturbate him until climax. The trial court concluded that this was relevant to support K.S.'s testimony.

Id. at 22.

The plan the defendant utilized here was similar to DeVincentis'. In place of utilizing a daughter to find him the targets of his sexual desires, he used familial connections, targeting stepdaughters, nieces, and granddaughters. The purpose was the exact same. “This plan allowed DeVincentis [and Mr. Slocum] to bring the children into ‘an apparently safe but actually unsafe and isolated environment so that he could pursue his compulsion to have sexual contact with these ... prepubescent or

pubescent girls.”” *Id.* In all of the cases, Mr. Slocum satisfied his sexual desires in the same manner, utilizing his hands, as opposed to his penis, mouth, or other device. The long period of ‘grooming’ was missing here. Mr. Slocum replaced it with the familial connection, that giving him an easy way to force the victims into compliance, and to pressure them against telling. The similarities in the fact patterns are striking.

The court was not wrong in finding a common scheme or plan. W.N., Jane, and Holly were sexually assaulted as the result of a conscious scheme on the part of the defendant, three manifestations of the same design. The defendant is correct to note that there were differences. Mr. Slocum was opportunistic, striking whenever he could, taking advantage of any chance he could. These differences are in the circumstances that create the opportunities Mr. Slocum used, not in the plan he utilized to assault the children, and attempt to escape punishment.

C. The evidence was highly relevant to prove the crime.

Mr. Slocum has presented no arguments to demonstrate the lack of relevance of the alleged plan to the act at hand. In essence, Mr. Slocum’s defense was that he never touched W.N. inappropriately, and that he lacked a sexual desire for children. (09/13/12, RP 40). When the defense levied by a defendant is general denial, properly introduced evidence of a

common scheme or plan is highly relevant to prove the State's case. *State v. Krause*, 82 Wn. App. 688, 695, 919 P.2d 123 (1996). The defense, in some ways, controls what 404(b) issues are relevant. Mr. Slocum disputed the allegations that he sexually molested anyone in their entirety. As a result, evidence showing that Mr. Slocum had molested 12 to 13-year-old girls before, using a cogent and identified scheme, was highly relevant to prove that Mr. Slocum had done so.

Furthermore, Mr. Slocum's defense included allegations that W.N. was lying at the provocation of the adults in her life.

Does it happen because Tonya doesn't like Mr. Slocum? Is it revenge? Is it a strange play by a woman who just really wants her mother? I don't have an answer to that. Is it by a woman who manipulates her daughter into testifying or exaggerating? I don't know the answer to that. Is it a girl because she doesn't have enough attention because her brother is in Afghanistan and there are two baby grandchildren in the family? I don't know the answer to that. Is it because we moved from house to house they wanted Mr. Slocum out of the way because he is getting older and the mother is 63 he is 78 or 75 or whatever it is and falling apart? I don't know what the answer is.

(09/13/12. RP 76-77).

Mr. Slocum's defense was predicated on W.N. being a liar. That her mother, her grandmother, someone had put her up to this, because of changing circumstances. As a result, the information that Mr. Slocum had molested other girls in the same exact way takes on greater importance.

The defense launched into an assault on the credibility of a 15-year-old girl, and as a result, the State was entitled to present evidence of her credibility, including allegations of a consistent scheme or plan Mr. Slocum used in his other sexual assaults, allegations which W.N. couldn't have known of at the time she made the disclosures she did.

D. The evidence, while possibly prejudicial, had probative value outweighing any prejudicial effect.

Mr. Slocum alleges that the evidence of the prior molestations should have been excluded under ER 403. He cites no case law in making his argument, beyond an instruction by the Court of Appeals to be careful when admitting this kind of evidence, as child molestation is an act to which a high degree of moral opprobrium rests. However, the defendant has pointed to no particular facts or circumstances that would indicate that this particular act of sexual abuse has specific prejudicial character, which makes the introduction of the evidence more inappropriate than it would be in any other child sex case.

State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995) contains an extensive evaluation of the factors favoring admission, and those indicating admission is inappropriate. There was a wide range of sexual misconduct alleged in *State v. Lough*, some of which was admitted, and some of which was deemed inadmissible. *Id.* at 862-863. The key for the

Appellate Court was how the evidence seeking to be admitted supported the alleged plan. *Id.* at 863. The Court specifically identifies in its opinion that repeated instances of conduct, evincing the same plan, increase the probative value of the evidence, making it more likely that the plan actually exists. *Id.* The Court also specifically mentions the repeated instructions to use the evidence of prior bad acts only in the fashion allowed for under the law as helpful in making their determination. *Id.*

In this instance, there was a highly specific plan. Mr. Slocum targeted 12 to 13-year-old girls. He targeted girls who he had a family relationship with, knowing that such a relationship would give him apparent authority over them, and likely stifle any reports that they gave to family members. He waited until the minor children were left alone with him, in an environment which he had complete control over. He then touched their breasts or vagina, always using his hands, as opposed to his mouth or penis. He portrayed the sexual molestation to the minor children as some form of play or other innocent activity, to give himself cover if the child was to report the sexual contact. All of the acts sought to be introduced matched every step of the plan. There were three independent instances of this plan being put into action, and the court consistently gave the instruction to use the evidence only in determining if the defendant had a common scheme or plan. (CP 164; 09/11/12, RP 42, 46).

The factors which the defense lay out are not a test laid out by any high Court, but instead a list of the factors argued to, and considered by a trial court before finding that 404(b) evidence was admissible in the specific case before it. *DeVincentis*, 150 Wn.2d at 23.

Oral argument on this issue before the trial court reflected that court's understanding of relevant factors used in balancing, such as the age of the victim, the need for the evidence, the secrecy surrounding sex abuse offenses, “[t]he vulnerability of the victims, the absence of physical proof of the crime, degree of public opprobrium associated with the accusation, ... [and the] general lack of confidence in the ability of a jury to assess the credibility of child witnesses.

Id.

Even if this list is treated as an established test, however, it clearly argues in favor of the admissibility of the evidence of abuse the defendant argues should have been excluded. Mr. Slocum acted to ensure that this evidence would be secret, by targeting victims who would be particularly vulnerable to his influence, and satisfying his sexual desire for the victims in a way that would not leave physical evidence. The need for the evidence is thus at its zenith. The age of the victim, at best, breaks even here. While she was older, and thus the jury was better able to judge her credibility, and she had less difficulty understanding and answering questions, the issue arises of why she did not inform anyone earlier. The age acts to cast her testimony into doubt.

While there was the possibility of prejudice to the defendant, as there is in every child sex case where common scheme or plan evidence is sought to be admitted, the defendant has pointed out no facts that suggest that the potential for prejudice was any greater than it would be any time these allegations are raised. The State sees no reason why Mr. Slocum's prior acts would be any more prejudicial to him than Mr. DeVicentis' were in his case. The mere fact that the prior wrong sought to be admitted was an allegation of child molestation does not require the suppression of evidence under ER 403. The defendant has failed to show any greater prejudice than in other cases where evidence of a highly-detailed scheme or plan was sought to be entered that entailed the sexual abuse of children.

In the end, appellate court's review a trial court's decision to admit or deny evidence under ER 403 for abuse of discretion. *Erickson v. Robert Kerr, M.D., P.S., Inc.*, 125 Wn.2d 183, 191, 883 P.2d 313 (1994). In light of the clear evidence that Mr. Slocum had a cogent plan to molest girls of W.N.'s age; it cannot be said that it was an abuse of discretion to allow the evidence in.

2. MR. METRO WAS NOT INEFFECTIVE IN ELECTING TO NOT OBJECT TO THE TESTIMONY IDENTIFIED BY THE DEFENDANT IN HIS BRIEF.

In answering the allegations that Mr. Metro was ineffective, it is important that the Court examines what, exactly, the defense alleges bolstered W.N.'s testimony. However, the defendant, in objecting, does not consider the effect of the "res gestae" doctrine. In essence, the doctrine of res gestae holds that even if evidence would be inadmissible otherwise, there is an inherent value in providing the finder of fact the full story behind the events on trial, including the crime and the investigation leading to the arrest. *State v. Tharp*, 27 Wn. App. 198, 204, 616 P.2d 693 (1980). The doctrine recognizes that there is an inherent danger in placing a story that is obviously incomplete before the finder of fact, as such a story invites speculation to fill in those holes. *Id.* Res gestae is not a hard and fast doctrine, and any relevancy established by it can be overcome by the operation of the other rules, depending on the circumstances. However, in this case, the prejudice alleged by the defendant is slight enough to render the application of the res gestae doctrine appropriate.

The defendant has identified multiple witnesses, which he alleges were utterly irrelevant: A.H., W.N., Leslie Guereca, Jane Slocum, Tonya Nash, Connor Nash, Holly Vaughn, Detective Boyer, and Mari Murstig.

A.H., and Leslie Guereca testified that W.N. disclosed certain facts to them, but did not disclose the contents of that disclosure.

A.H. was necessary to explain certain facts, particularly why W.N. disclosed to Ms. Guereca, and not her mother. (09/11/12, RP 23). Her testimony did not go into the contents of the allegations at all. She simply provided the jury with background information on how and why this disclosure came about. Whatever minimal prejudicial effect the fact that the knowledge that W.N. said something to A.H. might have on the jury, it was clearly outweighed by the need for the jury to have those background facts. Leslie Guereca's importance was similar, providing the jury background knowledge of her relationship with W.N., and informing the jury of how the information about this matter reached authorities. (09/11/12, RP 56-61).

The testimony of Tonya Nash likewise never went into the contents of the conversation between her daughter and herself. The testimony was simply to inform the jury of how she was informed of the situation, and provide the jury with a clear picture of how the allegations by W.N. triggered the remarkable reaction Tonya displayed. (09/11/12, RP 29). This questioning functioned as a lead in to questioning about Tonya's own abuse.

Calvin Nash's questioning mentioned two separate instances of disclosure. The first was not in response to a direct question, and was a simple repetition of a very bare fact that the jury was already aware of. That W.N., after speaking with Ms. Guereca, disclosed to her mother and father that Charles Slocum had molested her. (09/12/12, RP 92). Knowledge that W.N. had disclosed to him was necessary for the jury, because it explained how these allegations reached the authorities. Mr. Nash reported W.N.'s disclosure to the West Richland Police Department, and that report was the genesis of the legal case before the fact finder. (09/12/12, RP 92). While the words "Charles, Mr. Slocum, molested W.N." were likely superfluous, they were not sought by the prosecution, and an objection by the defense would likely have only served to magnify the prejudice, enhancing the importance of what was, in essence, a repetition of what the jury already knew. The second reported disclosure was the one that informed the State that the report of a single instance of abuse was incorrect, and that Mr. Slocum had been systematically abusing W.N. throughout her lifetime. (09/12/12, RP 93). Identifying the circumstances and the privacy that the second disclosure occurred informed the jury of why W.N. may have felt safer to disclose the additional abuse then, rather than when she first disclosed.

Holly Vaughn never stated that W.N. had disclosed abuse to her. Indeed, her testimony was that Calvin Nash informed her that W.N. had told him of the abuse. (09/12/12, RP 49-59). Her informing the jury of that fact was necessary to explain why Ms. Vaughn, after concealing Mr. Slocum's abuse of her for so long, elected to disclose the abuse. *Id.*

Jane Slocum likewise made no mention of hearing from W.N. that Mr. Slocum had abused her. Rather, her testimony was what Calvin Nash informed her that W.N. had been molested by Charles Slocum. (09/12/12, RP 74). Furthermore, that testimony was pivotal to dealing with one of the prongs that Mr. Slocum's defense rested upon. Mr. Slocum claimed, through the questioning, and in closing, that Ms. Slocum influenced her granddaughter to commit perjury to excuse her desire to divorce Mr. Slocum, due to his ailing health. *Id.* Ms. Slocum repeating what Mr. Nash had told her informed the jury of why Ms. Slocum divorced Mr. Slocum, to wit, that he had sexually abused one of Ms. Slocum's grandchildren, and the one of whom Ms. Slocum was closest with. (09/12/12, RP 75). In light of this attack on her credibility, informing the jury of actual reasons for her decision was key to defending Ms. Slocum's credibility. The timeline of when she first heard about the abuse, and when she decided to divorce Mr. Slocum was thus critical to the fact finders evaluation of the credibility of the defendant's contention.

Detective Boyer, and Mari Murstig's testimony focused entirely on the way the investigation was conducted. (09/12/12, RP 101-06; 111-17). They gave timelines for the disclosures, and helped the jury understand that it is often difficult for children to discuss sexual abuse. (09/12/12, RP 101-06; 111-17). Very commonly, children testify to a few details, and then disclose the rest after they have ascertained that they will not be in trouble, that no one will blame them. (09/12/12, RP 101-06; 111-17). This kind of testimony is critical for the juror's to understand W.N.'s testimony. If it was not given, then the jury would lack the expertise to view W.N.'s reticence as anything but a sign of dishonesty. Neither communicated anything on the nature of the disclosures.

The final witness the defendant identifies is W.N. herself. She did mention multiple disclosures. (09/12/12, RP 126). However, the purpose of this testimony was clearly to inform the jury why it took W.N. so long to disclose the abuse Charles Slocum perpetrated upon her. (09/12/12, RP 126-27). The goal of the questioning was to make the jury aware of why W.N. did not tell any adults for so long, and of the deep shame she felt because of what Mr. Slocum had done to her. (09/12/12, RP 101-06; 127). This kind of testimony is of the utmost relevance. It allowed the jury to accurately assess W.N.'s credibility. Furthermore, given defense counsel's repeated assertions that this allegation was something created by

Jane Slocum or Tonya Nash for some improper means, the testimony of the earlier disclosures takes on added relevance. It establishes that W.N. did not fabricate the allegation that Mr. Slocum had raped her in response to Mr. Slocum's infirmity. It gave the jury a clear indication of when W.N. first disclosed these allegations. ER 801(d)(1) indicates a belief that this kind of testimony is highly useful for the finder of fact, when the credibility of a witness is impugned by an allegation of recent fabrication or improper motive.

The defendant faces a high bar in arguing that Mr. Metro provided constitutionally-deficient counsel due to a simple failure to object to some allegedly improper testimony. The *Strickland* test for ineffective assistance is difficult to meet. Furthermore, this particular allegation is one that the courts have made clear is generally not well taken. "The decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *State v. Madison*, 53 Wn. App. 754, 764, 770 P.2d 662 (1989).

Looking at the testimony cited to by the defense, it is quite obvious that Mr. Metro's decision to not object was not egregious. The decision to object or not to object is inherently one of balancing. Trial counsel must consider the price of letting by potentially objectionable information, and

compare it with the possibility that objections will impugn the defendants' credibility with the jury, or emphasize otherwise innocuous information. Such a calculus is the hallmark of an experienced trial attorney, and a process which the courts of Washington have endorsed as providing effective representation. *State v. Hunter*, 29 Wn. App. 218, 223, 627 P.2d 1339 (1981). In the end, it is evident that there is no requirement that every time trial counsel can object, that they must. The decision of whether to object or not is one of trial tactics. Mr. Metro believed that the costs of objecting to the testimony, and repeatedly emphasizing it in the mind of the jury outweighed the benefit, given its innocuous nature.

Furthermore, this testimony was quite obviously not central to the State's case. A bare repetition that W.N. told various individuals something, without anything more, was hardly the core of the case. Indeed, W.N.'s own recitation that she had disclosed the abuse earlier, in one sentence, is hardly the core of the State's case. The State's case was founded upon Mr. Slocum's distinct plan for sexual abuse, and the very obvious ways W.N. was just the latest iteration of that plan.

In short, the State placed the witnesses on the stand to show the jury how this case wended through the court system, and to give them confidence in the system. It served to fill in the gaps in the story, and make them aware of the circumstances the disclosures occurred in. It was

not an endless litany of witnesses, who just repeated the same statements from W.N. over and over. In fact, the content of the statements was only given once, by Calvin Nash. There, it was a brief summary, in an answer that went beyond the question. The harms posited by the cases the defendant relies upon simply did not occur. If each and every one of these witnesses had testified to exactly what W.N. had said, giving the jury the same lurid details, then the concerns the defendant has might be justified. A simple admission that something was said, without anything more does not rise anywhere near the level of prejudice. Mr. Metro recognized this, and elected to not object. Objecting would have taken innocuous testimony, and granted it some more emphasis, focused the juror's attention on it. In other words, objecting was far more likely to bring about the harm the defendant argues occurred than being silent.

3. THE STATE NEVER ALLEGED ANY RECENT FABRICATION.

The defendant attempts to argue that the State inherently accused Mr. Slocum of a recent fabrication, because Mr. Slocum had earlier plead guilty. The State does not agree. The jury never heard that Mr. Slocum plead guilty. All of the evidence that the jury heard was that Mr. Slocum, throughout this process, had maintained his innocence. The guilty plea, and everything leading up to it, was rendered completely inadmissible

when Mr. Slocum withdrew the guilty plea. ER 410. Furthermore, even after pleading guilty, it became quite obvious that Mr. Slocum did not think he was guilty. He called W.N. a story teller, and refused to accept any culpability for his crimes. (CP 23).

The defendant claims that it was unfair that W.N. was allowed to testify to 801(d)(1) evidence, but not the defendant. In the first case, the State never actually admitted the evidence it considered arguing for under ER 801(d)(1). (09/13/12, RP 41). That request was withdrawn. (09/13/12, RP 41). Furthermore, the defendant's defense was based upon portraying Jane Slocum and Tonya Nash as instigators, coercing their granddaughter/daughter to claim sexual assault by an innocent man for some very specific reasons that arose at a certain point in time. The defendant argued this to the jury repeatedly, throughout the trial. As a result, statements prior to those alleged reasons for fabrication become admissible. The purpose of ER 801(d)(1) is to allow parties to rebut an allegation of false testimony by introducing a statement consistent with the allegedly false testimony, produced before whatever alleged reasons the witness testifying has to lie. *State v. Perez*, 137 Wn. App. 97, 107, 151 P.3d 249 (2007). After all, if the witness has professed whatever statement is alleged to be a lie before the alleged reason to lie came about, the allegation that the witness is lying for that reason is negated.

Here, the jury never heard any argument that Mr. Slocum had done anything but profess his innocence from the moment he first was confronted with the allegations. The guilty plea was never introduced, never argued to the jury. The State did not argue that this was a recent fabrication. The State did indicate a belief that he was lying. The State still believes that he lied. Mr. Slocum sexually abused W.N. However, the State never indicated to the jury that there was anything recent about that fabrication. The reason for fabrication was Mr. Slocum did not want to go to jail. He had that motivation from the moment he abused W.N. His position, in the eyes of the fact finder was consistent. He could not refute that motivation to lie with prior statements, because they did not predate the motivation the State indicated provided the impetus to lie. As a result, it would have been incorrect to admit the taped statement to rebut allegations that had not been made.

4. MR. SLOCUM'S ARGUMENT ABOUT THE AWARD OF COSTS IS NOT RIPE.

Any argument about Mr. Slocum's indigent status cannot be considered ripe. Mr. Slocum provides no indication that he has ever faced any kind of sanction, or that the State of Washington has ever tried to collect on these legal financial obligations. No documents indicate that there has been any action by the State to collect on these legal financial

obligations. Mr. Slocum suffers no injury from Finding 2.5. (CP 201). As such, only when the State attempts to collect would Mr. Slocum be entitled to a protest about his indigent status. The Court has stated as such: “If in the future repayment will impose a manifest hardship on defendant, or if he is unable, through no fault of his own, to repay, the statute allows for remission of the costs award.” *State v. Blank*, 131 Wn.2d. 230, 253, 930 P.2d 1213 (1997).

State v. Zeigenfuss, 118 Wn. App. 110, 113, 74 P.3d 1205 (2003) is illustrative. In *Zeigenfuss*, an inmate protested the Department of Corrections procedure for imposing sanctions upon those who fail to pay their legal financial obligations. *Id.* at 112. The Court stated in answer to her claims: “

Ziegenfuss has not failed to pay the VPA [Victim Penalty Assessment], nor has she been incarcerated or otherwise sanctioned for violating the terms of her community custody. As yet, therefore, she has suffered no harm, and her challenge to the constitutionality of the process in DOC community custody violation hearings is premature.

Id.

Another illustrative case is *State v. Crook*, 146 Wn. App. 24, 189 P.3d 811 (2008). There, Mr. Crook appealed an order denying his motion to alleviate him of his financial obligations. *Id.* at 26. The Court’s response was: “Inquiry into the defendant's ability to pay is appropriate

only when the State enforces collection under the judgment or imposes sanctions for nonpayment; a defendant's indigent status at the time of sentencing does not bar an award of costs.” *Id.*

Finally, *State v. Wimbs*, 68 Wn. App. 673, 847 P.2d 8 (1993) clearly shows what consideration, if any, is necessary before the imposition of costs. In *Wimbs*, the only funds of the defendant considered consist of \$108.00 held by the Yakima Police Department, all of which was dispersed to the State, in order to pay Mr. Wimbs’ cost bill, which left \$575.50 of the original \$683.50 cost bill. *Id.* at 680-81 In the Courts words: “The court's order also finds that Mr. Wimbs has the ability to pay. The record contains no evidence of Mr. Wimbs' ability to pay the remaining \$575.50.” *Id.* The Court upheld the imposition of fines and costs, agreeing with the lower court. *Id.*

Mr. Slocum has suffered no harm as a result of the finding of ability to pay his costs. When the State attempts to collect such from him, he will be given a chance to be heard, and make arguments about his ability to pay. The Court has made it clear: “There is no reason at this time to deny the State's cost request based upon speculation about future circumstances.” *State v. Blank*, 131 Wn.2d at 253 (1997). Finding number 2.5 of the Judgment and Sentence dated November 1, 2012, simply indicates that the court believes that Mr. Slocum may be able to

pay his legal financial obligations. (CP 201). When the State attempts to collect, then let the defendant claim indigence. The court will be able to make a determination based upon the best possible evidence.

**5. MR. SLOCUM IS NOT AN ‘AGGRIEVED PARTY’
AS PER RAP 3.1.**

Mr. Slocum is not an aggrieved party. “We have defined ‘aggrieved party’ as one whose personal right or pecuniary interests have been affected.” *State v. Taylor*, 150 Wn.2d 599, 604, 80 P.3d 605 (2003). The Courts of this State have stated an individual against whom costs have been assessed, but on which no actions have been taken is not aggrieved for the purposes of RAP 3.1. *State v. Smits*, 152 Wn. App. 514, 525, 216 P.3d 1097 (2009). The reasons for this are apparent. No pecuniary interests have been impacted by the simple fact that the State has assessed costs against Mr. Slocum. If and when the State attempts to collect upon Mr. Slocum’s legal financial obligations, he will then be an aggrieved party, able to petition the court for protection from collection orders.

The simple assessment of costs is not enough to convert a party without a grievance to an aggrieved party. *Id.* While Mr. Slocum may not like the fact that costs have been assessed against him, “[a]n aggrieved party is not one whose feelings have been hurt or one who is disappointed over a certain result.” *Taylor*, 150 Wn.2d at 604. The only point at which

Mr. Slocum may challenge the collection of costs despite his indigent status is when the State attempts to collect from him, despite his status as an indigent.

6. MR. SLOCUM IS LIKELY TO HAVE THE CAPACITY TO REPAY HIS LEGAL FINANCIAL OBLIGATIONS.

Mr. Slocum may have been indigent at the time of trial. This does not preclude the assessment of costs. Both RCW 10.01.160 and RCW 9.94A.753 ask the court to look to the defendant's current and *future* ability to pay. The court did exactly that in Finding 2.5:

The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

(CP 201).

It could be true that Mr. Slocum cannot pay at the current time, but the court had confidence that Mr. Slocum would be able to pay his court costs in the future.

The burden to show that the trial court had insufficient facts before it to make a finding lies entirely on Mr. Slocum. *Nordstrom Credit, Inc. v. Department of Revenue*, 120 Wn.2d 935, 939-940, 845 P.2d 1331 (1993). Mr. Slocum claims that the court had no evidence whatsoever before it

demonstrating the possibility of a future ability to pay. However, there was testimony throughout the trial about the financial resources of Mr. Slocum, and his former wife. (09/12/12, RP 79-80; 09/13/12, RP 37). He had a partial ownership interest in a \$100,000 home, as well as a saving and checking account. As a result, the testimony demonstrated that Mr. Slocum had some funds available to compensate the State for the cost of trying him.

The court had sufficient evidence before it to make Finding 2.5. The defendant cites no evidence showing that the court was in error when it decided that he was capable of meeting his legal financial obligations. As such, he has failed to meet his burden.

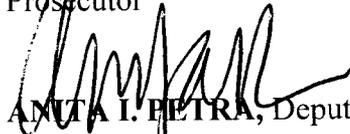
IV. CONCLUSION

Mr. Slocum has assigned error to four matters, all of which were not done in error. As Mr. Slocum has not demonstrated any mistakes by the trial court, the State would ask that this Court affirm the trial court's ruling.

RESPECTFULLY SUBMITTED this 6th day of June 2013.

ANDY MILLER

Prosecutor

A handwritten signature in black ink, appearing to read "Anita I. Petra", written over the printed name.

ANITA I. PETRA, Deputy
Prosecuting Attorney

Bar No. 32535

OFC ID NO. 91004

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

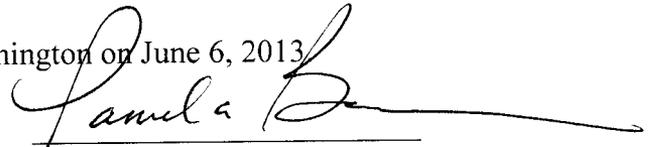
Kristina M. Nichols
Attorney at Law
P.O. Box 19203
Spokane, WA 99219-2303

E-mail service by agreement
was made to the following
parties:
wa.appeals@gmail.com

Charles Ben Slocum
#354711
P.O. Box 1899
Airway Heights, WA 99001-1899

U.S. Regular Mail, Postage
Prepaid

Signed at Kennewick, Washington on June 6, 2013



Pamela Bradshaw
Legal Assistant