

NO. 69950-4-1

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

STATE OF WASHINGTON,

Respondent,

v.

MAURICE THROWER,

Appellant.

REC'D

JUN 12 2013

King County Prosecutor
Appellate Unit

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION ONE

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

The Honorable Barbara Linde, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Defense counsel was ineffective for opening the door to otherwise inadmissible and highly prejudicial evidence.

2. The limiting instruction addressing the evidence was incomplete and insufficient.

Issues Pertaining to Assignments of Error

1. Appellant was charged with molesting his girlfriend's daughter. Prior to trial, defense counsel was informed that another young girl also had alleged improper sexual contact, but the State had no intention of eliciting this evidence at appellant's trial. Despite being forewarned about this evidence, defense counsel opened the door to its admission during trial. Did this deny appellant his constitutional right to effective representation?

2. Defense counsel attempted to mitigate the harm he caused with a limiting instruction informing jurors of the limited purpose for which the evidence had been permitted. The instruction failed, however, to state that jurors could not use the evidence to show appellant had a particular character (child molester) and acted in conformity with that character. Assuming a proper instruction could have sufficiently mitigated the harm from counsel's serious mistake, did the trial court err when it used a deficient instruction?

B. STATEMENT OF THE CASE

1. Pretrial Proceedings

The King County Prosecutor's Office charged Maurice Thrower with two counts of child molestation in the first degree, alleging that he had improper contact with his girlfriend's daughter, T.W., sometime during the period from October 18, 2004 to October 17, 2007 (a period spanning T.W.'s eighth and eleventh birthdays). CP 1-6.

One of the State's expected witnesses at trial was Carissa Astle, who was three years older than T.W. and babysat T.W. during a portion of the charged period. RP 241-249, 355-359. One subject the State had no intention of exploring with Astle was Astle's own claim that Thrower also had inappropriate sexual contact with her. The State recognized this incident – which did not involve T.W. – “was too far afield.” RP 382-383.

Defense counsel had full notice of the allegation, and Astle had been specifically instructed by the prosecutor not to mention it. RP 388-389. Unfortunately, as discussed later in this brief, defense counsel made a serious mistake while questioning Astle, opening the door to this damaging evidence. RP 386-399.

A jury convicted Thrower on both charges. CP 64-65. The Honorable Barbara Linde imposed concurrent indeterminate

sentences of 180 months to life, and Thrower timely filed his Notice of Appeal. CP 70, 81-94.

2. Trial Evidence

Maurice Thrower and Jennifer Wells began dating in 2005. RP 76, 456-457. Wells lived in Northgate with her daughter, T.W. (who was eight years old at the time), and T.W.'s younger brother. RP 78-79, 88. Thrower kept some of his personal belongings at the home and sometimes stayed the night. RP 80-81. Everyone got along well and T.W. did not seem to have any issues with Thrower, whom she called "Moe." RP 82-83.

Within about 6 months of meeting Thrower, Wells and her children moved to the Burke-Gilman Place Apartments off Sand Point Way. RP 78, 84-85, 354. As before, Thrower kept personal belongings at the home. He also began staying the night more frequently and helped around the apartment and with the children. RP 84-85. Wells worked during the day and hired a babysitter – Carissa Astle – to watch the children. RP 85-86. Wells had Thrower come by the apartment to check in on Astle and the children. RP 121-122.

Wells and Thrower parted ways in 2007. RP 463. During the last six months of their relationship, it was apparent T.W. no longer liked Thrower. She would snap at him and was generally

disrespectful towards him. RP 86-87. During this same period, Wells' and Thrower's relationship had also deteriorated – they were not getting along and there was infidelity. RP 122-126. There also may have been violence. RP 144, 152. T.W. was 10 years old when the relationship ended. RP 88. She was glad to have Wells “all to herself.” RP 90, 126. But Wells and Thrower remained in touch and, in fact, planned to reunite some day, a plan T.W. knew about. RP 89-90, 139.

When T.W. was 12 years old, Wells caught her “sexting” nude photographs of herself to a boy. Wells was very upset with T.W. and began screaming at her. RP 96-97. T.W. had never seen her mother so angry. RP 133. She took away T.W.'s phone and grounded her. RP 266. Wells asked T.W. why she was acting out and if anyone was touching her. RP 266-267. For the first time, T.W. claimed that Thrower had molested her. RP 97-98, 147-148, 266-267. Wells was shocked. RP 98. She shared the allegation with some others whom she knew and called the prosecutor's office for advice. RP 99-101, 105-106. Ultimately, however, because T.W. did not want her mother to contact police, she did not. RP 101-102.

In fact, no report was made until January 2012. RP 106, 180-181. By that time, it had been years since T.W. had seen Thrower, but T.W. learned that Thrower had returned to the area and others

had been encouraging T.W. to let her mother call the police. RP 270-273.

At trial, T.W. testified that, while the family still lived in the Northshore home, Thrower began coming into her bed at night. RP 214. Wearing boxer shorts, he would get under the covers and lie down behind her. RP 214-217. He would place his hands on her sides, hip, or stomach, and she could feel that he had an erection. RP 218-219, 236. She testified she did not tell anyone at the time because she believed she might get in trouble. RP 221-222.

According to T.W., similar behavior continued at Burke-Gilman Place, although it did not occur in her bedroom. Instead, it occurred in a downstairs room with couches and a television. On weekends, T.W. sometimes slept there. RP 223, 225-229, 237-240. On one occasion, she fell asleep on the floor next to her two younger cousins. RP 226-227, 234-235. According to T.W., she woke up to find Thrower's hand on her breast. She pulled away, and Thrower left. RP 223, 235-237. On a subsequent occasion, T.W. awoke on the couch to find Thrower's hand down her pants and touching her thigh. She told him to get off of her, and he never again attempted to touch her. RP 251-253.

The defense impeached T.W. by focusing on many inconsistencies in her versions of events depending on when and to

whom she was speaking. RP 289-308, 313-317, 331-340. Although T.W. claimed the touching would happen at night when she was going to bed or already asleep, Wells testified she never found Thrower engaged in suspicious activities at night. RP 81-82, 90-93, 215, 220-221.

T.W. testified she did not tell anyone she had been abused even after Thrower moved away because she was afraid he might come back. RP 240-241. At some point, when she was perhaps 12, T.W. did tell her friend, T.L., that she had been molested, and T.L. encouraged her to tell her mother. RP 263-264, 278-279, 283-284. T.W. denied making up the story about abuse to avoid being punished for sexting. RP 268. She knew her mother and Thrower were in contact at the time, but testified this was not a factor, either. RP 263-264.

T.W. also testified that once she disclosed, she did not feel the need to report the abuse to police so long as Thrower was out of their lives. RP 268-269. She changed her mind, however, after she learned Thrower was back in the area and had attempted contact with one of her mother's best friends – Shannon Williams, who has younger children. RP 141, 151, 272. Williams knew about T.W.'s allegations years before, had encouraged her at that time to report the matter to police, and now was very upset and angry about the

new contact with her family. RP 136-137, 147-149, 151. After Williams expressed her strong displeasure to Wells, Wells once again encouraged T.W. to let her contact police, and T.W. finally agreed. RP 136-138, 271-272.

The parties stipulated that Thrower was out of the community – and therefore could not have engaged in the charged acts – prior to February 16, 2005, and also between June 16 and June 30, 2005. RP 455. Moreover, there was an approximately 5-month period in 2006, during which the father of Wells' son was staying with Wells in the Burke-Gilman Place apartments, when Thrower was not staying in the apartment at all. RP 116-121.

At no time did the detective assigned to investigate T.W.'s allegations even attempt to speak with Thrower prior to forwarding the case to prosecutors for the filing of charges. RP 195-200. Thrower took the stand in his own defense, and denied all of T.W.'s allegations of inappropriate sexual contact. RP 463.

3. Defense Counsel Opens The Door

Former babysitter Carissa Astle's purpose on the stand was to describe an occasion where she saw Thrower's penis. According to Astle, when she was twelve and T.W. was nine, the two were playing in T.W.'s bedroom at the Burke-Gilman Place apartments when the door opened and Thrower walked in with his semi-erect

penis poking out the fly of his jeans. RP 359-363. He asked the girls the sit on the bed, spoke to them (she could not recall the topic), indicated they could continue playing, and left the room. RP 361, 364. Astle believes Thrower's penis is uncircumcised,¹ although she cannot be certain. RP 375. Nor can she be certain that Thrower even knew they could see his penis. RP 377. When he entered the room, he was walking in a hunched position. RP 362. Moreover, his penis was no longer visible by the time the girls sat on the bed.² RP 375.

On direct examination, the prosecutor inquired why Astle had not told anyone about this incident, and Astle responded that she had been scared. RP 364-366. On cross-examination, defense counsel followed up on this line of questioning:

Q: You were the babysitter?

A: Yes.

Q: And didn't do anything about this alleged incident at the time?

¹ In fact, Thrower is circumcised. RP 463.

² T.W. also testified to this event, although her memory did not precisely match Astle's. According to T.W., Thrower entered the room with his erection exposed and asked the girls if they wanted to play house with him. Astle immediately left. T.W. and Thrower went downstairs, where Thrower – still exposed – closed the blinds and continued to ask about playing house. T.W. then also left the house. RP 258-260.

A: No.

Q: You say you were scared, has Mr. Thrower ever threatened you?

A: No.

Q: Has he ever done anything to make you fear him, physical, other than your allegations around this?

RP 378.

At this point, Astle did not provide an audible response. She shook her head up and down (indicating Thrower had done something physical to cause her fear), began to shake, and began to cry. RP 378-379, 385, 387. Defense counsel returned to a prior question, asking Astle whether Thrower had ever threatened her, to which she again answered "no." RP 379. Defense counsel then moved on. RP 379.

At the next break, the prosecutor pointed out that defense counsel had just opened the door to the other, unrelated incident involving Astle that the State had not previously intended to use. RP 382-386, 388. Judge Linde agreed. RP 387-388, 391.

On redirect, the prosecutor asked Astle whether Thrower had done something to make her fearful of him. She answered "yes" and then provided details. RP 393. According to Astle, a couple of days after seeing Thrower's penis, she was at Wells' apartment doing laundry in the kitchen. RP 393. T.W. was outside playing. RP 394.

Thrower picked her up and carried her to the living room, where he kissed her on the forehead. RP 394-395. Thrower told Astle they were going upstairs and that it was okay. RP 395. He then carried her upstairs to the master bedroom and placed her on the bed, where he kissed her on the neck and chest. Astle was crying, and Thrower stopped. Before leaving the room, he told her they would keep the incident just to themselves. RP 395-397.

In an attempt to mitigate the damage from this evidence, defense counsel drafted a limiting instruction, which provides:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of the testimony of Carissa Astle with regards to the allegation concerning the Defendant picking her up, carrying her, and kissing her and may be considered only for the purpose of determining whether she had reason to fear the Defendant. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 54; RP 440.

C. ARGUMENT

DEFENSE COUNSEL WAS INEFFECTIVE FOR OPENING THE DOOR TO HIGHLY DAMAGING EVIDENCE AND THE LIMITING INSTRUCTION DID NOT CURE THE RESULTING PREJUDICE.

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his or her attorney's

conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)), cert. denied, 510 U.S. 944 (1993). Both requirements are met here.

Defense counsel was well aware of Astle's claim, which amounted to another allegation of child molestation against a different victim. See RCW 9A.44.086(1) ("A person is guilty of child molestation in the second degree when the person has . . . sexual contact with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim."). No competent attorney would have opened the door to this evidence. Allowing the prosecutor to use this information against Thrower clearly was not tactical. Counsel performed deficiently.

Moreover, the resulting prejudice was significant. ER 404(b) specifically provides, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show conformity therewith." And the prejudice from bad acts evidence is at its highest in sex abuse cases because, as the Washington Supreme Court has recognized, "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." State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982) (citation omitted).

There is more than a reasonable likelihood this evidence affected the outcome at trial. The evidence concerning Astle portrayed Thrower as a serial pedophile, taking advantage of opportunities for sexual contact with minor girls in Wells' home. In the absence of this evidence, Thrower had an opportunity for acquittal: no one had witnessed the alleged touchings involving T.W., there was no physical evidence of abuse, T.W. waited a long time to allege abuse and even longer to report it to law enforcement, and Thrower never made any incriminating statements. At trial, he denied any inappropriate contact.

The parties agreed that the jury's verdicts would turn on credibility – whether jurors believed T.W.'s claims of sexual contact. RP 525-527, 545-546, 556, 569-570. Jurors were far more likely to believe T.W. once they heard Astle claim that she, too, had been a victim of Thrower's sexual contact. Astle's otherwise inadmissible evidence contributed to the ultimate verdict.

In response, the State will surely seek to rely on the defense-proposed limiting instruction aimed at Astle's testimony. But there is

some evidence that is not susceptible to such a limitation because it is just too influential to ignore. This is certainly true with *curative* instructions. Although it is generally presumed juries follow instructions to disregard evidence, this Court has recognized that "no instruction can 'remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.'" State v. Escalona, 49 Wn. App. 251, 255, 742 P.2d 190 (1987) (quoting State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)); see also State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996) (in context of prosecutorial misconduct); State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (same).

There is no reason to treat *limiting* instructions differently. It may be safe to presume juries generally follow instructions limiting consideration of evidence to a particular purpose. See State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995); State v. Dent, 123 Wn.2d 467, 486, 869 P.2d 392 (1994). But there is some evidence, so inherently prejudicial, that it is unreasonable to assume jurors will be able to ignore that it establishes a propensity to commit a certain class of crime (here, molestation) and only consider the evidence for a narrow and less damaging purpose.

Moreover, even if a limiting instruction could have sufficed at Thrower's trial, the instruction used fell short. Where a limiting instruction is requested, it must be correct. State v. Gresham, 173 Wn.2d 405, 424, 269 P.3d 207 (2012). "An adequate ER 404 (b) limiting instruction must, at a minimum, inform the jury of the purpose for which the evidence is admitted and that the evidence may not be used for the purpose of concluding that the defendant has a particular character and has acted in conformity with that character." Id. at 423-424. The instruction in this case never informed Thrower's jury that Astle's testimony could not be used to establish his character and actions in conformity with that character.

The absence of a sufficient limiting instruction requires a new trial if, within reasonable probabilities, it materially affected the outcome at trial. Gresham, 173 Wn.2d at 425 (citing State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). For the reasons already discussed – the absence of eyewitnesses, physical evidence or a confession, and Thrower's denials – Astle's additional claim of molestation materially affected the outcome at Thrower's trial. The incomplete limiting instruction could not change that.

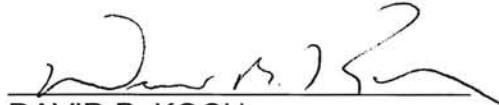
D. CONCLUSION

Thrower was denied his right to effective representation when his attorney opened the door to damaging evidence that was otherwise inadmissible. To the extent a limiting instruction could sufficiently mitigate admission of this evidence, the trial court erred when it failed to ensure an adequate instruction was used. Thrower's convictions should be reversed and he should receive a new trial.

DATED this 12th day of June, 2013.

Respectfully submitted,

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON

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 12TH DAY OF JUNE, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 12TH DAY OF JUNE, 2013.

x *Patrick Mayovsky*