

NO. 71453-8-1

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL WILCKEN,

Appellant.

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COURT OF APPEALS

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

The Honorable Lori K. Smith, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. PROSECUTORIAL MISCONDUCT DURING VOIR DIRE AND OPENING STATEMENT DEPRIVED WILCKEN OF HIS RIGHT TO A FAIR TRIAL.

In his opening appellate brief, Wilcken argued the prosecutor improperly appealed to the passions and prejudices of the jury during voir dire 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. Brief of Appellant (BOA) at 24-43. Wilcken argued the prosecutor's exercise was tantamount to asking jurors to put themselves in the victims' shoes. Id.

Wilcken argued the prosecutor committed further misconduct during opening statement and exacerbated the prejudice resulting from the voir dire misconduct by repeatedly stating "we're here" for C.S., as well as H.J., S.E., T.W. and J.B. BOA at 34-38. Because the misconduct engendered an incurable prejudice in the minds of the jury, Wilcken argued his motions for mistrial should have been granted. BOA at 24-38.

In response to Wilcken's first argument, the state suggests the prosecutor was merely attempting to ferret out whether jurors would be biased against the alleged victims:

Here, given the nature of the charges and the youth of the victims who would be called to testify, the deputy prosecutor was fully entitled to determine whether the members of the jury panel would be biased against the victims if they were less than entirely composed, eloquent, and in complete command on the witness stand when describing the acts of assault they had experienced.

Brief of Respondent (BOR) at 12-13.

But the prosecutor went much further than this. He asked one prospective juror whether he would want "a hundred of your closest strangers" to know about his first sexual experience. RP 1097. He asked whether Juror 64 would "want to come up here," meaning the witness stand. RP 1097. He asked Juror 82 "how would you feel if somebody made you come in and testify?" RP 1097. He then clarified, "Yeah, if somebody said, Come in, you have to sit up there, how would you feel." RP 1097. To Juror 81, the prosecutor next asked, "how would you feel if you had to be up there and recounting that?" RP 1097.

These questions were not designed to ferret out bias, but to engender sympathy for the alleged victims who – he suggested by

this line of questioning – were being forced to come to court and tell a bunch of strangers the embarrassing details of their first sexual experiences. Contrary to the state’s assertion, asking jurors to close their eyes and recall the details of their first sexual experiences and asking whether they would want to talk about it on the witness stand is unlike such commonplace areas of discussion, such as why a defendant might invoke his right to remain silent. The state’s argument therefore should be rejected.

In response to Wilcken’s second argument, the state appears to concede the prosecutor’s remarks in opening statement were improper. See BOR at 1 (arguing “any impropriety” could have been cured). Accordingly, the state attempts to distinguish the misconduct at issue here from the misconduct resulting in reversal in State v. Pierce, 169 Wn. App. 533, 280 P.3d 1158 (2012).

Contrary to the state’s assertion, however, the prosecutor here invited jurors to put themselves in the victims’ shoes, just as much as the prosecutor in Pierce. Whereas the prosecutor in Pierce argued in closing, “never in your wildest nightmares would you imagine something like that happening to you,” the prosecutor in Wilcken’s case invited jurors to imagine how it would feel to be

forced to testify about their first sexual experience. It is a form of inviting jurors to put themselves in the shoes of the victim. Maybe not while the allegations themselves are alleged to have occurred but from a current prospective. It is no less an appeal to the jurors' passions and prejudices. It was improper.

As in Pierce, there was additional misconduct here, apart from the put-yourself-in-the-victims'-shoes misconduct. The prosecutor also aligned himself with the victims and jurors against the defendant with his "we're here" rhetoric. Whether standing alone this misconduct would have merited a mistrial, it is not standing alone. As in Pierce, there were multiple instances of misconduct in this case. The state' argument that Pierce is distinguishable should be rejected.

The state also argues that because Wilcken did not lodge a contemporaneous objection to the prosecutor's misconduct that he "should not be permitted to sit quietly when he hears remarks that he now depicts as reprehensible being made repeatedly, and then contend on appeal that the repetition increases the prejudice, when a timely objection in the first instance could have resulted in an effective curative instruction." BOR at 16.

But Wilcken moved for a mistrial. Accordingly, he did not sit quietly and gamble on a favorable verdict. See State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal). Moreover, contrary to the state's assertion, the combined effect of the misconduct could not have been cured by an instruction. The court therefore erred in denying Wilcken's motion for a mistrial based on prosecutorial misconduct.

2. THE COURT'S ADMISSION OF PROPENSITY EVIDENCE DEPRIVED WILCKEN OF HIS RIGHT TO A FAIR TRIAL.

Over defense counsel's objection, the court admitted evidence Wilcken committed misconduct in the 1980s. Reasoning the misconduct evidenced a common scheme or plan, the court admitted evidence: Wilcken rubbed M.W.'s chest under her shirt when she was 6 years old, tried to get into her sleeping bag and reach under her shirt when she was 10; frequently touched A.C. under her swimsuit when she was 7 years old, and put his hand down her pants when she was ten; and pulled K.M.'s shirt up when she was 13. BOA at 21-23 (citing record).

The court ruled the evidence showed “a common scheme or plan by the defendant to molest young females.” CP 251-53. But such is exactly what ER 404(b) prohibits – admission of prior bad acts evidence to show the defendant’s propensity to commit the charged offense. In his opening appellate brief, Wilcken argued the court therefore erred in admitting the evidence. BOA at 38-47.

In response, the state claims “the commonalities among the charged incidents and Wilcken’s prior bad acts are abundantly clear, and the trial court’s decision here comports with established case law[.]” BOR at 23. Whether there is some similarity between the charged incidents and those involving A.C., M.W. and K.M. when they were older and sleeping, there is no similarity between the charged incidents and the alleged molestation of A.C. and M.W. when they were 6 and 7 years old, respectively.

Over defense counsel’s objection, A.C. was allowed to testify at length regarding Wilcken’s reported molestation of her during swim outings when she was 7 years old. RP 2573-74. Over defense counsel’s objection, M.W. was allowed to testify Wilcken molested her when she was 6 years old and they were waiting for a ferry. RP 2259, 2263-65. These incidents do not bear any similarity to the charged incidents in which Wilcken allegedly

touched or attempted to touch pre-teen and teenaged girls while they were sleeping over with Wilcken's daughters.

In response, the state argues:

While it is indeed true that A.C. and M.W. were awake on these occasions, these instances still share other significant similarities with the charged offenses, such as the manner in which he gained access, and his use of attention and affection to develop trust with children.

BOR at 25. But such amorphous circumstances do not amount to a common scheme or plan make. Rather, the swim suit and ferry dock incidents, if believed, are examples of mere opportunistic behavior, not the execution of a plan.

A recent case from Division Three of this Court is directly on point. State v. Slocum, \_\_ Wn. App. \_\_, 333 P.3d 541 (2014). Charles Slocum was convicted of first degree child molestation and third degree rape for alleged acts involving his step-granddaughter, W.N. W.N. alleged that beginning at the age of 3 or 4, up until age 11 or 12, during visits to her grandparents' home, Slocum rubbed her vagina and breast, both over and under her clothing. Slocum, 333 P.3d at 544. She said Slocum would call her over to sit in his lap so he could talk to her, and would rub her while sitting in his recliner. Slocum, at 544. W.N. also alleged that when she was 14

years old, Slocum put his finger in her vagina. Slocum, 333 P.3d at 544.

The state sought to admit evidence Slocum sexually abused W.N.'s mother and paternal aunt years earlier under the common scheme or plan exception to ER 404(b). Slocum, 333 P.3d at 544. V.W.'s mother alleged Slocum molested her twice when she was about 12. On the first occasion, Slocum reportedly took her shirt off while she was lying on the floor watching television and put his hands on her breasts. Slocum, 333 P.3d at 545. On the second occasion, Slocum reportedly rubbed her vagina while she sat on his lap in the recliner. Id.

M.N.'s aunt alleged Slocum molested her once when she was about 12. They were preparing to go swimming and Slocum offered to put sunscreen on M.N.'s aunt. Slocum reportedly touched her breasts while doing so. Slocum, 333 P.3d at 545.

The state argued these incidents should be admitted on grounds they showed:

[A] plan to molest children. The defendant would find victims he had access to and would abuse them in his home. He would perform the same type of abuse on similar aged children. Lastly, he was in the same position of authority over each child.

Slocum, 333 P.3d at 544. The trial court agreed the evidence showed “a common plan or design on Mr. Slocum’s part to molest children” and admitted the allegations. Id. at 545.

On appeal to Division Three, the court held two of the prior instances of misconduct did not qualify under the common scheme or plan exception – the television incident and suntan lotion incident. Slocum, 333 P.3d at 549. As an initial matter, the court held “a common scheme or plan to molest children” did not qualify as an exception under ER 404(b):

If the trial court believed that any evidence of a defendant’s prior molestation of a child was a sufficient basis for finding a “plan or design to molest children” admissible under ER 404(b), then we agree. We reject the state’s characterization of [State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2012)] to the trial court. . . . Nowhere did the Gresham court suggest, as the State argued in the trial court, that variations in a defendant’s molestation of earlier victims can be disregarded because the prior acts demonstrate a defendant’s plan “to molest children.” To construe that as a holding of Gresham is to conclude that, when it comes to child molestation cases, the Supreme Court no longer recognizes the categorical bar to propensity evidence expressed in ER 404(b).

Slocum, 333 P.3d at 449.

On appeal, however, the state changed its tune and argued there were other similarities, such that the trial court did not rely on

a general plan to molest children. Slocum, at 449. Division Three disagreed there were significant similarities, however, noting W.N. was much younger than W.N.'s mother and aunt when the abuse started and that it was ongoing in W.N.'s case, in contrast to the isolated incidents involving W.N.'s mother and aunt. In short, the court concluded: "The evidence establishes only that in the case of all three victims, they were young, Mr. Slocum was an adult, and there was a family relationship by marriage." Slocum, at 449.

While the court did not go so far as to hold the lower court erred in admitting the recliner incident involving M.N.'s mother, it held the court's admission of the other incidents was manifestly unreasonable:

In both cases, Mr. Slocum is accused of rubbing the girls' crotch and vaginal areas. It was not manifestly unreasonable for the trial court to admit W.N.'s mother's testimony about being molested in the recliner. The trial court did not abuse its discretion in concluding that the evidence was more probative than prejudicial.

There is no evidence to suggest that the incidents in which Mr. Slocum was on the floor with W.N.'s mother or putting sunscreen on W.N.'s aunt were anything but opportunistic, however. Admission of that evidence was manifestly unreasonable whether or not the trial court had the correct legal standard in mind.

Slocum, 333 P.3d at 550.

The same must be said of the swimsuit and ferry dock incidents admitted against Wilcken here. They bore no similarity to the charged incidents, other than the fact that all victims were young and Wilcken was an adult with whom they were acquainted in some manner. As in *Slocum*, it was manifestly unreasonable for the court to admit these incidents based on such superficial similarity.

Indeed, the court recognized the lack of similarity between the swimming pool incidents and the charged sleepover incidents (RP 2539) but admitted them anyway, because they were similar to the ferry incident. RP 2544. As in *Slocum*, it appears the court here applied the incorrect legal standard when it found these incidents admissible as a common scheme or plan to molest young females. As the *Slocum* court recognized, this logic does away with the categorical bar to propensity evidence in child molestation cases. As such, it was a manifest abuse of discretion.

Finally, in support of the court's ruling, the state suggests the young age of A.C. and M.W. during the swimming and ferry dock incidents is not all that significant:

[T]he trial court properly recognized the distinction between a prior victim who was near the age of maturity (I.S.) and the victims of the charged

offenses, because a more mature victim would have a much different type of relationship with an adult than would a younger child. There is far less of a division to be drawn between children who are seven and children who are twelve with regard to their ability to perceive and detect another's ill intent, their awareness of the wrongness of certain types of contact, and their knowledge of proper reporting mechanisms.

BOR, at 26.

This argument should be rejected for several reasons. First, M.W. was 6 at the time of the ferry dock incident. Second, regardless, there is nothing on the record indicating 6 and 7 year olds have perception similar to a 12 year old. In fact, common sense belies such a conclusion. And finally, while this is not a close case, the balance must be tipped in favor of Wilcken regarding these past allegations of A.C. and M.W. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). In short, the court erred in admitting the 1980s misconduct, particularly with regard to A.C. and M.W.

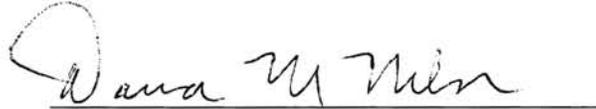
B. CONCLUSION

For the reasons stated in Wilcken's opening appellate brief and this reply, this Court should reverse his convictions.

Dated this 8<sup>th</sup> day of December, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in cursive script, appearing to read "Dana M. Nelson", is written over a horizontal line.

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DIVISION ONE

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
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v.	)	COA NO. 71453-8-1
	)	
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 8<sup>TH</sup> DAY OF DECEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY 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  
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SIGNED IN SEATTLE WASHINGTON, THIS 8<sup>TH</sup> DAY OF DECEMBER 2014.

X *Patrick Mayovsky*