

NO. 41962-9-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

PATRICK HENRY POST, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Susan Serko

No. 09-1-04820-9

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court abused its discretion admitting evidence of the defendant's prior sexual misconduct?
2. Whether the defendant demonstrates misconduct where the prosecutor used a jigsaw puzzle analogy in closing argument?
3. If such argument is misconduct, whether the defendant waived the objection where he failed to object to the argument?
4. Where the trial court did not seal juror questionnaires, whether this violated Art. 1, § § 10 and 22 of the State Constitution?
5. Whether sealing juror questionnaires violates Art. 1, § § 10 and 22 of the State Constitution?

B. STATEMENT OF THE CASE.

1. Procedure

On October 27, 2009, the Pierce County Prosecuting Attorney (State) charged the defendant, Patrick Post with one count of rape of a child in the first degree and two counts of child molestation in the first degree. CP 1-2. On February 7, 2011, the State amended the Information to charge one count of rape of a child in the first degree and one count of child molestation in the first degree. CP 7-8.

The case was assigned to Hon. Susan Serko for trial and began on February 10, 2011. 1 RP 3. Before jury selection and witnesses were heard, the court considered discussion and argument regarding a jury questionnaire (1 RP 20-21) and whether to admit evidence of other bad acts under RCW 10.58.090 and ER 404(b). 1 RP 29-56.

After hearing all the evidence, the jury found the defendant guilty, as charged. CP 77, 78. On April 8, 2011, the court sentenced the defendant to 318 months to life for rape of a child; and 198 months to life for child molestation. CP 88. The defendant filed a timely notice of appeal the same day. CP 100.

2. Facts

M.C.M.¹ has a 10 year old daughter, M.M. 2 RP 261². At one point, M.C.M. was married to a man named JR Herrington. 2 RP 262. JR Herrington's mother, Vicki Herrington, had a long-term, but non-marital relationship with Patrick Post. 4 RP 543. So, JR Herrington considered the defendant his step-father. 4 RP 518. M.M. referred to the defendant as "Papa Post". 2 RP 216.

¹ The victim, M.M. and her mother, M.C.M., will be referred to by their initials to respect their privacy.

² References to the Report of Proceedings will be by volume and page number. The VRP is labeled 1 of 5, 2 of 5, etc. There is a separate, un-numbered volume that contains the opening statements, which are not at issue in this case.

While M.C.M. and JR Herrington were married, Vicki Herrington would sometimes provide child care for M.M. 4 RP 545. On occasion, Ms. Herrington would drop M.M. off at the defendant's residence for him to watch M.M. 2 RP 217.

When M.M. was at the defendant's, the defendant touched her "private parts" with his hands. 2 RP 219. The defendant also touched her private parts with his "toys." 2 RP 220, 221. M.M. said the toys looked like "boy's private parts." *Id.* M.M. said that one of the "toys" vibrated. *Id.* The defendant also would lick M.M.'s privates. 2 RP 221.

The defendant also exposed himself to M.M. 2 RP 221-222. He ejaculated in front of her and asked her to touch his penis. 2 RP 222. The defendant showed M.M. photographs of naked women in magazines. 2 RP 223. He also showed her movies that had naked people in them. *Id.*

In 2008, M.M. disclosed these incidents to her mother, M.C.M., and her great-grandparents. 2 RP 284, 316, 319, 335.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF THE DEFENDANT'S PRIOR MISCONDUCT, UNDER ER 404(b).

Evidence of prior bad acts is admissible to prove a common scheme or plan where 1) the acts are proved by a preponderance of the evidence, 2) they are admitted for the purpose of proving a common

scheme or plan, 3) the acts are relevant to prove an element of the crime charged or to rebut a defense, and 4) the evidence is more probative than prejudicial. *State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003).

The State must prove these acts by a preponderance of the evidence; such as by having the victims of the prior bad acts testify to the conduct sought to be introduced. See *State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995); *State v. Griswold*, 98 Wn. App. 817, 991 P.2d 657 (2000).

The degree of similarity for the admission of evidence of a common scheme or plan must be substantial. *DeVincentis* at 14. The focus is on the similarity between the prior acts and the charged crime, rather than the uniqueness of the individual acts. *Id.* at 13. Sufficient similarity is reached when the trial court determines that the “various acts are naturally to be explained as caused by a general plan . . .” *Lough*, 125 Wn.2d at 860.

In *DeVincentis*, the defendant was found to have created a “safe channel” or environment that allowed an apparent safe and isolated environment by gaining a position of trust with each of the victims; the defendant wore an unusual piece of clothing (bikini or G-string) in front of each of the victims; the defendant asked for and gave massages to each of the victims; and the acts themselves were similar in each instance. These similarities between the prior acts and those alleged in the charge before

the court were sufficient to warrant the admission of other crimes or misconduct under ER 404(b). *Id.* at 21.

In *Griswold*, the defendant was charged with child molestation in the third degree. He was alleged to have driven a student in his class to his house and asked her to play “truth or dare.” After molesting the girl he made remarks in an attempt to prevent her from disclosing what had occurred. At trial, two witnesses were permitted to testify that they were also molested by the defendant because the defendant played the same “truth or dare” game with them and made similar remarks in an attempt to prevent the girls from disclosing. Again, the court held that the similarities in the position of trust the defendant held, the similarity of the “truth or dare” game, the similarity in the touching, and the similarity in his attempt to prevent their disclosure were sufficient to warrant the admission of these acts under ER 404(b). *Griswold* 98 Wn. App. at 826.

As in *DeVincentis* and *Griswold*, the defendant’s conduct in the present case towards each victim was sufficiently similar to warrant admission under ER 404(b). The defendant held the same position of trust over all three victims. He used this status to create the same “safe channel” discussed in *DeVincentis*, and committed all of these acts in his respective homes once entrusted with the care of these children. As the Court held in both *DeVincentis* and *Griswold*, the defendant’s similarity of abusive conduct warranted the admission of his prior conduct under ER 404(b), as his conduct manifested a common or general plan of abuse.

In *State v. Sexsmith*, 138 Wn. App. 497, 157 P.3d 901 (2007), the court was faced with a very similar factual scenario that the trial court faced here. Sexsmith was charged with child molestation in the first degree, three counts of child rape in the second degree, incest in the first degree, and two counts of possession of depictions of a minor engaged in sexually explicit conduct. Sexsmith began first touching C.H., his girlfriend's daughter, when she was 11. The abuse occurred in the basement of his residence. He would make C.H. watch pornography, force her to touch his penis, and make her perform oral sex. At trial, the State presented testimony from Sexsmith's daughter regarding his prior abuse of her. Sexsmith's daughter, A.S., testified that she was also abused in the basement of the residence, that he forced her to watch pornography, and would make her touch his penis.

Finally the Court must find that this evidence is relevant to prove an element of the crime charged or to rebut a defense before balancing its probative value against any prejudicial effect should it be presented to the jury.

Generally, courts will find that probative value is substantial in cases where there is very little proof that sexual abuse has occurred, particularly where the defendant asserts a defense of general denial. *Sexsmith*, 138 Wn. App. at 506. Where general denial is asserted, and every element of the offense is at issue, credibility is central to the outcome of the case and supports the admission of common scheme or

plan evidence. *Id.* Here, the defendant asserted a general denial defense, and as such, this evidence was relevant to rebut this defense.

The trial court also weighed the probative value versus prejudicial effect. The Court in *State v. Krause*, 82 Wn. App. 688, 919 P.2d 123, (1996), held that the probative value outweighs the prejudice where: 1) the evidence is highly probative because it tends to show a common design or plan, 2) the need for evidence is great given the nature of the allegations, and 3) the trial court gives the appropriate limiting instruction to the jury. Where a common plan is shown, corroborating evidence is highly probative in these cases as they are otherwise a credibility contest between an adult and a child. *Griswold* at 827.

In each of the cases cited above, the Court considered several factors before admitting these prior acts. These include: the age of the victim, the need for evidence, the secrecy surrounding sex abuse offenses, the absence of physical proof of the crime, the degree of public opprobrium associated with the accusation, and the availability of less inflammatory documentation or corroboration that the crime occurred was available. See *DeVincentis* 150 Wn.2d at 23, *Griswold* at 827, and *Krause* at 696. Evidentiary rulings under ER 404(b), are reviewed for abuse of discretion. *DeVincentis*, at 17.

Here, the court found that the State had established a common design or plan, and the nature of the allegations warranted the admission of the 404(b) evidence. 1 RP 56. The court considered the factors

discussed above. 1 RP 51-55. The court balanced the probative value with the prejudicial effect. 1 RP 55-56. Defense counsel agreed that the court had done the proper balancing under ER 403. 1 RP 56.

The court gave a limiting instruction at the time of the evidence. 3 RP 400, CP 40. The court also included a limiting instruction in the instructions at the close of the case. CP 63. The court did not err in admitting the evidence.

2. WHERE THE PROSECUTOR'S ARGUMENT WAS PROPER, OR WAS NOT FLAGRANT OR ILL-INTENTIONED AS TO BE INCURABLE BY INSTRUCTION, THE DEFENDANT WAIVES THE ISSUE ON APPEAL WHEN HE FAILED TO OBJECT AT TRIAL.

- a. The defendant has the burden to show prosecutorial misconduct and prejudice.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d 570 (1995), citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), *overruled on other grounds by, State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002). Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed 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. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997) citing *Gentry*, 125 Wn.2d at 593-594.

b. Use of a jigsaw puzzle analogy regarding reasonable doubt is not misconduct.

In the present case, the prosecutor candidly acknowledged that, often, evidence does not supply every detail:

There’s a doubt in virtually every case, ladies and gentlemen. Without my ability to put you all in that trailer and put you all in that house in Bonney Lake so that you could see with your own eyes exactly what the defendant did to [M.M.], I grant you there’s going to be a doubt.

4 RP 657.

In an effort to explain to the jury that the State could still meet its burden under such circumstances, the prosecutor used the example of putting a puzzle together. 4 RP 658. The prosecutor argued that once enough pieces are placed into the puzzle, a person is able to confidently recognize the picture in the puzzle. The prosecutor used this analogy to acknowledge the reality that cases often go to juries with “pieces missing” or questions:

But I’m also going to grant you that there’s still a big piece of the puzzle missing. There is no eyewitnesses, there is no medical evidence. The only question though is even though not every[]one of your question[s] has been answered, and even though there may still be doubts, are they reasonable ones? Would you have a reasonable doubt

that even though a big piece of the puzzle is missing that this is a picture of the city of Seattle?

4 RP 658.

This description during closing argument did not misstate the law. It did not reduce or shift the burden of proof. *Cf.*, ***State v. Warren***, 165 Wn.2d 17, 28, 195 P. 3d 940 (2008). Jury Instruction 3 correctly defined reasonable doubt. CP 60. The jurors were also correctly instructed to disregard any argument regarding the law that was inconsistent with the instructions of the court. Instruction 1, CP 57. The jurors are presumed to have followed these instructions. *See State v. Ervin*, 158 Wn.2d 746, 756, 147 P. 3d 567 (2006).

Even if the prosecutor's statements were error, if any prejudice arose in the analogy, a curative instruction could have resolved it. *See, e.g. Warren*, 165 Wn.2d at 28. But the defendant did not ask for such an instruction. Even assuming that these comments were a misstatement of the law, had defense counsel objected, the trial court could have instructed the jury to ignore these comments as inaccurate statements of the law, and reminded or instructed the jury correctly. These comments were not so "flagrant" or "ill intentioned" that a simple curative instruction would not have remedied any possible prejudice.

An attorney may properly use a jigsaw puzzle analogy to help jurors to understand the concept of listening to all the evidence, and not making a decision until all they have heard and seen all the evidence. In

some cases, numerous witnesses testify regarding a small aspect of a case, or piece of seemingly insignificant evidence, which at the end the prosecutor will argue adds up to proof beyond a reasonable doubt.

Prosecutors sometimes use the analogy to describe that it is possible to have an abiding belief in the truth of the charge, even though there are some “holes” or “pieces” missing. The puzzle analogy does not diminish the State’s burden. It is merely one way to argue the concepts of “piecing together” evidence and that of reasonable doubt.

Different attorneys have different ways of arguing these same concepts to a jury. Some may find the puzzle analogy helpful. Others may find it homespun or trivial. It is not improper. Nor is it misconduct.

3. THE TRIAL COURT DID NOT VIOLATE ART. 1, § § 10 OR 22 OF THE WASHINGTON CONSTITUTION.

a. The court did not order the juror questionnaires sealed.

The pre-requisite for an analysis of a potential violation of the requirement of an open trial and courtroom under Article 1 §§ 10 and 22 of the State Constitution is a court order closing some aspect of the public proceedings. See *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); see also *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

In the present case, the court raised the issue open courtroom issue regarding the juror questionnaires:

THE COURT: ...And are you satisfied Mr. [Prosecutor] that your four-page form would not need to be sealed?

THE PROSECUTOR: I am, your Honor. And, as a matter of fact, I think one of the—the final sentence on the introductory paragraph, how many of the jurors will understand the significance of that I don't know, but I do try to make that clear that this is something that's filed in the court's file. Nowhere in this questionnaire is there any assurance to the jurors that this questionnaire is going to be sealed.

THE COURT: Well, in light of [the] new Division 1 case this week, I'll be telling them—or not telling them. Normally I tell them it's sealed and normally I seal them.

PROSECUTOR: Yes.

THE COURT: But I don't think we have that option anymore.

PROSECUTOR: I tend to agree with the court; at least, not without conducting a *Bone-Club* analysis as to each questionnaire.

1 RP 19-20.

After some additional discussion, the court stated:

THE COURT: ...*The questionnaire will be filed in the court's file so there is no implication that this might not be public.*

1 RP 21 (emphasis added).

Nowhere in the trial record does the court order the juror questionnaires sealed or the courtroom or proceedings closed in any way.

Indeed, a few days after the above exchange, the trial court raised the issue again. The court informed counsel that a very recent Division 2 case held that sealing juror questionnaires was not a violation of the open courtroom requirement and a *Bone-Club* analysis was unnecessary. 3 RP 412. The court contemplated changing its prior order, and now to seal the questionnaires. 3 RP 413. The State strongly objected, urging caution, and citing a scenario where the split in decisions might result in the Supreme Court reversing a conviction in the present case. *Id.* The court then decided: “All right. *I’m going to leave them open then.*” 3 RP 414 (emphasis added). After additional cautionary remarks from the State, the court again says: “But given the State’s strong reaction, *I’m going to leave them open.*” *Id.* (emphasis added).

The court did not order the questionnaires sealed. There was no error.

Apparently, the questionnaires were subsequently sealed, but through no order or act of the court. The Clerk’s Papers indicate that the questionnaires are sealed. CP 141-321. Such a post-trial *sua sponte* action by the Clerk’s Office would not operate to close the trial under *Bone-Club*.

b. Sealing juror questionnaires does not violate Article 1 § 10 and 22 of the State Constitution.

This Court has discussed the issue of sealing juror questionnaires in two recent opinions: *State v. Smith*, 162 Wn. App. 833, 262 P. 3d 72 (2011) and *In re Personal Restraint of Stockwell*, 160 Wn. App. 172, 248 P.3d 576 (2011).

In *Stockwell*, at 180-181, the Court held that the trial court's sealing of juror questionnaires after voir dire was not "structural error;" nor did it render the trial fundamentally unfair. In *Smith*, the Court noted, as in *Stockwell*, that the defendants had full access to the questionnaires and benefited from the trial court's promise to the prospective jurors that their questionnaires would be sealed after voir dire. This assurance of confidentiality made it more likely that the jurors would candidly reveal in their questionnaires information that the defendants might use to challenge them for cause. *Stockwell*, 160 Wn. App. at 180–181.

In both cases, the Court noted that sealing juror questionnaires after voir dire, at most, affects only the public's right to "open" information connected to the trial. *Stockwell*, at 181. In *Smith*, the Court pointed out that the sealing procedure did not affect the public's right to open information because the defendants used the "content of the questionnaires" to question the jurors "in open court, where the public could observe." *Smith*, 162 Wn. App. at 847; *Stockwell*, at 183.

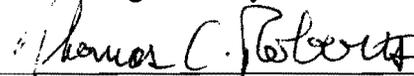
In the present case, the court never ordered the questionnaires sealed, so there was no violation of the “open court” provisions of Article 1 §§ 10 and 22. Even if the trial court had sealed the questionnaires, the defendant does not show that the information in the questionnaires was unavailable to the public during the trial. He also fails to show how a subsequent sealing of the questionnaires, whether by the court or by the Clerk, is a violation of his or the public’s right to an open trial. The defendant does not show that any aspect of jury selection excluded the defendant or the public. To the contrary, as pointed out above, the trial court was very careful to conduct all aspects of the trial in open court.

D. CONCLUSION.

The trial court did not abuse its discretion in admitting evidence of the defendant’s prior sexual misconduct. The court conducted a trial open to the public in every respect. The State respectfully requests that the conviction be affirmed.

DATED: May 22, 2012

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Certificate of Service:

The undersigned certifies that on this day she delivered by *email* U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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PIERCE COUNTY PROSECUTOR

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