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King County Prosecutor  
Appellate Unit

NO. 71453-8-I

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

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STATE OF WASHINGTON,

Respondent,

v.

DANIEL WILCKEN,

Appellant.

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

The Honorable Lori K. Smith, Judge

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BRIEF OF APPELLANT

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3

**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Pertaining to Assignments of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. <u>Procedural Facts</u> .....	2
2. <u>Motion for Mistrial Based on Prosecutor’s Questioning         During Voir Dire</u> .....	4
3. <u>Motion for Mistrial Based on Prosecutor’s Opening         Statement</u> .....	10
4. <u>Trial Testimony</u> .....	11
(i) <u>Count One</u> .....	13
(ii) <u>Count Two</u> .....	14
(iii) <u>Count Three</u> .....	15
(iv) <u>Count Four</u> .....	16
(v) <u>Count Five</u> .....	17
(vi) <u>Allegations of Misconduct during the 1980s                 Admitted under ER 404(b)</u> .....	18
C. <u>ARGUMENT</u> .....	24
1. <u>PROSECUTORIAL MISCONDUCT DURING VOIR         DIRE DEPRIVED APPELLANT OF HIS RIGHT TO A         FAIR TRIAL</u> .....	24
(i) <u>The Prosecutor’s Misconduct during Voir Dire Was                 a Serious Trial Irregularity</u> .....	26

**TABLE OF CONTENTS (CONT'D)**

	Page
(ii) <u>The Voir Dire Irregularity Did Not Involve Cumulative Evidence</u> .....	33
(iii) <u>No Curative Instruction Was Given or Capable of Curing the Voir Dire Irregularity</u> .....	33
2. PROSECUTORIAL MISCONDUCT DURING OPENING STATEMENT DEPRIVED APPELLANT OF HIS RIGHT TO A FAIR TRIAL. ....	34
(i) <u>The Prosecutor's Misconduct During Opening Was a Serious Trial Irregularity</u> .....	35
(ii) <u>The Opening Statement Irregularity Was Not Cumulative of Other Evidence</u> .....	37
(iii) <u>No Curative Instruction Was Given or Capable of Curing the Opening Statement Irregularity</u> .....	37
3. IMPROPER ADMISSION OF PROPENSITY EVIDENCE DENIED APPELLANT A FAIR TRIAL.....	38
D. <u>CONCLUSION</u> .....	47

## TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>State v. Aho</u> 137 Wn.2d 736, 975 P.2d 512 (1999).....	39
 <u>State v. Allen</u> 159 Wn.2d 1, 147 P.3d 581 (2006).....	 25
 <u>State v. Borboa</u> 157 Wn.2d 108, 135 P.3d 469 (2006).....	 29
 <u>State v. Brown</u> 132 Wn.2d 529, 940 P. 2d 546 (1997) <u>cert. denied</u> , 523 U.S. 1007 (1998).....	  26, 31, 39
 <u>State v. Burkins</u> 94 Wn. App. 677, 973 P.2d 15 (1999) <u>rev. denied</u> , 138 Wn.2d 1014 (1999).....	  41
 <u>State v. Case</u> 49 Wash.2d 66, 298 P.2d 500 (1956) .....	 27
 <u>State v. Coe</u> 101 Wn.2d 772, 684 P.2d 668 (1984).....	 44
 <u>State v. Davis</u> 141 Wash.2d 798, 10 P.3d 977 (2000) .....	 31
 <u>State v. DeVincentis</u> 150 Wn.2d 11, 74 P.3d 119 (2003).....	 39
 <u>State v. Escalona</u> 49 Wn. App. 251, 742 P.2d 190 (1987).....	 25
 <u>State v. Fisher</u> 165 Wash.2d 727, 202 P.3d 937 (2009) .....	 26

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Irving</u> 24 Wn. App. 370, 601 P. 2d 954 (1979) <u>rev. denied</u> , 93 Wn.2d 1007 (1980) .....	44
<u>State v. Johnson</u> 124 Wn.2d 57, 873 P.2d 514 (1994).....	25
<u>State v. Krause</u> 82 Wn. App. 688, 919 P.2d 123 (1996) <u>rev. denied</u> , 131 Wn.2d 1007 (1997) .....	41, 42, 43, 44, 45
<u>State v. Laureano</u> 101 Wash.2d 745, 682 P.2d 889 (1984) .....	31
<u>State v. Lord</u> 161 Wn. 2d 276, 165 P.3d 1251 (2007).....	25
<u>State v. Lough</u> 125 Wn.2d 847, 889 P. 2d 487 (1995).....	40, 41, 42, 43, 44, 45
<u>State v. McKenzie</u> 157 Wash.2d 44, 134 P.3d 221 (2006) .....	26
<u>State v. Mendoza</u> 139 Wn. App. 693, 162 P.3d 439 (2007) <u>aff'd</u> , 165 Wn.2d 913, 205 P.3d 113 (2009) .....	39
<u>State v. Mer</u> 174 Wn.2d 741, 278 P.3d 653 (2012).....	34
<u>State v. Monday</u> 171 Wn.2d 667, 257 P.3d 551 (2011).....	11, 26, 27, 35
<u>State v. Pierce</u> 169 Wn. App. 533, 280 P.3d 1158 (2012).....	27, 28, 29, 30, 31, 32, 35, 36
<u>State v. Saltarelli</u> 98 Wn.2d 358, 655 P.2d 697 (1982).....	39, 40, 44, 45

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Sanchez-Guillen</u> 135 Wn. App. 636, 145 P.3d 406 (2006) .....	40
<u>State v. Smith</u> 106 Wn.2d 772, 725 P.2d 951 (1986).....	1, 40, 46
<u>State v. Stenson</u> 132 Wn.2d 668, 940 P.2d 1239 (1997).....	25
<u>State v. Wilson</u> 144 Wn. App. 166, 181 P.3d 887 (2008).....	39, 40
<u>State v. Yates</u> 161 Wash.2d 714, 774, 168 P.3d 359 (2007) .....	26
 <u>FEDERAL CASES</u>	
<u>Hawthorne v. United States</u> 476 A.2d 164 (D.C. 1984) .....	36
<u>Skilling v. United States</u> 561 U.S. 358, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010).....	31
 <u>OTHER JURISDICTIONS</u>	
<u>People v. Fielding</u> 158 N.Y. 542, 53 N.E. 497 (1899).....	27
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
CR 47 .....	31
CrR 6.3 .....	31
CrR 6.4.....	31
CrR 6.5.....	31

**TABLE OF AUTHORITIES (CONT'D)**

	Page
ER 403 .....	44
ER 404 .....	18, 38, 39, 43
RCW 4.44.120-.250 .....	31
RPC 3.8.....	36

A. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct during voir dire and opening statement deprived appellant of his right to a fair trial.

2. The court erred in denying defense counsel's timely motions for a mistrial during voir dire and opening statement.

3. The court's admission of propensity evidence violated appellant's right to a fair trial.

Issues Pertaining to Assignments of Error

1. Whether the court erred in denying appellant's motion for a mistrial in the state's prosecution of appellant for child molestation, when – during voir dire – the prosecutor: directed jurors to close their eyes and remember back to their first sexual experiences; and then asked jurors a number of questions relating to whether they would feel comfortable if forced to testify about those experiences from the witness stand in front of a bunch of strangers?

2. Whether the court erred in denying appellant's second motion for a mistrial, when – during opening statement – after describing what he believed the evidence would show as to each alleged victim, the prosecutor concluded: “we’re here” for that alleged victim, i.e. “were

here” for C.S., “we’re here” for H.J., “we’re here” for S.E., “we’re here” for T.W., and “we’re here” for J.B.?<sup>1</sup>

3. Whether the court erred in admitting evidence appellant committed sexual misconduct in the 1980s to show “a common scheme or plan by the defendant to molest young females?”<sup>2</sup>

B. STATEMENT OF THE CASE

1. Procedural Facts

By an amended information, the King county prosecutor charged appellant with the following five counts: (1) second degree child molestation of H.J., allegedly committed between 4/8/05 and 7/7/08; (2) attempted second degree child molestation of C.S., between 11/13/05 and 11/12/06; (3) first degree child molestation of S.E., between 7/28/04 and 7/27/06; (4) attempted second degree child molestation of T.W., between 6/3/02 and 6/2/05; and (5) first degree child molestation of J.B., between 7/27/01 and 7/26/02. CP 211-213.

The state alleged the conduct occurred during sleepovers when the girls were asleep. RP 1335-36, 1338, 1340-42. With the exception of J.B., who was a family friend, the girls were friends with Wilcken’s daughters, C.W. and E.W. RP 1331, 1335, 1339-42.

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<sup>1</sup> RP 1335, 1338, 1340, 1341. The prosecutor stated “we’re here” twice for C.S. RP 1335, 1338.

Significantly, however, a prior investigation of Wilcken in 2008 (post-dating the charged conduct) concerning three of the same girls, resulted in no charges. CP 5, 317; RP 38, 42-43, 1902-09, 1974. During that investigation, C.S. – whose allegations initiated the 2010 investigation leading to the current charges – did not disclose anything untoward. CP 4-5; RP 1582. In fact, C.S. told the detective “nothing had ever happened to [her] with Mr. Wilcken.” RP 1594.

H.J., who was also interviewed in 2008, likewise disclosed nothing untoward. RP 1357. Rather, she told police “nothing had happened to [her] by Dan at his house.” RP 2133.

Nor did S.E. disclose anything in 2008. RP 1794, 1807. On the contrary, S.E. told police she had never seen or heard anything that made her feel uncomfortable in Wilcken’s company. RP 1808.

Following a jury trial in the fall of 2013, however, Wilcken was convicted of counts (1) - (4) and acquitted of count (5). CP 327, 329, 331, 333-336. The court imposed an indeterminate sentence of 198 months on count (3) to be served concurrently with sentences imposed on the other counts. CP 349-50. This appeal timely follows. CP 363-76.

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<sup>2</sup> RP 251, 253.

2. Motion for Mistrial Based on Prosecutor's Questioning During Voir Dire

During voir dire, the prosecutor asked jurors to close their eyes and imagine their first sexual experience:

I want to shift gears and I want to ask you all to close your eyes at this point. You aren't going to need to lift up your card for this one, but you close your eyes.

I want you to think back to your first sexual experience. It can be whatever you consider to be your first sexual experience. I want you to think about who it was with. I want you to think of that person's name. I want you to think about the day's events leading up to that event. Think about where you were when it occurred, who you were beforehand, think about the clothing that you were wearing, think about the time of day, think about what he or she might have said to you leading up to it, think about the feeling that you had when you experienced it, think about the scents that you might have smelled, think about the sounds, think about words that were exchanged, think about how it ended, think about how it felt afterwards, how things were left between you.

RP 1094-95.

The prosecutor then asked whether jurors would feel comfortable relating that experience to others, or being forced to testify about it on the witness stand:

I want you to open up your eyes now and I want to ask who would like to come up here and talk about that on the witness stand? I'm not seeing any cards. And Juror 131, you kind of chuckled to yourself.

PROSPECTIVE JUROR: I don't know anybody that might want to recount that necessarily.

MR. WYNNE [prosecutor]: Okay.

PROSPECTIVE JUROR: Just if you were young and fumbling.

MR. WYNNE: Sure, sure. Are there other reasons why you wouldn't want to come up and do that?

PROSPECTIVE JUROR: I don't know if I want to make known my business.

MR. WYNNE: Okay.

PROSPECTIVE JUROR: Private.

MR. WYNNE: You don't want, what, a hundred of your closest strangers to know about it?

PROSPECTIVE JUROR: Juror 64, what about you? Would you want to come up here?

PROSPECTIVE JUROR: No.

MR. WYNNE: And why not?

PROSPECTIVE JUROR: It's personal, it's private.

MR. WYNNE: Juror 63.

PROSPECTIVE JUROR: I wouldn't want to talk about it. It's my own personal experiences that are for me and that other person.

MR. WYNNE: Juror 85.

PROSPECTIVE JUROR: Yeah, I wouldn't want to tell other full strangers about it.

MR. WYNNE: Juror 82, how would you feel if somebody made you come in and testify?

PROSPECTIVE JUROR: If someone made me?

MR. WYNNE: Yeah, if somebody said, Come in, you have to sit up there, how would you feel?

PROSPECTIVE JUROR: A little shaky, maybe, but I would do it. Yeah.

MR. WYNNE: Okay. Juror 81, how would you feel if you had to be up there and recounting that?

PROSPECTIVE JUROR: I'd prefer not to.

MR. WYNNE: Prefer not to or, like I really don't want to do that?

PROSPECTIVE JUROR: I'd prefer not to.

MR. WYNNE: Okay. And why?

PROSPECTIVE JUROR: Just because, you know, it's a private, personal matter.

RP 1097.

Jurors 79, 77 and 76 agreed it would be difficult to discuss their first sexual experiences in front of others. RP 1097. As the prosecutor continued voir dire on this subject, Juror 78 added, "every person likes to feel like if they do talk about it, it's because it's something they want to do, not being coerced into it by somebody else." RP 1098. Jurors 137 and 97 explained they would be more willing to share their experiences if it was "for other people or for the good" or "because it will help someone with an experience they might be going through." RP 1099. Juror 2

rounded off the questioning, responding: "I'd feel shaky, but I'd do it, but I was assuming it was a situation where I was called as a witness." RP 1100.

On a related issue, the prosecutor inquired whether jurors were able to recall all the details of their experiences, as he had asked them to do when closing their eyes:

MR. WYNNE: Right, right. Now, I had asked a number of questions. Was everyone able to answer every one of the questions that I had when I was going through them? Smells that you smelled, sounds that you heard, the clothes that you were wearing?

I see some heads shaking. Yeah. How many people were not able to answer every one of my questions. I'm seeing quite a few. And who was able to answer every one of them and you know it all? Not too many, but still a few.

If I had asked you more detailed questions, you know, what shoes you were wearing, what song was playing on the radio, the precise time of day, do the details start to fall away for those people who know everything or remember everything pretty well? Juror 81.

PROSPECTIVE JUROR: Yeah, they fall away.

MR. WYNNE: Yeah, a little bit. Juror 6.

PROSPECTIVE JUROR: Yeah.

RP 1101.

At this point, defense counsel asked to approach the bench to lodge an objection. At the sidebar, defense counsel moved for a mistrial, on

grounds the prosecutor was encouraging jurors to put themselves in the shoes of the alleged victims:

MR. ADAIR [defense counsel]: Your Honor, I want to move for a mistrial on the excuse of (inaudible) because of the Prosecutor is engaging in a lost innocence type of voir dire to try to put these particular jurors actually in the shoes of the victims and the argument itself is not permissible at closing and it should not be permissible in the voir dire process.

I believe that the prosecutor is intentionally trying to create the type of sympathy and connection between the jurors and the victims and it wants to place it during the trial. They can't do it in argument in closing, they shouldn't be allowed to do it during voir dire. Now it's tainted. We have to start over.

RP 1101-1102. The court resolved to address the motion after the prosecutor finished voir dire on other topics. RP 1102.

At the break, defense counsel argued that while the state did not expressly say "think of yourself as the victim," the prosecutor invited jurors "to picture themselves talking about a sexual experience that they've had in a witness stand telling a bunch of strangers," amounting to the same thing. RP 1110.

The court reserved ruling until after lunch, at which time, defense counsel argued the state had made an improper "golden rule" argument. RP 1116. While the "golden rule" cases addressed closing arguments, defense counsel argued the same prohibition should be required in voir dire:

But again, I think the arguments are essentially the same as is discussed in those closing argument cases, that it is the invitation to put themselves in the place of the jury, it is to inflame the passions of the jury, and it is to potentially seek a conviction for reasons other than the evidence that will be presented.

RP 1116. The defense argued the jury was tainted and the bell could not be unrung. RP 1117-18.

The prosecutor agreed requesting jurors to put themselves in the shoes of the alleged victims would constitute misconduct as “clearly a golden rule violation.” RP 1118. However, the prosecutor asserted he made no such request. Rather, he asserted he merely solicited jurors’ expectations of witnesses and their abilities to perceive and remember events. RP 1117. Moreover, he pointed out voir dire is not closing argument. RP 1119.

The court denied the defense motion to dismiss the jury pool. RP 1121-1122. The court reasoned voir dire is different than closing argument and the prosecutor merely asked jurors to reflect on their own experiences, not facts pertaining to the case; in other words, he did not ask jurors to put themselves in the victims’ shoes. RP 1121-22.

3. Motion for Mistrial Based on Prosecutor's Opening Statement

In opening statement, after describing what he believed the evidence would show as to each alleged victim, the prosecutor concluded "we're here" for that alleged victim:

We're here for [T.W.].

And we're also here for [C.S.] ...

RP 1335.

So we're here for [C.S.], as well, . . .

We're also here for [H.J.].

RP 1338.

We're also here for [S.E.].

RP 1340.

Oh, yeah. Also here for [J.B.]

RP 1341.

After openings, defense counsel moved for a mistrial based on the prosecution's "we're here" assertions:

Actually, you know what, first of all, moving for a mistrial based on the State's characterization in opening statement of the we are here for Jessica Bean, we are here for Chelsea Staab, we are here for all these other things. That's improperly inflaming the passions and prejudices, trying to put them in the shoes of these alleged victims, saying that we are here to somehow vindicate the victim

rights or something like that. That is not what the State's role is.

State v. Monday<sup>[3]</sup> talks about the role of the Prosecutor being – well, representing the state as a whole and the People and that they need to be conscious of the things that they're saying, and we think that saying that we're here for, we're her for, we're here for is unfairly prejudicial and it is designed to inflame the passions and the prejudices of the jury.

RP 1359.

The state described its “we're here” statements as rhetorical device. RP 1362. The court denied the motion for mistrial. RP 1362.

4. Trial Testimony

As indicated above, in 2008, C.S. told police nothing inappropriate occurred between her and Wilcken. RP 1592-93. In February 2010, however, C.S. told her mother Wilcken touched her inappropriately in 2005. RP 1594-95. Des Moines police officer Casey Emly took C.S.'s new statement. RP 1427.

Significantly, C.S.'s disclosure came approximately three months after Wilcken told C.S.'s mother C.S. was secretly contacting her father. RP 1472, 1583, 1595-97. C.S.'s mother and father – Ann Garner and Craig Staab – divorced when C.S. was two years old. RP 1431, 1446. Staab testified it was a “rough” divorce. RP 1446. Although he tried to maintain contact with C.S., he met with limited success. RP 1447. C.S.

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<sup>3</sup> State v. Monday, 171 Wn.2d 667, 675, 257 P.3d 551 (2011).

testified she and her mother “would butt heads a lot, mostly because she would keep me from my dad.” RP 1474.

When C.S. spent the night at C.W.’s house, however, Wilcken allowed C.S. to telephone Staab. RP 1449, 1495-96. Wilcken also facilitated a visit between C.S. and Staab. RP 1450.

But once Wilcken reported the contact to Garner, Garner prohibited C.S. from further contacting Staab. RP 1584, 1596. Garner prohibited C.S. from having a cell phone and directed parents of C.S.’s friends not to allow C.S. to use their telephone when visiting. RP 1596. C.S. admitted her mother’s conduct angered her. RP 1596.

On February 16, 2010, Des Moines police detective Paul Young received Emly’s report. RP 1909, 1440. In following up, Young revisited the 2008 allegations. RP 1910-1912. He subsequently re-contacted C.S. and H.J. RP 1917-18. Young thereafter obtained a search warrant for computer equipment at Wilcken’s residence. RP 1918-19, 1954. Initially, police were investigating Wilcken for allegedly possessing depictions of minors engaged in sexually explicit conduct.<sup>4</sup> CP 1; RP 1975.

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<sup>4</sup> The state initially charged Wilcken with possessing depictions of minors engaged in sexual explicit activity based on pictures found on his computer pursuant to the search warrant. CP 1-9. The charge was dismissed the first day of trial for federal prosecution. RP 176.

While fellow officers executed the search warrant, Young interviewed Wilcken at the police station. RP 1923. Wilcken acknowledged he possessed nude pictures of his daughters on his computer. RP 1925-26, 1939, 1947-48. He acknowledged he possessed photos of another girl as well. RP 1948. As Wilcken explained, however, the photographs were taken as reference samples in an effort to create digital characters for a computer movie project. RP 1925.

(i) Count One

H.J. became friends with Wilcken's daughter E.W. in the fifth grade, after E.W. invited her to a birthday party. RP 2042-45. But H.J. did not spend much time at C.W.'s house until later, when H.J. was 12. RP 2048.

H.J. recalled that on one occasion when she was twelve years old and spent the night at E.W.'s house, Wilcken lay down next to her in the bed. RP 2056. H.J. claimed that when she awoke, Wilcken's hand was down her pants underneath her underwear. RP 2056, 2060. H.J. testified she pretended nothing happened and went back to sleep. RP 2057, 2062.

The court admitted evidence Wilcken asked H.J to pose nude and photographed her in the nude, although such evidence was admitted solely for the purpose of determining whether Wilcken acted pursuant to a

common scheme or plan.<sup>5</sup> CP 284; RP 2104-2105. Wilcken told H.J. the pictures would be used to create a digital stunt double for an internet series. RP 2101-2105.

(ii) Count Two

C.S. became friends with C.W. when she was approximately twelve years old. RP 1483. About a week after first meeting, C.W. invited C.S. to spend the night. RP 1486, 1590.

C.S. testified that during one sleepover at C.W.'s house, she awoke to find Wilcken hovering over her. RP 1500-1501. His hands were on either side of her shoulders and his knees on either side of her hips. RP 1501-02. C.S. claimed her shirt was pushed up and Wilcken's hand was down her pajama bottoms but on top of her underwear. RP 1502.

C.S. testified she got up and went out to the living room. RP 1505, 1507. According to C.S., Wilcken asked C.S. not to discuss what happened and later bought her a DVD. RP 1509-1511.

The court admitted evidence Wilcken watched C.S. sleep, was nude in C.S.'s presence, asked her to pose nude and showed her nude pictures.<sup>6</sup> RP 1492, 1515-18, 1524, 1527-29. Wilcken told C.S. he was making a movie and needed reference samples to create virtual characters.

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<sup>5</sup> The court also admitted other instances of conduct solely for the purpose of determining whether Wilcken felt lust toward H.J. CP 285; RP 2068-69, 2108, 2110-2111.

RP 1524. The court instructed the jury Wilcken's nudity and the other incidents were to be considered only for the limited purpose of deciding whether Wilcken acted pursuant to a common scheme or plan. CP 282-83.

(iii) Count Three

S.E. testified she became friends with E.W. when she was ten years old and starting the fifth grade. RP 1751-52. S.E. spent the night at E.W.'s house not long after. RP 1759. S.E. testified that between fifth and sixth grade, she spent the night at E.W.'s approximately 2-3 times a month. RP 1760.

S.E. testified that on one occasion, Wilcken "staggered" into the bedroom where E.W. and S.E. were sleeping, lied down next to S.E. and put his hand under her pants and underwear. RP 1764. When S.E. awoke, Wilcken was no longer there. RP 1769.

According to S.E., she was ten years old and in the fifth grade at the time. RP 1765. S.E. claimed this happened on another occasion when she was in the fifth grade.<sup>7</sup> RP 1773-4. But according to S.E. "this time it was more aware to me that it was sleepwalking was something that he said that he did." RP 1774.

S.E. explained that one time, while she and E.W. were in the living room, Wilcken "had come out and he was sleepwalking." RP 1778-79.

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<sup>6</sup> These pictures were admitted as exhibits. RP 1530.

There was another occasion when Wilcken “appeared to be talking on a telephone that was actually his hand.” RP 1816. S.E. believed Wilcken told her once he walked in his sleep. RP 1779.

The court admitted evidence Wilcken wore see-through clothing in S.E.’s presence, asked her to pose in the nude and took nude photos of her. RP 1780, 1782-83. Wilcken told S.E. he needed “anatomy references” for the animation program he was running on his computer. RP 1782. The evidence was admitted for the limited purpose of determining whether Wilcken acted pursuant to a common scheme or plan. CP 286.

(iv) Count Four

T.W. and C.W. became friends sometime in the third or fourth grade. RP 2210, 2373, 2409. T.W. began spending the night frequently. RP 2223, 2374-75.

T.W. was interesting in modeling and Wilcken offered to help her get started. RP 2184, 2348. Towards that end, Wilcken took photographs of T.W. RP 2379, 2387-88. T.W.’s sister testified T.W. was only “partially dressed” in the photos she viewed.<sup>8</sup> RP 2189. In contrast, T.W.’s mother Carolyn Bunch testified the photographs were “typical, everyday poses.” RP 2234.

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<sup>7</sup> The jury was instructed it must be unanimous as to which act it relied upon. CP 280.

<sup>8</sup> Wilcken said the photos were typical of what people in the business wanted. RP 2200.

T.W. testified she remembered a time when she was twelve or thirteen years old staying over with C.W. and awoke with her shirt pulled up. RP 2380, 2414. T.W. reportedly pretended to be asleep and rolled over. RP 2380. T.W. testified she heard Wilcken walk out of the room and start up the van outside. RP 2380.

T.W. testified she called her mother, who came over and confronted Wilcken. RP 2384. Bunch remembered a time T.W. returned home from a sleep over and reported someone touched her inappropriately. RP 2225, 2228. Bunch drove T.W. back to Wilcken's house and confronted him. RP 2225-27. Wilcken explained he came to tuck everyone in and pulled down T.W.'s shirt after noticing it was pulled up. RP 2227, 2385.

The court admitted evidence Wilcken was a nudist and watched T.W. sleep, but only for the purpose of determining whether Wilcken acted pursuant to a common scheme or plan.<sup>9</sup> CP 287; RP 2379.

(v) Count Five

During the 1980s, Wilcken dated Darcy Bean, formerly Cain. RP 2253-54, 2465. Bean and Wilcken remained friends after the relationship. Bean's husband sometimes spent the night at Wilcken's instead of

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<sup>9</sup> The court also admitted other instances of conduct for the limited purpose of determining whether Wilcken felt lust toward T.W. CP 288; RP 2398-2400.

commuting home to Vashon Island when he was working swing shift at Boeing. RP 2678. The families interacted socially. RP 2675-78.

J.B. is Bean's daughter and the same age as Wilcken's daughter, C.W. RP 2254, 2669. J.B. testified that on one occasion when she was nine and spending the night, she woke up and Wilcken's hand was under her shirt. RP 2679-81. J.B. reportedly rolled over as if asleep. RP 2679.

J.B. admitted her memory about the incident was "vague." RP 2689. She also testified the incident occurred at Wilcken's house in Des Moines. RP 2688. However, records showed Wilcken did not yet live in Des Moines when J.B. claimed the incident happened. RP 2959. As indicated above, Wilcken was acquitted of this charge. CP 333-335.

(vi) Allegations of Misconduct during the 1980s  
Admitted under ER 404(b)

The state moved pretrial to admit allegations of misconduct Wilcken allegedly committed in the 1980s as additional evidence of a common scheme or plan. Specifically, the state alleged that while Wilcken was dating Darcy Cain, he had inappropriate contact with her younger sisters, A.C. and M.W., as well as A.C.'s friend, K.M. Supp. CP \_\_\_ (sub. no. 163, State's Trial Memo, 10/23/13).

According to the state's offer, Wilcken rubbed M.W.'s chest under her shirt while waiting for a ferry when she was six years old. RP 234.

On another occasion when M.W. was approximately ten years old, she reportedly awoke to find Wilcken trying to get into her sleeping bag and reaching his hand under her shirt. RP 234. The state further alleged Wilcken touched A.C. under her swimsuit and put his hand down her pants while she was sleeping, when she was ten or eleven years old. RP 234. Finally, the state claimed ten-year-old K.M. awoke during a campout at A.C.'s with her shirt pulled up and saw someone moving back to the couch; whereupon, she reportedly saw Wilcken "pretending to sleep there." Supp. CP \_\_ (sub. no. 163, State's Trial Memo);<sup>10</sup> see also RP 235.

The state alleged these uncharged incidents were relevant as evidence of Wilcken's common scheme or plan of "satisfying his sexual desire for young girls by befriending them through his significant other, desensitizing them to a more sexualized relationship through sexual 'jokes,'<sup>[11]</sup> touching, and nudity, and molesting them while they slept[.]" Supp. CP \_\_ (sub. no. 163), page 28-29.

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<sup>10</sup> The state also sought to admit evidence Wilcken propositioned his 17-year-old niece and took photographs of her. RP 235; Supp. CP \_\_ (sub. no. 163). The court found this evidence was not sufficiently similar to the charged conduct to be admitted under the common scheme or plan exception. RP 275-76.

<sup>11</sup> The state later withdrew its request to admit evidence of sexual jokes under the common scheme or plan exception. RP 1263.

In response, the defense countered the “common scheme or plan” asserted by the state merely suggested a propensity to “offend against young women or young girls.” RP 251. Moreover, the lack of similarity between the charged conduct and the bulk of the previous incidents – particularly the ferry incident alleged by M.W. and swimming incidents alleged by A.C. – weighed against admission under the common scheme or plan exception. RP 251, 254.

Any probative value was further diminished by the fact there were five current complainants and evidence of a common scheme or plan relating to them already being admitted. There was therefore no need for the state to rely on antiquated uncharged conduct to bolster its case. RP 256-57.

As defense counsel summarized, the probative value of the 1980s evidence was far outweighed by its potential for prejudice:

We have a case with the charged victims and there’s five of them. They all sort of say similar things to one another. And we do have a separate motion to sever one of the victims, but again, if you look at sort of the four victims that have the most similarity, there’s enough there that the State does not need to have these people coming in from either the beginning of this century or from the 1980s to talk about things that by themselves might superficially look similar, but when you actually get down to what they’re actually saying or what they’ve actually reported saying to us during interviews, that they really are significantly different and they’re different enough to argue against the finding of an actual common scheme or plan

and that the introduction of allowing witnesses to come in and say, you know, not only have you heard from the people that are charged victims, but now we're going to bring in some people that are going to talk about what happened to them from Mr. Wilcken back when they were younger, that it's – the juries just don't recover from that type of evidence.

And that's why the strict rules about the type of balancing test that has to be performed by the Court and why there's such a prohibition about getting this type of information before the jury. Because it is – it is Kryptonite. You know, it's going to take away any chance that we're going to have with keeping the jury mindful of what they have to be mindful of throughout the pendency of this trial, which is he's presumed innocent. And that's just not possible when you have all these individuals testifying.

RP 257.

The court admitted the 1980s conduct on grounds it showed “a common scheme or plan by the defendant to molest young females.” CP 251-253; see also RP 275. The court found the probative value of the prior alleged misconduct outweighed its prejudicial effect. RP 276.

At trial, detective Young testified the prosecutor asked him to investigate an old police report from 1987. RP 1956-57, 1987. In following up, Young spoke to A.C. and K.M. RP 1959, 1985. A.C. told her younger sister M.W. about the investigation. RP 2279.

A.C. and M.W. are younger sisters of Darcy Bean. RP 2253-54. M.W. testified she was about six years old when Wilcken and Bean started dating. RP 2259. Wilcken and Bean sometimes took M.W. on outings off

of Vashon Island, where she and Bean lived; one time to Wild Waves, and one time, to the Science Center. RP 2259-2260.

M.W. claimed that once when she was six years old and they were waiting to catch a ferry back to Vashon, Wilcken rubbed M.W.'s chest inside her shirt for approximately five minutes, while M.W. was sitting on his lap. RP 2263-65.

M.W. also remembered a time in 1986, when she was about ten years old and camping out with other family members in the living room. RP 2268-69, 2275. Upon waking, M.W. reportedly saw that Wilcken had unzipped her sleeping bag and was reaching under her shirt. RP 2269. M.W. left the campout and went to her room. RP 2269.

A.C. was between the ages of six and twelve years old when Bean and Wilcken were dating. RP 2568. A.C. testified she started feeling uncomfortable around Wilcken when she was between seven and nine, following swimming outings. RP 2573. A.C. testified Wilcken lived somewhere with a pool, that Wilcken provided her with age-inappropriate swim wear, touched her underneath her swim wear and played "tickling games."<sup>12</sup> RP 2573-75. He reportedly photographed A.C. in a bikini he provided. RP 2583.

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<sup>12</sup> Defense counsel argued the swimming pool incidents were unlike anything allegedly occurring during the sleepovers and therefore were not evidence of a common scheme or

A.C. testified she also remembered Wilcken tried to get into her sleeping bag and touch her when she was sleeping in the living room. RP 2577. According to A.C., Wilcken also tried to crawl into her bed. RP 2577, 2580.

A.C. reportedly stayed with Wilcken and Dean when her parents went to China. RP 2580. A.C. claimed she awoke frequently with Wilcken trying to get into her bed and putting his hand in her clothes; she claimed he also opened the curtain when she was taking a shower. RP 2582, 2584.

K.M. was friends with A.C. and spent a lot of time with A.C.'s family. RP 2278, 2460. K.M. testified she met Wilcken in the summer of 1987, when she was thirteen years old, and Wilcken was dating Bean. RP 2465.

K.M. remembered returning to A.C.'s late one night and camping out with A.C. and her siblings in the living room. RP 2469. K.M. testified she woke up when she felt someone's breath on her face. RP 2472. K.M. reportedly realized her shirt was pulled up and heard "scurrying back to the couch." RP 2472. K.M. claimed she saw Wilcken lying on the couch pretending to sleep. RP 2474.

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plan. RP 2539. The court agreed the pool incidents were dissimilar to the sleepover incidents but held they were admissible because similar to the ferry incident. RP 2544.

C. ARGUMENT

1. PROSECUTORIAL MISCONDUCT DURING VOIR DIRE DEPRIVED APPELLANT OF HIS RIGHT TO A FAIR TRIAL.

During voir dire, the prosecutor asked jurors to close their eyes and imagine the intimate details of their first sexual experiences, including “scents,” “sounds,” “how it ended” and “how things were left between you.” RP 1094-95. The prosecutor then asked jurors whether they would feel comfortable if forced to relate their experiences to a number of strangers on the witness stand. RP 1097. Not surprisingly, jurors agreed they would not be comfortable, that such an experience would be difficult, but they would do it if necessary for the greater good. RP 1097.

The prosecutor then asked whether jurors under such circumstances would still be able to recall all the details of their first sexual experiences, such as “smells,” “sounds you heard,” “the clothes that you are wearing.” RP 1101. One juror agreed the details fall away over time. RP 1101.

The prosecutor’s line of questioning was clearly an appeal to the passions and prejudices of the jury. It was tantamount to asking jurors to put themselves in the victims’ shoes. It was designed to create sympathy for the victims for having to relate difficult experiences the details of

which have faded over time. The prosecutor's questioning set the stage for how jurors would hear the state's evidence – with a sympathetic ear.

The prosecutor's exercise and questioning was gross misconduct and constituted a serious trial irregularity. The court erred in denying defense counsel's timely motion for a mistrial.

When examining a trial irregularity, the question is whether the irregularity so prejudiced the jury that the accused was denied his right to a fair trial. If it did, the trial court should have granted a mistrial. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). In deciding whether a trial irregularity may have had this impact, the appellate court examines (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether a curative instruction was given capable of curing the irregularity. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994); Escalona, 49 Wn. App. at 254.

A trial court's denial of a motion for a mistrial is reviewed for an abuse of discretion. State v. Allen, 159 Wn.2d 1, 10, 147 P.3d 581 (2006). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). The underlying questions of law are reviewed de novo. State v. Lord, 161 Wn. 2d 276, 284, 165 P.3d 1251 (2007).

(i) The Prosecutor's Misconduct during Voir Dire Was a Serious Trial Irregularity

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial. State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011); State v. Fisher, 165 Wash.2d 727, 747, 202 P.3d 937 (2009). Instead of examining improper conduct in isolation, this Court determines the effect of a prosecutor's improper conduct by examining that conduct in the full trial context, including the evidence presented, “the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.” State v. McKenzie, 157 Wash.2d 44, 52, 134 P.3d 221 (2006) (quoting State v. Brown, 132 Wash.2d 529, 561, 940 P.2d 546 (1997)).

Generally, the prosecutor's improper comments are prejudicial where there is a substantial likelihood the misconduct affected the jury's verdict. State v. Yates, 161 Wash.2d 714, 774, 168 P.3d 359 (2007).

A prosecutor serves two important functions. A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. A prosecutor also functions as the representative of the people in a quasijudicial capacity in a search for justice. Monday, 171 Wn.2d at 667 (citing State v. Case, 49 Wash.2d 66,

70–71, 298 P.2d 500 (1956) (quoting People v. Fielding, 158 N.Y. 542, 547, 53 N.E. 497 (1899)).

As the Supreme Court recently stated:

[A] public prosecutor ... is a quasi-judicial officer, representing the people of the state, and presumed to act impartially in the interest only of justice. If he lays aside the impartiality that should characterize his official action, to become a heated partisan, and by vituperation of the prisoner and appeals to prejudice seeks to procure a conviction at all hazards, he ceases to properly represent the public interest, which demands no victim, and asks no conviction through the aid of passion, sympathy or resentment.

Monday, 171 Wn.2d at 676, n.2 (quoting Fielding, 158 N.Y. at 547, 53 N.E. 497).

Defendants are among the people the prosecutor represents. The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. Monday, at 676. Thus, a prosecutor must function within boundaries while zealously seeking justice. Id.

The prosecutor did not do so here. A prosecutor may not make appeals to the passions and prejudices of a jury in seeking a conviction. State v. Pierce, 169 Wn. App. 533, 280 P.3d 1158 (2012). The court's opinion in Pierce is instructive.

Pierce was convicted inter alia of two counts of first degree felony murder for the deaths of Pat and Janice Yarr, whose bodies were found after their house burned down; each had been shot in the head. Pierce, 169 Wn. App. at 539, 543.

Pierce became a suspect when his image was captured on an automatic teller machine (ATM) surveillance video using the Yarrs' debit card. Pierce, 169 Wn. App. at 537. Pierce told police he was not the shooter, but knew who was, as he was waiting down the road when the shooter went to the Yarrs' house to borrow money. Pierce, 169 Wn. App. at 540.

In closing argument, the prosecutor argued how unexpected the crimes must have been for the victims and asked jurors to imagine something as ghastly happening to them:

It was just another day. Never in their wildest dreams or in their wildest imagination or in their wildest nightmares would they have thought what was going to happen to them probably 14 hours after they rolled out of bed, 14, 15 hours after [sic] rolled out of bed, that they would be forced to lay facedown in their own kitchen in their own home to be robbed by somebody that knew them, somebody who they had given a job to, somebody who they had given money to, and they would shoot them in the back of their heads. Never in their wildest dreams would they have imagined that, and never in your wildest nightmares would you imagine something like that happening to you, in your own home, the place where you grew up, where you raised kids, where you sent them to

school, where you hoped to go ahead and play with your grandkids. Never did they imagine that. Never.

Pierce, 169 Wn. App. at 541.

On appeal, Pierce argued the “wildest dreams” argument amounted to an improper appeal to the passions and prejudices of the jury. Division Two of this Court agreed:

This argument was an improper appeal to passion and prejudice. It served no purpose but to appeal to the jury’s sympathy. That the Yarrs would never have expected the crime to occur was not relevant to Pierce’s guilt, nor were the prosecutor’s assertions about the Yarrs’ future plans. Moreover, the argument invited the jury to imagine themselves in the Yarrs’ shoes, increasing the prejudice.

Pierce, 169 Wn. App. at 556.<sup>13</sup>

Although Pierce did not object to this argument, the court reversed his convictions on grounds he had shown reversible misconduct:

Because the prosecutor focused on how shocking and unexpected the crimes were and invited the jury to imagine themselves in the position of being murdered in their own homes, in conjunction with the prosecutor’s other improper and highly inflammatory arguments this argument engendered an incurable prejudice in the minds of the jury. Taken together, there is more than a substantial likelihood that the above three improper arguments affected the verdict. The prosecutor argued outside the evidence about what Pierce’s thoughts were before the crime, invited the jury to relive the horror of the murders by fabricating a

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<sup>13</sup> In so holding, the court noted the issue was more properly analyzed under the rubric of appeals to the jury’s sympathy or passion, rather than as a “golden rule” argument. Pierce, 169 Wn. App. at 555, note 9 (citing State v. Borboa, 157 Wn.2d 108, 124 n.5, 135 P.3d 469 (2006)).

heart-wrenching story about how the murders occurred, and invited the jury to imagine the crimes happening to themselves. In light of the trial court's failure to sustain Pierce's objections, coupled with the prosecutor's repeated improper comments, we are compelled to conclude that the prosecutor's improper comments had a substantial likelihood of affecting the verdict.

Pierce, 169 Wn. App. at 556.

Just as the prosecutor in Pierce invited jurors to imagine themselves in Yarrs' shoes, the prosecutor here invited jurors to imagine themselves in the complainants' shoes. The jury was well aware the case against Wilcken involved child molestation charges. Whether jurors could be fair in light of the nature of the allegations was one of the main issues addressed during voir dire. See e.g. 641-666, 677-689, 693-697, 705-708. Accordingly, the jury was aware it would be hearing testimony from alleged victims about sexual experiences occurring as children.

Thus, when the prosecutor asked jurors to close their eyes and think back to their first sexual experience and asked whether jurors would feel comfortable talking about it amongst strangers, or if forced to talk about it on the witness stand, the prosecutor was inviting jurors to imagine themselves in the victims' shoes. Contrary to the trial court, it was an improper appeal regardless of whether the prosecutor uttered the magic words, "put yourself in their shoes." The exercise served no purpose but

to appeal to the jury's sympathy. It was just as improper as the prosecutor's argument in Pierce.

Moreover, the fact the improper argument occurred during voir dire as opposed to closing argument should be of no consequence. The underlying goal of the jury selection process is "to discover bias in prospective jurors" and "to remove prospective jurors who will not be able to follow [ ] instructions on the law," and thus, to ensure an impartial jury, a fair trial, and the appearance of fairness. State v. Davis, 141 Wash.2d 798, 824–26, 10 P.3d 977 (2000).

The jury selection process includes the questioning of jurors during voir dire and the exercise of causal and peremptory challenges to remove individual prospective jurors from the venire, until a sufficient number of qualified jurors have been designated for service in the case. See CrR 6.3, 6.4, 6.5; CR 47; RCW 4.44.120–.250. The nature and scope of voir dire is left largely to the discretion of the trial court. See, e.g., Skilling v. United States, 561 U.S. 358, 130 S.Ct. 2896, 2917, 177 L.Ed.2d 619 (2010); Davis, 141 Wash.2d at 825, 10 P.3d 977. But the scope of this process "should be coextensive with its purpose." State v. Laureano, 101 Wash.2d 745, 758, 682 P.2d 889 (1984), overruled on other grounds by State v. Brown, 111 Wash.2d 124, 132–33, 761 P.2d 588 (1988).

The prosecutor's appeal to the passions and prejudices of the jury was not coextensive with the purpose of ensuring an impartial jury, a fair trial, and the appearance of fairness. On the contrary, the prosecutor's invitation to sympathize with the victims on grounds they were being forced to tell embarrassing details of their first sexual experiences to strangers belied these purposes.

As in Pierce, there is a substantial likelihood the misconduct affected the verdict. Wilcken was acquitted of one charge. Moreover, there were reasons to doubt the other allegations. Three of the four remaining complainants denied anything inappropriate when provided an opportunity in 2008. And the fourth, T.W., continued to visit at the Wilcken's house after the alleged shirt incident. RP 2421. The prosecutor's exercise gave jurors a reason to sympathize with the complainants, rather than to view the evidence with the objectivity their role required. The nature of the irregularity was therefore serious.

In response, the state may attempt to distinguish Pierce on grounds there were three instances of misconduct in that case. First, Wilcken maintains that – standing alone – the prosecutor's invitation to jurors to imagine themselves in the victims' shoes so prejudiced the jury that Wilcken did not receive a fair trial.

Alternatively, as will be argued infra, the prosecutor committed additional misconduct during opening statement when he presented himself as a representative of the alleged victims. Accordingly, when combined, the cumulative effect of the misconduct constituted a serious trial irregularity warranting a mistrial.

(ii) The Voir Dire Irregularity Did Not Involve Cumulative Evidence

The irregularity during voir dire did not involve the improper admission of evidence but an improper appeal to the jury's sympathies. It cannot be excused as "cumulative."

(iii) No Curative Instruction Was Given or Capable of Curing the Voir Dire Irregularity

As defense counsel recognized, no curative instruction was capable of curing the prosecutor's improper appeal to the jury's sympathy:

I believe that that whole line of questions was inappropriate and, more than inappropriate, it was tainting the jury with issues that they cannot argue in closing. And so there's no way to unring that bell, as the old adage goes, because it's out there, its something that the seed has been planted, and we have no reason to think that it would not grow.

RP 1117-18.

Indeed, arguments that have an inflammatory effect on the jury are generally not curable by a jury instruction. State v. Mer, 174 Wn.2d 741,

763, 278 P.3d 653 (2012). In any event, one was not given, as the court failed to recognize the impropriety of the prosecutor's questioning.

In short, the prosecutor's exercise in asking jurors to remember their first sexual experience and imagine being forced to talk about it on the witness stand constituted an improper appeal to the passion and prejudice of the jury. It was not cumulative and no curative instruction was given. This was a serious trial irregularity that required a mistrial. The court erred in denying defense counsel's timely motion.

2. PROSECUTORIAL MISCONDUCT DURING OPENING STATEMENT DEPRIVED APPELLANT OF HIS RIGHT TO A FAIR TRIAL.

In opening statement, after describing what he believed the evidence would show as to each alleged victim, the prosecutor concluded "we're here" for that alleged victim. RP 1335, 1338, 1340, 1341. On six occasions, the prosecutor told the jury "we're here" for one of the alleged victims, twice for C.S. Rhetorical device or not, the prosecutor aligned himself with the alleged victims as their representative. This constituted misconduct and a serious trial irregularity. The court erred in denying defense counsel's timely motion for a mistrial.

(i) The Prosecutor's Misconduct During Opening Was a Serious Trial Irregularity

As indicated above, prosecutorial misconduct is grounds for reversal if "the prosecuting attorney's conduct was both improper and prejudicial." State v. Monday, 171 Wn.2d at 676. It is improper for the prosecutor to step into the victim's shoes and become his representative. Pierce, 169 Wn. App. at 554, 557-58. Again, Pierce is instructive.

There, in both opening and closing, the prosecutor stated he brought this case on behalf of the victims. Pierce, 169 Wn. App. at 557-58. As the court recounted:

The most egregious of these statements were those during closing argument rebuttal, where the prosecutor stated that he brought the case "[o]n behalf of ... the elected Prosecuting Attorney of Jefferson County, and [the Jefferson County Sheriff], whose agency handled this investigation, [the Yarrs' daughters], the friends and family of, of the Yarrs, and certainly, last but not least, Pat and Janice Yarr ...."

Pierce, 169 Wn. App. at 557-58 (citation to record omitted).

The court held these statements were improper, as the prosecutor does not represent the alleged victim:

These statements were likewise improper. A prosecutor does not represent the victims in a criminal trial. According to comment 1 of the Rules of Professional Conduct (RPC) 3.8, "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that

guilt is decided upon the basis of sufficient evidence.” Thus, by stating that he represented law enforcement, the family and friends of the victims, and the victims themselves, the prosecutor misrepresented to the jury that he was an advocate for law enforcement and the victims and he misstated his duties under RPC 3.8.

Pierce, 169 Wn. App. at 558.

While finding the arguments improper, the court held they could have been cured by an objection from Pierce and an instruction from the court. Pierce, 169 Wn. App. at 558. The court reasoned the arguments were not inflammatory appeals to the jury’s emotions, but rather a misstatement about the prosecutor’s role. Id.

But the prosecutor’s remarks here are worse than those set forth above and addressed in Pierce. Not only did the prosecutor assert himself as the victims’ representative, but he invited jurors to see their role in the same vein. By repeatedly stating we’re here for C.S., as well as H.J., S.E., T.W. and J.B., the prosecutor aligned himself and jurors on the side of the victims against the defense. Accordingly, he was not merely misstating his role. See Hawthorne v. United States, 476 A.2d 164 (D.C. 1984) (employing first person rhetorical device was improper appeal to passion and prejudice of jury).

Moreover, unlike Pierce, Wilcken brought the issue to the court’s attention and moved for a mistrial on grounds the prosecutor was

“improperly inflaming the passions and prejudices, trying to put them in the shoes of these alleged victims, saying that we are here to somehow vindicate the victim rights or something like that.” RP 1359.

Regardless, however, the prosecutor’s statements inviting jurors to see their role as one with the prosecution representing the alleged victims no doubt served to exacerbate the prejudicial impact of the prior misconduct inviting jurors to imagine themselves in the victims’ shoes. As such, it is difficult to imagine a curative instruction that could unring the ever-loudening bell.

In short, whether these latter statements alone warranted a mistrial, they exacerbated the prejudicial effect of the prosecutor’s earlier misconduct and constituted a serious trial irregularity.

(ii) The Opening Statement Irregularity Was Not Cumulative of Other Evidence

As before, the irregularity did not concern improperly admitted evidence that was admissible through some alternative channel. The prosecutor’s statements of alignment were misconduct.

(iii) No Curative Instruction Was Given or Capable of Curing the Opening Statement Irregularity

In light of the prior misconduct, defense counsel correctly recognized there was no instruction capable of curing the prejudice engendered by the prosecutor’s rhetorical device. Jurors were invited

again to view themselves in the victims' shoes and as their vindicators, together with the prosecutor. There was no way to unring the bell. The court erred in denying the second motion for a mistrial.

3. IMPROPER ADMISSION OF PROPENSITY EVIDENCE  
DENIED APPELLANT A FAIR TRIAL.

Over defense counsel's objection, the court admitted evidence Wilcken committed misconduct in the 1980s. Under the guise of the common scheme or plan exception, the court admitted evidence Wilcken: rubbed M.W.'s chest under her shirt when she was six, tried to get into her sleeping bag and reach under her shirt when she was ten; frequently touched A.C. under her swimsuit when she was between the ages of seven and nine, and put his hand down her pants when she was ten; and pulled K.M.'s shirt up before scurrying back to the couch pretending to be asleep. The court admitted this evidence on grounds it showed "a common scheme or plan by the defendant to molest young females." CP 251-53. But this is merely another way of saying propensity to commit the crimes charged. Propensity evidence is not admissible under ER 404(b). The court therefore erred in admitting the 1980s allegations.

It is well settled the accused must be tried only for those offenses actually charged. State v. Aho, 137 Wn.2d 736, 744, 975 P.2d 512 (1999). Consistent with this rule, evidence of other bad acts must be excluded unless relevant to a material issue and more probative than prejudicial. State v. Wilson, 144 Wn. App. 166, 177, 181 P.3d 887 (2008); State v. Saltarelli, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982). ER 404(b)<sup>14</sup> prohibits admission of prior acts evidence to prove the defendant's propensity to commit the charged offense. State v. Mendoza, 139 Wn. App. 693, 713, 162 P.3d 439 (2007), aff'd, 165 Wn.2d 913, 205 P.3d 113 (2009). In other words, evidence of other misconduct may not be admitted merely to show the accused is a criminal type. State v. Brown, 132 Wn.2d 529, 570, 940 P. 2d 546 (1997), cert. denied, 523 U.S. 1007 (1998). It is presumed, therefore, that evidence of prior bad acts is inadmissible. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

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<sup>14</sup> ER 404(b) provides: 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.

Because of the high potential for risk of prejudice, the state must meet a substantial burden before evidence is admitted to show a common scheme or plan. DeVincentis, 150 Wn.2d at 17. The court must (1) find by a preponderance of the evidence the accused committed the prior acts; (2) identify the purpose for which the evidence is meant to be introduced; (3) decide whether the evidence is relevant to prove an element of the crime charged; and (4) weigh the probative value of the evidence against its prejudicial effect.<sup>15</sup> State v. Lough, 125 Wn.2d 847, 852, 889 P. 2d 487 (1995).

The court must be particularly careful when completing steps (3) and (4) in a sex case, because the prejudice potential of prior [sexual] acts is at its highest. Saltarelli, 98 Wn.2d at 363. In close cases, the balance must be tipped in favor of the accused. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986); Wilson, 144 Wn. App. at 177.

This Court reviews the trial court's interpretation of an evidentiary rule de novo. State v. Sanchez-Guillen, 135 Wn. App. 636, 642, 145 P.3d 406 (2006). If the court correctly interprets the rule, its decision to admit or exclude the evidence is reviewed for an abuse of discretion. DeVincentis, 150 Wn.2d at 17.

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<sup>15</sup> Similarly, ER 403 provides: Although relevant, evidence may be excluded if its probative value is substantially outweighed by danger of unfair prejudice, confusion of the issues, or misleading the jury . . . .

The requisite cautious approach to evidence of criminal propensity demonstrates the 1980s allegations were not part of a common scheme or plan with the current charged offenses.

Admission of evidence of a common scheme or plan requires substantial similarity between the prior bad acts and the charged crime. DeVincentis, 150 Wn.2d at 21. Random similarities are not enough. DeVincentis, 150 Wn. 2d at 18. To be admissible, the prior bad acts must show a pattern or plan with marked similarities to the facts in the case before it, such that the various acts are naturally to be explained as caused by a general plan. DeVincentis, 150 Wn.2d at 13, 21. Sufficient repetition of complex common features leads to a logical inference that all of the acts are separate manifestations of the same overarching plan, scheme, or design. State v. Burkins, 94 Wn. App. 677, 689, 973 P.2d 15 (1999), rev. denied, 138 Wn.2d 1014 (1999).

Exemplative of a common scheme or plan are the cases of Lough, 125 Wn.2d 847, and State v. Krause, 82 Wn. App. 688, 919 P.2d 123 (1996), rev. denied, 131 Wn.2d 1007 (1997). But a review of the circumstances of Lough and Krause does not support application of the exception here. See Lough, 125 Wn.2d at 856 (the admissibility of prior misconduct to prove a common scheme or plan is largely dependent on the facts of each case).

Lough was charged with attempted second-degree rape, indecent liberties, and first-degree burglary for allegedly drugging and raping a woman with whom he was personally acquainted. Lough, 125 Wn.2d at 849. Lough was a paramedic with special expertise with drugs. The trial court permitted testimony from four women who claimed while they had been in relationships with Lough, he slipped them drugs in drinks and raped them. Lough, 125 Wn.2d at 850.

Lough told three women they would not be believed if they reported the assaults. He told the fourth they engaged in consensual sex. Lough, 125 Wn.2d at 850-51. The Supreme Court found the evidence of these prior assaults admissible as showing a common scheme or plan. Specifically, the Court held Lough's actions evidenced a larger design to use his special expertise with drugs to render them unable to refuse consent to sexual intercourse. Lough, 125 Wn.2d at 861.

In Krause, the repetition of complex common features also established a common scheme or plan. Krause was charged with one count of first-degree child rape and five counts of first-degree child molestation. Krause, 82 Wn. App. 690. Krause had a history of sexually molesting young boys. In each case, with five different boys, he gained the confidence of the adults who were in positions of trust over the boys. He then established a relationship with the boys by playing games and

going on outings with them before molesting them over their protest. Krause, 82 Wn. App. at 692, 694-95.

Unlike the congruity between the acts in Lough and Krause, the 1980s allegations do not show a pattern at all similar to the circumstances of the current charges. First, Wilcken became acquainted with M.W., A.C. and K.M. through his girlfriend, not his children, as in the current case. Wilcken did not even have any children in the 1980s. Second, the 1980s allegations involved younger children – six-year-old W.M., whom he touched at a ferry dock, and seven-to-nine year old A.C., whom he allegedly touched under her swim suit at swimming outings. The nature of the allegations is not at all similar to the current incidents, which reportedly occurred when the girls were sleeping. Regarding the 1980s misconduct, there was also no allegation Wilcken was nude or asked to photograph the girls nude, or that he was working on a movie. In short, the lack of similarity between the prior misconduct and the current allegations reveals the only real probative value is to show a propensity to molest young females, as the court aptly stated. However, such is not a proper purpose under ER 404(b).

Moreover, any relevance was further diminished by the remoteness in time of the 1980s allegations. Lough, 125 Wn.2d at 860 (to be admissible, evidence of a defendant's prior sexual misconduct offered to

show a common plan or scheme must be sufficiently similar to the crime with which the defendant is charged and not too remote in time); State v. Irving, 24 Wn. App. 370, 373-74, 601 P. 2d 954 (1979), rev. denied, 93 Wn.2d 1007 (1980) (holding that testimony concerning attempted rape in 1972 was inadmissible to show proof of a common scheme or plan to commit rape five years later upon a different woman in a different location).

Even if the trial court properly found the 1980s incidents relevant to show a common scheme or plan, prior bad act evidence must be excluded unless its probative value clearly outweighs its prejudicial effect. Lough, 125 Wn.2d at 862; ER 403. The trial court erred in so finding here.

The prejudice potential of prior bad acts evidence is at its highest in sex abuse cases. State v. Coe, 101 Wn.2d 772, 780-81, 684 P.2d 668 (1984). Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise. Saltarelli, 98 Wn.2d at 363.

In Lough, the Court considered three factors in deciding the probative value of the testimony clearly outweighed its prejudicial effect. Krause, 82 Wn. App. at 696 (citing Lough, 125 Wn.2d at 864). First, the

Court found the evidence highly probative because it showed the same design or plan on a number of occasions. Krause, 82 Wn. App. at 696. This is not true in Wilcken's case. As discussed above, the incidents with M.W. at the ferry and with A.C. at swimming outings were significantly different than the allegations concerning the current complainants.

Second, the Court determined the need for the evidence was especially great because the alleged victim was drugged during the attack and not entirely capable of testifying to Lough's actions. Krause, 82 Wn. App. at 696. Again, this is not true in Wilckens' case. Moreover, the state had other common scheme or plan evidence already being admitted in regard to the current complainants. The state's need for this aged evidence was therefore further diminished.

Finally, the Court believed the use of a limiting instruction prevented the evidence from being used to prove Lough's bad character. Krause, 82 Wn. App. at 696. Whether such an instruction minimizes prejudice to some extent, courts have often held that the inference of predisposition is too prejudicial and too powerful to be contained by a limiting instruction. Krause, 82 Wn. App. at 696 (citing Saltarelli, 98 Wn.2d at 363; State v. Parr, 93 Wn.2d 95, 107, 606 P.2d 263 (1980)).

It was too prejudicial here. While the acts were not sufficiently similar to constitute a common scheme or plan, they were sufficiently

similar to portray Wilcken as a person of abnormal bent and bad character. No limiting instruction could undo the resulting prejudice. As defense counsel aptly recognized, the 1980s allegations were the same as “Kryptonite.” RP 257. The trial court erred in finding otherwise.

Evidentiary error is grounds for reversal if it results in prejudice. State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). An error is not harmless if, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected. Smith, 106 Wn.2d at 780. Here, the outcome of Wilcken’s trial was materially affected by evidence of his alleged misconduct in the 1980s.

As indicated above, there were reasons to doubt the current charges. Three of the four complainants denied anything untoward happening when confronted by police in 2008. The allegations arose only after Wilcken told C.S.’s mother about her secret contact with her father. T.W., the remaining complainant whose allegation resulted in Wilcken’s conviction, continued to visit the Wilckens after the alleged shirt incident, which may have given jurors reason to doubt her allegation. Finally, there was evidence Wilcken may have a sleep disorder and therefore could have touched the girls on accident, not for the purpose of sexual gratification. In light of the 1980s allegations, which painted Wilcken as a person of abnormal bent, however, jurors likely would have resolved any doubt

against him and in favor of conviction. This Court should therefore reverse his convictions.

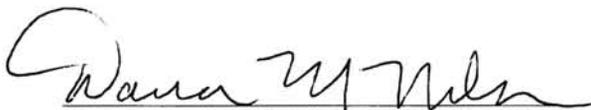
D. CONCLUSION

Prosecutorial misconduct during voir dire and opening statement deprived Wilcken of his right to a fair trial. The court's improper admission of propensity evidence likewise violated his right to a fair trial. This Court should reverse Wilcken's convictions.

Dated this 25<sup>th</sup> day of July, 2014

Respectfully submitted

NIELSEN, BROMAN & KOCH



DANA M. NELSON, WSBA 28239

Office ID No. 91051

Attorneys for Appellant

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 71453-8-I
	)	
DANIEL WILCKEN,	)	
	)	
Appellant.	)	

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**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 25<sup>TH</sup> DAY OF JULY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DANIEL WILCKEN  
DOC NO. 370975  
STAFFORD CREEK CORRECTIONS CERNTER  
191 CONSTANTINE WAY  
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 25<sup>TH</sup> DAY OF JULY 2014.

x Patrick Mayovsky

COURT REPORTER  
STAFFORD CREEK  
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