

71453-8

71453-8

NO. 71453-8-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

---

STATE OF WASHINGTON,

Respondent,

v.

DANIEL WILCKEN,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LORI K. SMITH

---

**BRIEF OF RESPONDENT**

---

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

DAVID SEAVER  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

2019 OCT 23 PM 3:05  
CLERK OF COURT  
COURT OF APPEALS  
DIVISION I

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. PROCEDURAL FACTS .....	2
2. SUBSTANTIVE FACTS .....	3
C. <u>ARGUMENT</u> .....	9
1. THE DEPUTY PROSECUTOR DID NOT COMMIT REVERSIBLE MISCONDUCT .....	9
a. Voir Dire .....	10
b. Opening Statement .....	14
2. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF WILCKEN'S PRIOR MOLESTATION OF OTHER CHILDREN .....	17
D. <u>CONCLUSION</u> .....	27

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

<u>Lopez-Stayer ex rel. Stayer v. Pitts</u> , 122 Wn. App. 45, 93 P.3d 904 (2004).....	12
<u>State v. Baker</u> , 89 Wn. App. 726, 950 P.2d 486 (1997).....	24
<u>State v. Cheatam</u> , 150 Wn.2d 626, 81 P.3d 830 (2002).....	10
<u>State v. Evans</u> , 45 Wn. App. 611, 726 P.2d 1009 (1986).....	26
<u>State v. Frederiksen</u> , 40 Wn. App. 749, 700 P.2d 369 (1985).....	12
<u>State v. Gentry</u> , 125 Wn.2d 570, 888 P.2d 1105 (1995).....	10
<u>State v. Gregory</u> , 158 Wn.2d 759, 147 P.3d 1201 (2006).....	10, 15
<u>State v. Gresham</u> , 173 Wn.2d 405, 269 P.3d 207 (2012).....	24
<u>State v. Hernandez</u> , 99 Wn. App. 312, 997 P.2d 923 (1999).....	21
<u>State v. Krause</u> , 82 Wn. App. 688, 919 P.2d 123 (1996).....	24
<u>State v. Lough</u> , 70 Wn. App. 302, 853 P.2d 920, <u>aff'd</u> , 125 Wn.2d 847, 889 P.2d 487 (1995).....	21, 22
<u>State v. Lough</u> , 125 Wn.2d 847, 889 P.2d 487 (1995).....	23, 26

<u>State v. Mutchler</u> , 53 Wn. App. 898, 771 P.2d 1168 (1989).....	21
<u>State v. Pierce</u> , 169 Wn. App. 533, 280 P.3d 1158 (2012).....	15, 16
<u>State v. Pirtle</u> , 127 Wn.2d 628, 904 P.2d 245 (1995).....	10
<u>State v. Saltarelli</u> , 98 Wn.2d 358, 655 P.2d 697 (1982).....	21

### Rules and Regulations

#### Washington State:

CrR 4.6.....	12
ER 402.....	21
ER 404.....	21, 23

**A. ISSUES PRESENTED**

1. A defendant who asserts prosecutorial misconduct bears the burden of establishing that the challenged conduct was both improper and prejudicial to the extent that it likely affected the jury's verdict. Here, during voir dire, the deputy prosecutor engaged in a discussion with the venire in which he asked them to reflect on whether it would be difficult to have to testify about something as private and personal as sexual experiences. Also, during opening statement, the prosecutor, by way of introducing each alleged victim who would testify in his case-in-chief, noted that "we're here for" these individuals. Given that the prosecutor's inquiry during voir dire was entirely appropriate, and considering that any impropriety in his opening statement could have easily been ameliorated by a curative instruction that defense counsel never made at any point, does the defendant fail to establish misconduct warranting reversal?

2. Evidence of a defendant's prior bad acts is admissible to prove common scheme or plan if the prior events show a shared strategy, as opposed to mere proclivity. A trial court's decision to admit such evidence is reviewed for abuse of discretion. In this case, the defendant was charged with multiple sexual offenses

against children with whom he had come into contact through others to whom he was close. He lavished attention on his intended victims to secure their trust, and then molested them by approaching them while they slept. The trial court admitted evidence of prior instances in which the defendant committed the same illegal conduct in the same fashion against other children who had come into his life in a similar way and on whom he had similarly doted. Did the trial court properly exercise its discretion in concluding that the similarities between his current conduct and his past behavior evinced more than mere propensity?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The appellant, Daniel Wilcken, was charged by sixth amended information with second-degree child molestation for engaging in prohibited sexual contact with H.J. (Count 1), attempted second-degree child molestation for his conduct with regard to C.S. (Count 2), first-degree child molestation with regard to S.E. (Count 3), attempted second-degree child molestation with regard to T.W. (Count 4), and first-degree child molestation with regard to J.B. (Count 5). By jury verdict rendered on December 13,

2013, Wilcken was found guilty as charged on Counts 1, 2, 3, and 4, and acquitted on Count 5. CP 327-37.

## 2. SUBSTANTIVE FACTS

When she was twelve years old, C.S. befriended C.W., the daughter of Daniel Wilcken, at a church event.<sup>1</sup> 12RP 1482-83. C.S. shared an interest in Japanese animation and comic books with C.W., who was the same age as C.S. 12RP 1484. C.S. and C.W. quickly became very close, and C.S. was encouraged to spend a good deal of time at the Wilckens' home in Des Moines. 12RP 1487.

The seeming stability of the Wilckens' home life was quite different than C.S.'s; C.S. lived with her mother, who had divorced C.S.'s father, and C.S.'s mother refused to allow her to speak with him. 12RP 1475, 1481. On her first visit to the Wilckens' residence, C.S. asked Daniel if she could use his phone to call her father, and explained why she could not do so from her own home.

---

<sup>1</sup> The verbatim report of proceedings consists of 26 volumes, referred to in this brief as follows: 1RP (10/22/2013); 2RP (10/23/2013); 3RP (10/28/2013); 4RP (10/29/2013); 5RP (10/30/2013); 6RP (10/31/2013); 7RP (11/4/2013); 8RP (11/4/2013); 9RP (11/6/2013); 10RP (11/7/2013); 11RP (11/12/2013); 12RP (11/13/2013); 13RP (11/14/2013); 14RP (11/19/2013); 15RP (11/20/2013); 16RP (11/21/2013); 17RP (12/2/2013); 18RP (12/3/2013); 19RP (12/4/2013); 20RP (12/5/2013); 21RP (12/9/2013); 22RP (12/10/2013); 23RP (12/11/2013); 24RP (12/12/2013); 25RP (12/13/2013); and 26RP (1/17/2014). Pagination runs consecutively through the entirety of the volumes.

12RP 1496. Daniel approved and allowed her to phone her father.

12RP 1496.

Daniel's two daughters, C.W. and E.W., shared a bedroom furnished with a bunk bed. 12RP 1500. On her first sleepover at the Wilckens' home, C.S. shared C.W.'s bunk. 12RP 1500-01. During the night, C.S. awakened to find Daniel straddling her. 12RP 1501. Daniel had put his hand down C.S.'s pajama pants, on top of the underwear covering her vagina. 12RP 1502, 1506. C.S. found that her shirt had been rolled up over her chest, as well. 12RP 1504.

Alarmed, C.S. extricated herself and ran into the bathroom. 12RP 1508. When she left the bathroom, she found C.W. waiting for her in the living room. 12RP 1508. Daniel joined them, and asked C.S. if "it felt good." 12RP 1509. C.S. answered that it had not, and Daniel asked her not to tell anyone. 12RP 1509. In the morning, Daniel took C.S. and his daughters to an anime store, and told C.S. that he would buy her a DVD if she promised not to tell anyone about the prior night's incident. 12RP 1510. He then purchased a DVD for C.S. and drove her to her mother's residence. 12RP 1511. Confused by what had occurred and nervous to jeopardize her friendship with C.W., who was, at that time, C.S.'s

only friend, C.S. remained silent about Daniel's conduct.

12RP 1511, 1514.

C.S. continued to visit C.W. at the Wilckens' residence, but, when she slept over, she always wore her bra, wrapped herself tightly in her blanket, and slept as close to C.W. as possible.

12RP 1514. Although she never again awakened to find Daniel on top of her, she woke up, on two or three occasions, to find Daniel standing in the darkened bedroom. 12RP 1515-16.

Daniel encouraged C.S. and his daughters to perform in "photo shoots" inside the Wilcken home. 12RP 1519. When C.S. was fifteen years old, he asked her if she would pose in the nude for him. 12RP 1524. Daniel told C.S. that he was planning on making a movie, and needed nude photographs so he could create digital avatars on his computer to use in the film. 12RP 1524-25.

Daniel had made a similar request to S.E., a ten-year-old friend of Wilcken's other daughter, E.W. 14RP 1782-83. S.E. became friends with E.W. when the two were students together at Pacific Middle School; both were members of the school's anime club. 12RP 1747-48. S.E. often spent afternoons following school at the Wilckens' home while her mother worked and would sleep over two or three times per month. 14RP 1753-54, 1760.

During one such sleepover, S.E. was awakened by Daniel as she slept next to E.W. 14RP 1763. Daniel told S.E. to make room for him, and then lay down next to her. 14RP 1763. He then put his hand under S.E.'s pajama pants and underwear and rubbed her vulva. 14RP 1764.

S.E. had never experienced anything like that before, and thought it was just something that the Wilckens did. 14RP 1771. S.E. testified that she could recall Daniel engaging in similar contact with her while she slept in E.W.'s and C.W.'s bedroom on one other occasion, and that he convinced her to be photographed in the nude on the pretext of needing the photos for digital film-making purposes. 14RP 1775-77, 1782-84. She remained E.W.'s friend and continued to visit her; the Wilckens made her feel especially welcome and appreciated, often telling her how much they loved her. 14RP 1772.

H.J. was another school friend of E.W., and met Daniel at E.W.'s eleventh birthday party. 16RP 2043, 2046. H.J. and E.W. shared an interest in Japanese comics and became close; H.J. slept over at the Wilckens' home on occasion. 16RP 2046, 2054.

During one night at the Wilckens', when she was twelve or thirteen years of age, H.J. woke up to find Daniel lying next to her

and C.W. 16RP 2056. She then realized that Daniel's hand was down her pants, and his fingers were tangled in her pubic hair. 16RP 2056. When H.J. began to move away, Daniel stopped. 16RP 2062. He apologized to H.J. the next day, but she did not want to talk about the subject with him. 16RP 2065. H.J. did not know what to do about the incident, and was worried that she would get into trouble if she told anyone. 16RP 2068.

As with C.S. and S.E., Daniel asked H.J. if he could photograph her in the nude, explaining that he needed to create a digital "stunt double" of her for a movie he intended to produce. 16RP 2014. H.J. agreed, and posed for him, naked, when she was twelve years old. 16RP 2105.

Another friend of C.W.'s, T.W.,<sup>2</sup> visited the Wilckens' home often, beginning when she and C.W. were in the third grade together. Daniel lavished attention on T.W., buying her anything she wanted, and encouraging her interest in pursuing a modeling career. 18RP 2391. He often photographed her, and said it would help him develop a business interest he had in child modeling. 18RP 2387-88. T.W. found all of the attention comforting, because it was unlike what she experienced at her own home. 18RP 2395.

---

<sup>2</sup> T.W. is not related to Daniel Wilcken and does not share the same surname.

T.W. noticed that Daniel would sometimes come in to the bedroom where she slept with E.W. and C.W. and just look at her. 18RP 2379. Once, however, she awakened to find Daniel lifting her shirt over her breasts. 18RP 2380. Disturbed, she rolled away from Daniel, and he left the room. 18RP 2384. T.W. was eleven years of age at the time. 18RP 2384. She was scared, and told her mother about the incident when she got home. 18RP 2384.

J.B. testified that her family and the Wilckens had been friends for many years, since her mother had dated Daniel when the two were teenagers. 20RP 2673. J.B. was closest with C.W., who was the same age as her. 20RP 2674. Because the two families were so close, J.B. and her family would sometimes spend the night at the Wilckens' home. 20RP 2674, 2677.

On one such occasion, when J.B. was nine years old, and sharing E.W.'s bunk, she woke up to find Daniel touching her breasts, under her shirt. 20RP 2679. J.B. rolled away, and told her mother about it the next morning. 20RP 2679, 2686. J.B. and her family never went back to Daniel's home again. 20RP 2686.

J.B. acknowledged on the witness stand that her recollection of this incident, which occurred twelve years before trial, was rather hazy. 20RP 2689.

Daniel did not testify in his case-in-chief. 22RP 2838. He called only one witness, the father of C.S., to clarify a matter of timing with regard to when C.S. told her father what had happened to her. 21RP 2784-85.

**C. ARGUMENT**

**1. THE DEPUTY PROSECUTOR DID NOT COMMIT REVERSIBLE MISCONDUCT**

Wilcken contends that his multiple convictions must be reversed because the deputy prosecutor committed misconduct on two occasions. Wilcken identifies the first instance as having occurred during voir dire, when the deputy prosecutor asked the venire to consider whether it would be difficult to have to testify about their first sexual experience. Second, Wilcken challenges comments that the deputy prosecutor made in his opening statement, when he framed his outline of the anticipated evidence by introducing each alleged victim by photograph and noting that “we” were “here for” the victims. Brief of Appellant, at 24-25, 34.

Wilcken's claims are without merit. As to his first assertion, Wilcken cannot demonstrate impropriety, much less unfair prejudice that likely affect the outcome of his trial. And he is unable to demonstrate that the prosecutor's rhetorical choices during his

opening statement amounted to inflammatory misconduct wholly immune to curative instruction. His claims should be rejected.

A defendant who asserts prosecutorial misconduct bears the burden of establishing that the challenged conduct was both improper and prejudicial. State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2002). Prejudice occurs only if “there is a substantial likelihood the instances of misconduct affected the jury’s verdict.” State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). When a defendant’s attorney objected to a prosecutor’s remarks at trial or timely moved for mistrial, the trial court’s ruling is reviewed for abuse of discretion. State v. Gregory, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006). When defense counsel fails to lodge a contemporaneous objection, the issue of misconduct is waived unless the misconduct was so flagrant and ill-intentioned that “it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” State v. Gentry, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995).

a. Voir Dire

By the time the deputy prosecutor commenced his opening round of voir dire, the panel of prospective jurors had already been informed by the trial court of the sexual nature of the crimes alleged

to have been committed by the defendant. 9RP 872, 970-71. The deputy prosecutor began by asking the panel to consider whether they would expect such crimes to be committed openly or privately. 10RP 1089-94. The prosecutor then asked the venire to recall their own initial sexual experiences, and invited them to volunteer to talk about their memories from the witness stand. 10RP 1094-95. When no one volunteered, the prosecutor explored with the prospective jurors the reasons for their hesitancy, and asked them to explain how it might affect their demeanor and delivery were they required to take the witness stand under subpoena. 10RP 1096-1101.

Defense counsel objected to this line of questioning and sought a mistrial. 10RP 1101-02. Outside the presence of the jury panel, defense counsel asserted that the deputy prosecutor was duplicitously trying to engender sympathy for the alleged victims by asking the venire members to stand "in the shoes of the victims," whose own sexual experiences had been horrific. 10RP 1109-10. The prosecutor responded that he meant only to determine how the jurors might respond to a victim's ability to relate facts regarding highly personal subject matter, and noted that he had never suggested to the jurors to consider how they would feel if their own

experiences involved victimization or otherwise carried any other negative context. 10RP 1111. The trial court denied defense counsel's motion, observing that the prosecutor had never asked the prospective jurors to imagine that they were crime victims, and that his questions concerned a person's abilities to recall and describe past events, and not about how awful it is to be victimized. 10RP 1121-22.

The trial court did not abuse its discretion. In this state, a trial judge is vested with considerable latitude in shaping the limits and extent of voir dire. Lopez-Stayer ex rel. Stayer v. Pitts, 122 Wn. App. 45, 50, 93 P.3d 904 (2004). The primary purpose of voir dire is to give a litigant the opportunity to explore potential jurors' attitudes in order to determine whether any of them should be challenged. State v. Frederiksen, 40 Wn. App. 749, 752, 700 P.2d 369 (1985); see also CrR 4.6(b) (providing that counsel may ask venire members "questions touching their qualifications to serve as jurors in the case, subject to the supervision of the court as appropriate to the facts of the case.").

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. To explore this area, the prosecutor asked the prospective jurors to think about what it would be like to testify in a room full of strangers about the most private kind of subject matter. He did not ask the venire to imagine what it would be like to be victims of molestation, nor did he ask them to consider having to describe being molested.

The prosecutor's line of questioning was not fundamentally different than such commonplace areas of discussion during jury selection as whether the venire members had ever themselves testified before, and how that felt, or whether they could think of good reasons why a defendant might choose to exercise his constitutional right to refuse to take the witness stand. In each instance, the attorney is asking the members of the panel to expand their perspective and consider things from a different point of view; the purpose is to see if the prospective jurors are able to do so, because their ability or inability may, quite reasonably, be considered by the attorney during his or her exercise of peremptory challenges. Under the circumstances, the trial court's denial of Wilcken's motion for a mistrial was quite reasonable.

b. Opening Statement

During his opening statement to the now-empanelled jury, the deputy prosecutor introduced the evidence he anticipated would be presented at trial with regard to each alleged victim by showing a photograph of the victim and noting that “we’re here for” that person. 11RP 1335, 1338, 1340, 1341. Defense counsel did not object to these remarks at the time they were made, and delivered its own opening statement. 11RP 1348. After the jury was excused for the day, Wilcken’s counsel then moved for mistrial, asserting that the prosecutor had attempted to inflame the passions and prejudices of the jury and had asked them to again put themselves in the victims’ “shoes.” 11RP 1359. The prosecutor denied having any bad intent, and explained that he had used a rhetorical device simply in order to introduce each alleged victim to the jury. 11RP 1362. The trial court denied Wilcken’s motion. 11RP 1362.

The trial court’s decision fairly reflects the innocuous nature of the prosecutor’s remarks. The prosecutor was not beseeching the jurors to defend the alleged victims; he was only introducing them, in the context of a trial in which the jury would have to decide whether the defendant had committed crimes against the victims

and, by extension, the people of the state. Wilcken is unable to point to any other aspect of the State's opening remarks that suggest that the prosecutor was in any way acting as an overzealous advocate, rather than simply outlining the evidence he expected to present, at the conclusion of which he explained that he would stand before them again at the end of the trial and "ask you to consider all of the evidence...and hold the Defendant accountable" for the charged misdeeds. 11RP 1346; see Gregory, 158 Wn.2d at 810 (a prosecutor's statements should be reviewed in the context of the entire argument, the evidence addressed in the argument, and the instructions to the jury).

Wilcken's reliance on State v. Pierce, 169 Wn. App. 533, 280 P.3d 1158 (2012), is misplaced. The challenged remarks in that Jefferson County case were so excessive, theatrical, and unjustified as to constitute a difference in kind, rather than degree, from those questioned in the instant appeal. In Pierce, the prosecutor told the jurors, during closing argument, "in your wildest nightmares[,] would you imagine something like that [i.e., being robbed at gunpoint and then shot in the back of the head] happening to you, in your own home, the place where you grew up, where you raised your kids [etc.]." Pierce, 169 Wn. App. at 541.

The prosecutor then went on to describe the defendant's step-by-step thought processes as he committed the charged crimes, and described a conversation that occurred between the homicide victims and the defendant as the crimes were occurring, despite the fact that there was no evidence presented at trial whatsoever regarding such matters. Id. at 542.

Here, in contrast, the deputy prosecutor simply noted that “we’re here for” the alleged victims whom he would later be calling to the witness stand. The mildness and relative ambiguity (it is unclear to whom “we’re” refers, after all) of these comments are vastly different than the inflammatory and indefensible arguments made by the prosecutor in Pierce. This mildness likely accounts for the failure of Wilcken’s counsel to object at *any* point during the prosecutor’s opening statement.

Wilcken’s failure to object now obligates him to demonstrate a level of incurable prejudice he makes little effort to show. 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 made at the first instance could have resulted in an effective curative instruction. Moreover, given that the

prosecutor's challenged statements were made in the context of a relatively routine opening statement lacking in great drama, before a multi-week trial involving many witnesses and exhibits which ended with closing arguments that are not challenged on appeal, it is extremely unlikely that the prosecutor's comments under attack here factored into the outcome of a trial in which, notably, the defendant was acquitted on one charge. Frankly, it is doubtful that the jurors even remembered the parties' opening statements by the time they began their deliberation.

**2. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF WILCKEN'S PRIOR MOLESTATION OF OTHER CHILDREN**

Following a lengthy pretrial hearing, the trial court ruled that the State could present evidence of other select instances in which Wilcken had fondled or attempted to fondle young girls. The trial court agreed that this evidence was relevant to prove the existence of a common scheme or plan, and that the probative value of the evidence outweighed the risk of unfair prejudice. 3RP 275.

The prior instances concerned A.C., M.W., K.M., and I.S. 3RP 233-35. A.C. is the younger sister of a woman who dated

Wilcken in the 1980s.<sup>3</sup> 19RP 2568, 2593. At the time that Wilcken entered her life, A.C. was between the ages of seven and nine years, and Wilcken was in his early twenties. 19RP 2569, 2575. Wilcken gave A.C. a lot of attention, which she found flattering at the time, and took her on outings to amusement parks and other fun places. 19RP 2571-72.

Wilcken would, on occasion, try to put his hands under A.C.'s swimsuit. 19RP 2575. He attempted to crawl into her sleeping bag at one slumber party at her home while she slept, and she awakened to find him putting his hand under her blouse. 19RP 2580. Later, A.C. was obligated to stay at Wilcken's apartment for a period of time while her parents were away on business. 19RP 2582. During that time, A.C. repeatedly arose to find Wilcken climbing into her bed and putting his hands under her clothes. 19RP 2582, 2584. Wilcken did the same things so often at her home that she began to sleep in her closet or in her parents' bedroom in order to protect herself. 19RP 2586-87. Wilcken often took photos of A.C. and told her that he was planning to film a movie; he encouraged A.C. to recruit her friends to appear in the movie as well. 19RP 2587-88.

---

<sup>3</sup> J.B. is the daughter of A.C.'s sister, who dated Wilcken.

M.W. was also a younger sister of the same woman whom Wilcken dated in the 1980s. 17RP 2258-59. As with A.C., M.W. experienced Wilcken's aggression. When she was six or seven years of age, M.W. was waiting with Wilcken and her older sister for a ferry back to her family's home on Vashon Island after Wilcken had taken her on an outing. 17RP 2259-60. While they waited, M.W. sat on Wilcken's lap, at his request. 17RP 2263-64. Wilcken moved his hand underneath M.W.'s shirt and, to her surprise and unease, rubbed her chest, including her nipples. 17RP 2265.

On another occasion, during one of their family's slumber parties, Wilcken tried, just as he had with A.C., to unzip M.W.'s sleeping bag while she slept. 17RP 2269. She awoke to Wilcken putting his hand under her shirt and stroking her breasts. 17RP 2269, 2271.

K.M. was a close friend of A.C.'s in the 1980s, and often spent time at A.C.'s and M.W.'s home. 19RP 2460. When she was approximately thirteen years old, K.M. spent the night at A.C.'s when A.C.'s family was having a slumber party. 19RP 2469-70. K.M. awakened in the middle of the night because she felt someone breathing on her. 19RP 2471. She saw that her shirt had been pulled up over her breast. 19RP 2472. K.M. heard someone

scurrying away, and turned to see Wilcken, who was pretending to be asleep. 19RP 2472-74.

I.S. is Wilcken's niece, and stayed at Wilcken's home with his wife and children when she was seventeen years old. 3RP 235. Wilcken told I.S. that he could help her break into modeling, and then propositioned her, without success. 3RP 235. On one occasion, she awakened at Wilcken's home to find him fondling her breasts. 3RP 236.

The trial court permitted the State to present evidence with regard to the incidents involving A.C., M.W., and K.M. 3RP 274-75. The court found similarities between these girls – in terms of their ages, the nature of their interaction with Wilcken, and the manner in which they were assaulted – and the victims of the charged offenses. 3RP 275. Because I.S. was significantly older than the victims of the charged crimes and her interaction with Wilcken were substantively different as a result of her maturity, the trial court prohibited the State from offering her testimony, notwithstanding the circumstances of Wilcken's assault, i.e., when she was asleep. 3RP 276. Prior to A.C.'s, M.W.'s, and K.M.'s testimony, and in its closing instructions, the trial court directed the jury as to the proper

uses of this evidence and prohibited its misuse. 17RP 2262; 19RP 2453-54, 2560-61; CP 289-91.

Wilcken contends on appeal that the trial court erred by allowing A.C., M.W., and K.M. to testify at his trial. He contends that admission of evidence of these events violated ER 404(b) and necessitates reversal of his conviction. Evidence of prior bad acts is admissible under ER 404(b) if it satisfies two distinct criteria. First, the evidence must be logically relevant to a material issue before the jury. Evidence is relevant if (1) the identified fact for which the evidence is admitted is of consequence to the action, and (2) the evidence tends to make the existence of that fact more or less probable. ER 402; see also State v. Saltarelli, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982); State v. Mutchler, 53 Wn. App. 898, 901, 771 P.2d 1168 (1989). Second, if the evidence is relevant, its probative value must outweigh its potential for unfair prejudice. Saltarelli, 98 Wn.2d at 362. A trial court's admission of evidence under ER 404(b) is reviewed for abuse of discretion. State v. Hernandez, 99 Wn. App. 312, 322, 997 P.2d 923 (1999).

As this Court explained in State v. Lough, 70 Wn. App. 302, 853 P.2d 920, aff'd, 125 Wn.2d 847, 889 P.2d 487 (1995), there are two categories of evidence that may be sufficient to form a common

scheme or plan: (1) evidence of a single plan used to commit separate, but very similar crimes, and (2) evidence of multiple acts or events that constitute parts of a larger, overarching criminal plan in which the prior acts are causally related to the charged offense. Lough, 70 Wn. App. at 302. In this case, the trial court made clear that it was admitting evidence of the events involving A.C., M.W., and K.M. because they bore significant similarities to the charged crimes. 3RP 274-76. In other words, Wilcken used the same approach to commit separate but similar offenses. 3RP 275.

In Lough, this Court identified a number of “commonsense questions” to keep in mind when determining whether prior events show a common scheme as opposed to a mere proclivity to commit crime. Id. at 319. Those questions include: whether the crimes involved forethought, so that prior experience with preplanned crimes would benefit the defendant later, when he committed the charged offense; whether evidence exists of a repetitive, conscious effort to orchestrate events in order to avoid exposure; whether an unusual technique was involved; and whether there are sufficient features in common from which the fact finder could determine that the prior and current incidents were the work of a single

mastermind. Id. at 319-20. Or, as the supreme court noted when affirming this Court's opinion:

To establish common design or plan, for the purposes of ER 404(b), the evidence of prior conduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations.

State v. Lough, 125 Wn.2d 847, 860, 889 P.2d 487 (1995).

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 issued by this and other appellate courts in this state. Wilcken did not independently seek out any of his victims. Rather, he took advantage of a pre-existing relationship (a girlfriend in the 1980s, and his daughters in the 2000s) to gain and secure access to young girls. Wilcken demonstrated the ability, with A.C. and M.W., to develop a bond with his intended target by giving them a great deal of attention and providing them with entertainment. He would later use the same methods to acquire the misplaced trust of T.W., S.E., C.S., and H.J. Wilcken employed a stratagem with A.C. – to encourage her to perform in a film he was creating – that he would later use to regrettable “success” with C.S., H.J., and T.W.

Wilcken demonstrated the ability to develop sufficiently familiar relationships with young girls that he would have access to them while they slept. He thus placed himself in a position where he could attempt to initiate sexual contact at his choosing. This court and others have often found such practices to constitute a common scheme that justifies admission of similar uncharged acts. See, e.g., State v. Gresham, 173 Wn.2d 405, 422-23, 269 P.3d 207 (2012) (fondling children's genitals during outings with them, while their caregivers were asleep); State v. Baker, 89 Wn. App. 726, 733-34, 950 P.2d 486 (1997) (rubbing children's backs until they fell asleep and then reaching under the children's clothing); State v. Krause, 82 Wn. App. 688, 694-95, 919 P.2d 123 (1996) (lavishing attention on targeted children in order to gain unmonitored access to them).

Wilcken nonetheless contends that his case is different, for several reasons. First, he insists that there is a qualitative distinction to be drawn by the fact that he gained access to his victims in the 1980s through a girlfriend, rather than through the daughters he would later have. Brief of Appellant, at 43. This is indeed a distinction, but one without a difference. In both circumstances, the key fact is that he used others who had already

developed closeness with his targets in order to easily insinuate himself into their lives.

Next, he asserts that his efforts to fondle A.C. when she was wearing a swimsuit and M.W. as she sat on his lap at the ferry dock are too dissimilar from the instances in which he molested his charged victims while they slept to warrant admission. Brief of Appellant, at 43. While it is indeed true that A.C. and M.W. were awake on these two occasions, these instances still share other significant similarities with the charged offenses, such as the manner in which Wilcken gained access, and his use of attention and affection to develop trust with children.

Wilcken is mistaken when he asserts that he never tried to use his photography skills or his purported filmmaking plans to bait his targets in the 1980s. Brief of Appellant, at 43. In fact, he used the same ploy with A.C. that he would later use with C.S., S.E., T.W. and H.J.

Finally, Wilcken contends that his prior bad acts are distinguishable from the charged conduct because A.C. and M.W. were a few years younger than the named victims when he began to prey upon them, and because the earlier, uncharged offenses occurred twenty-plus years ago. Brief of Appellant, at 43. His

claims should be rejected. First, the 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. Second, the passage of time between prior and current bad acts affects weight, rather than admissibility. See State v. Evans, 45 Wn. App. 611, 617, 726 P.2d 1009 (1986). Moreover, "when similar acts have been performed repeatedly over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan."). Lough, 125 Wn.2d at 860.

The trial court's conclusion that Wilcken's conduct toward children as a younger man shared markedly common features with the charged offenses is eminently understandable. Its decision to admit evidence of Wilcken's prior bad acts was a proper exercise of its discretion.

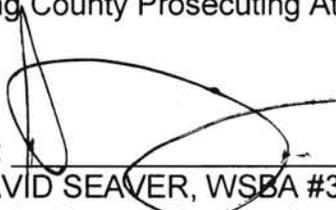
D. CONCLUSION

The State did not commit reversible misconduct during voir dire or in opening statement, and the trial court properly admitted evidence of Wilcken's prior misconduct. The State respectfully asks this Court to affirm Wilcken's multiple convictions for child molestation.

DATED this 23<sup>rd</sup> day of October, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
DAVID SEAVER, WSBA #30390  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Dana Nelson, the attorney for the appellant, at Nelsond@nwattorney.net, containing a copy of the Brief of Respondent, in State v. Daniel John Wilcken, Cause No. 71453-8, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 23<sup>rd</sup> day of October, 2014.



Name:

Done in Seattle, Washington