

NO. 47772-6-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

STANLEY S. WILSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR CLARK COURT
The Honorable Scott Collier, Judge
Cause No. 14-1-02134-8

BRIEF OF APPELLANT

THOMAS E. DOYLE, WSBA NO. 10634
Attorney for Appellant

P.O. Box 510
Hansville, WA 98340
(360) 626-0148

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in admitting evidence in violation of Wilson's right of confrontation.
02. The trial court erred in admitting testimony under ER 404(b) that Wilson had previously shown K.N.C. a cover jacket of a movie depicting a naked lady while asking her if she wanted to watch the movie.
03. The trial court erred in ruling that K.N.C.'s statement to Officer Haske that Wilson had previously asked her if she wanted to watch a pornographic movie was admissible as an excited utterance.
04. The trial court erred in permitting Wilson to be represented by counsel who provided ineffective assistance by failing to specifically object that the testimony of Officer Haske that repeated K.N.C.'s allegation that Wilson had previously asked her if she wanted to watch a pornographic movie was inadmissible as an excited utterance because the statement did not relate to a startling event or condition.
05. The trial court erred in allowing prosecutorial misconduct during closing argument to deprive Wilson of his constitutional due process right to a fair trial.
06. The trial court erred in allowing Wilson to be represented by counsel who provided ineffective assistance by failing to object or to either move for a mistrial or request a curative instruction in light of the State's improper closing argument.

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07. The trial court erred in failing to dismiss Wilson's convictions where the cumulative effect of the claimed errors materially affected the outcome of the trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether admission of evidence as to the estimated occurrence of Y-STR profile evidence violated Wilson's right of confrontation?
[Assignment of Error No. 1].
02. Whether it was reversible error for the trial court to admit K.N.C.'s allegation that Wilson had previously shown her the cover jacket of a movie that depicted a naked lady while asking her if she wanted to watch the movie?
[Assignment of Error No. 2].
03. Whether it was reversible error for the trial court to rule that the testimony of Officer Haske that repeated K.N.C.'s allegation that Wilson had previously asked her if she wanted to watch a pornographic movie was admissible as an excited utterance?
[Assignment of Error No. 3].
04. Whether Wilson was prejudiced as a result of his counsel's failure to specifically object that the testimony of Officer Haske that repeated K.N.C.'s allegation that Wilson had previously asked her if she wanted to watch a pornographic movie was inadmissible as an excited utterance because the statement did not relate to a startling event or condition?
[Assignment of Error No. 4].

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05. Whether Wilson was denied his constitutional due process right to a fair trial where during closing argument the prosecutor engaged in prejudicial misconduct by presenting arguments calculated to inflame the passions or prejudices of the jury?
[Assignment of Error No. 5].
06. Whether Wilson was prejudiced as a result of his counsel's failure to object or to either move for a mistrial or request a curative instruction in light of the State's improper closing argument that was calculated to inflame the passions or prejudices of the jury?
[Assignment of Error No. 6].
07. Whether the cumulative effect of the claimed errors materially affected the outcome of the trial requiring reversal of Wilson's convictions.
[Assignment of Error No. 7].

C. STATEMENT OF THE CASE

01. Procedural Facts

Stanley S. Wilson was charged by amended information filed in Clark County Superior Court May 21, 2015, with rape of a child in the third degree, count I, and child molestation in the third degree, count II, contrary to RCWs 9A.44.079 and 9A.44.089. Each count further alleged the aggravating circumstance of violation of a position of trust, contrary to RCW 9.94A.535(3)(n), which was subsequently removed by agreed order. [CP 3-4, 48; RP 17].

Wilson's pretrial statements were ruled admissible following a CrR 3.5 hearing [RP 51-53], and trial to a jury commenced May 26, the Honorable Scott A. Collier presiding. Wilson was found guilty, sentenced within his standard range after the court found his two convictions encompassed the same criminal conduct, and timely notice of this appeal followed. [CP 46-47, 50-68].

02. Trial

On August 25, 2013, at approximately 4:00 in the morning, police were dispatched to the scene of a reported rape at a residence in Clark County occupied by Joshua Cox, his 15-year-old daughter K.N.C., and Wilson, his 42-year-old friend and roommate. [RP 86, 169, 195, 199, 211, 353].

At the scene, K.N.C. alleged that Wilson, who had his own bedroom, had come into the living room where she was sleeping on the couch and fondled her breasts and put his hand under her sweatpants and digitally penetrated her vagina, all the while kissing her and asking if she was okay. [RP 172, 197-98, 200]. When Wilson went to have a cigarette, K.N.C. contacted her dad who called 911 to report the incident. [RP 179, 199].

At trial, K.N.C. explained that she had been staying at her dad's for a day or so before the incident. [RP 90]. That evening she had fallen

asleep on the couch in the living room around 11:00 while watching Netflix. [RP 96, 98]. She was wearing a shirt and sweatpants. [RP 95].

I woke up and I heard someone breathing really heavy next to me. I felt pressure on my chest and hands over my pants. And someone kept whispering, Is it okay? Is it okay? Tell me this is okay. And then he put his hands in my pants, and I just kept my eyes closed. And then he started to finger me and kept rubbing my chest. Then he kisses my cheek and kissed my lips, and I was crying, but, like, silently and just kind of stayed still. And that went on for, like, 15, 20, 25 minutes.

And then he, like, pulled away and said, I can't believe you didn't wake up, and then he got up and walked away.

[RP 99].

When asked if Wilson had ever shown her the cover of a movie that made her feel uncomfortable, K.N.C. responded:

I was sitting on the couch. The TV was on, and I was on the laptop. And he walked behind me and put a movie by my face and said, Do you want to watch this? It's better. And I glanced at it, and there was a picture of a naked lady on it. And I looked back at the computer and said, No, I'm fine, and he walked away.

[RP 129].

When interviewed the morning of the alleged incident, Wilson told police he had been in his bedroom the entire night, had gone outside to

have a cigarette, but had never gone into the living room. [RP 215]. “I never touched her.” [RP 217].

Cotton swabs of saliva were collected from Wilson and tested positive for amylase, which was also detected on the waistband area of K.N.C.’s sweatpants and on vaginal swabs collected from her. [RP 219, 316-19]. Brad Dixon, a DNA analyst for the Washington State Patrol Crime Laboratory [RP 264], performed Y-STR testing on the sample taken from the sweatpants and determined:

[T]here was a mixture of at least four male individuals in that particular cutting from the waist. There was a major Y-STR profile, and that matched the profile of Stanley Wilson. Therefore, neither Stanley Wilson or any of his paternal male relatives can be excluded as the donor of the major human male DNA from that sample.

[RP 321].

....

I entered the major Y-STR profile into the U.S. Y-STR Database, and it found to have no matches to that particular profile, and it estimated the occurrence of that profile in the population of the U.S. population to be, one in 7700 male individuals in the U.S. population.

[RP 321-22].

Dixon also obtained a partial Y-STR profile from the vaginal swabs collected from K.N.C., which was consistent with the profile of

Wilson, meaning, as with the above sample taken from the waistband area of K.N.C.'s sweatpants, that "neither Stanley Wilson nor any of his paternal male relatives can be excluded as the donor of the human DNA from this sample." [RP 322].

So when I entered this into the U.S. Y-STR Database, this profile had been observed 942 times in the database. And it is not expected to occur more frequently than 1 in 26 male individuals in the U.S. population.

[RP 323].

The source of the amylase can be blood, feces, urine, or semen, but Dixon could not say where the amylase came from. [RP 316, 326]. When asked if he could determine a DNA profile if it were saliva that was found on the vaginal swabs [RP 326], Dixon responded:

So I would - - depending on the sample, I would likely develop a DNA profile. Now, I couldn't say if it was a mixed sample, I couldn't say who that amylase may have come from.

[RP 327].

Dixon also performed a "normal type of DNA analysis" on the crotch area of K.N.C.'s sweatpants. "I divided that particular sample into two samples, and called one of them crotch A, and the other crotch B."

[RP 329]. Addressing the crotch B sample:

And it was a mixture consistent of at least two individuals in which (K.N.C.) matches the major

component of the profile ... The major profile matched (K.N.C.), and the minor component is attributable to an unknown contributor of which Stanley Wilson is excluded as a potential contributor.”

[RP 329].

....

In this case there was presence of two individuals and possibly a third individual.

[RP 330].

Regarding the crotch A sample:

So this was also a mixture of at least two individuals, where (K.N.C.) matched the major component of the profile. Now, in this case, this minor component was not suitable for inclusion comparisons. But Stanley Wilson is excluded as a potential contributor to this profile.

[RP 330].

A Y-STR analysis of the crotch A and B samples taken from K.N.C.’s sweatpants also excluded Wilson as a potential contributor. [RP 331-32].

Wilson testified consistent with his initial statements to the police, noting that he had talked to the police because he “had nothing to hide.”

[RP 350]. He again denied K.N.C.’s allegations, asserting he had not gone into the living room, had not inappropriately touched K.N.C., and had not shown her the cover of a pornographic movie. [RP 350-52, 361].

D. ARGUMENT

01. THE ADMISSION OF EVIDENCE
AS TO THE ESTIMATED STATISTICAL
OCCURRENCE OF Y-STR PROFILE EVIDENCE
VIOLATED WILSON'S RIGHT OF
CONFRONTATION.

After obtaining a Y-STR profile from K.N.C.'s sweatpants and a partial Y-STR profile from the vaginal swabs collected from her, as set forth above, Brad Dixon, the DNA analyst, uploaded the profiles into the U.S. Y-STR Database. [RP 281].

[T]he software uses a formula. I access the database and enter a profile, which is then searched against the database and will return any matches to that particular profile, and then it will calculate statistics based on the number of matches that it's found in that database.

[RP 293-94].

Dixon did not perform any calculations nor any statistical probability analysis. [RP 295-96]. "[O]nce it (the database) does its search, I don't know anything about the search algorithms that it performs." [RP 296]. The database is maintained and operated by the National Center for Forensic Science (NCFS) at the University of Central Florida. [RP 64]. No one from NCFS testified at trial to explain how the statistics are generated and how they correlate to the general U.S. population.

Dixon was permitted to testify, as fully set forth above, to the estimated statistical occurrence of the profiles generated by the Y-STR profile obtained from the waistband area of K.N.C.'s sweatpants ("one in 7700 male individuals in the U.S. population") and the partial Y-STR profile obtained from the vaginal swabs ("1 in 26 male individuals in the U.S. population"). [RP 321-23]. In overruling Wilson's confrontation objection to the evidence, the trial court held that the issue goes to weight, not admissibility, and that the testimony did not involve testimonial statements. [RP 302-04].

The above evidence violated Wilson's right of confrontation. The Sixth Amendment provides that a person accused of a crime has the right "to be confronted with witnesses against him." Similarly, article I, section 22 of the Washington State Constitution asserts that "[i]n criminal prosecutions the accused shall have the right to ... meet the witnesses against him face to face." Const. art. I, § 22 (amend. 10).

Such a violation is reviewed de novo. Lilly v. Virginia, 527 U.S. 116, 137, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999). The right to confront adverse witnesses is an issue of constitutional magnitude, which may be considered for the first time on appeal. RAP 2.5(a); State v. Clark, 139 Wn.2d 152, 156, 985 P.2d 377 (1999); State v. Price, 158 Wn.2d 630, 639

n.3, 146 P.3d 1183 (2006); State v. Lee, 159 Wn. App. 795, 813-14, 247 P.3d 470 (2011).

In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the United States Supreme Court held that out-of-court testimonial statements by witnesses are inadmissible under the Sixth Amendment's Confrontation Clause if the witness fails to testify at trial, unless the witness is unavailable and the defendant has had a prior opportunity to cross examine the witness. Crawford, 541 U.S. at 59. On appeal, the State has the burden of establishing that statements are nontestimonial. State v. Koslowski, 166 Wn.2d 409, 417 n.3, 209 P.3d 479 (2009).

The court in Crawford did not offer a "comprehensive definition" of what constitutes testimonial statements, though it did say "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" are testimonial, Crawford, 541 U.S. at 52.

More recent United States Supreme Court cases have also held that documents specifically prepared for use in a criminal proceeding fall within this core class of testimonial statements. See Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310-11, 324, 129 S. Ct. 2527, 174 L. Ed. 2d

314 (2009) (holding three forensic “certificates of analysis” stating that a substance testes positive as cocaine were testimonial).

In State v. Lui, 179 Wn.2d 457, 315 P.3d 493 (2014), where the defendant was charged with second degree murder, the State presented testimony from Dr. Richard Harruff, chief medical examiner, identifying the manner of death and the fact that the deceased was dressed postmortem, which was based on the examiner’s review of the autopsy report and photographs taken at the autopsy, which the examiner had not preformed. Id., at 465, 494. The examiner also testified to the conclusions of a toxicology report prepared by another analyst and to temperature readings of the deceased’s body taken by another doctor, which the examiner used to estimate a range for the time of death. Id., at 465. Additionally, Gina Pineda, supervisor of a DNA laboratory, testified regarding DNA testing she had not performed. Lui objected on hearsay and confrontation grounds. Id., at 466.

The court examined Lui’s claims solely under the Sixth Amendment, finding that article I, section 22 of the Washington Constitution provided no more protection under the facts of the case with regard to Lui’s right of confrontation. Id., at 467-470. Acknowledging that a majority of the United States Supreme Court has yet to “provide a controlling rule on cases like Lui’s that involve expert witnesses(,)” the

court turned to the plain language of the Sixth Amendment: one charged with an offense has the right to be confronted with “the witnesses against him.” Id. at 469. From this, a five-member majority of the court articulated a “working rule” for confrontation of expert witnesses: if a declarant makes a factual statement to the tribunal he or she is a witness; and if the witness’s statements inculcate the defendant, then the witness is a witness against the defendant and the confrontation clause applies. Id. at 480.

The court applied its newly fashioned “working rule” to the admissibility of the testimony regarding (1) the results of the DNA testing, (2) the temperature readings, and (3) the toxicology and autopsy reports. Addressing the former two, the court held there was no confrontation violation in either instance because the testifying witness had brought his or her expertise to bear on the data compiled by others in order to reach the conclusion presented the jury. Regarding the DNA evidence presented through supervisor Pineda, rather than the analysts who had conducted the testing, the court reasoned that the testing process does not become inculpatory and invoke the confrontation clause until an analyst employs

his or her expertise to interpret the machine readings and create a profile. Pineda used her expertise to create a factual profile that incriminated Lui, and therefore Pineda was the appropriate witness to introduce the DNA.

Id., at 486. Same result for the temperature readings. The Sixth Amendment lies dormant “without the intervening analysis of an expert. Because Harruff used his expertise to turn raw data into a conclusion that inculpated Lui, it is Harruff and not (the person who took the temperature readings) with whom the confrontation clause is concerned.” Id., at 493.

But the Supreme Court concluded that the trial court had erred with regard to the toxicology and autopsy reports, where statements taken from the reports were used for the purposes of identifying the cause and manner of death and to prove that the deceased was dressed postmortem. Id., at 494. The chief medical examiner “did not bring his expertise to bear on the statements or add original analysis—he merely recited a conclusion prepared by nontestifying experts.” Id. Citing Bullcoming v. New Mexico, 564 U.S. ___, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011), the court held this evidence violated Lui’s right of confrontation, but the error was harmless given the overwhelming untainted evidence of his guilt. Id., at 495-97.

In this case, Dixon provided no original analysis and brought no expertise to bear on the estimated statistical occurrence of the Y-STR profile evidence generated by the database maintained and operated by the University of Central Florida. “I don’t know anything about the search

algorithms that it performs.” [RP 296]. Without performing any calculations or any statistical analysis, Dixon was merely reciting a conclusion prepared by nontestifying experts. Like the chief medical examiner in Lui addressing the toxicology and autopsy reports, Dixon testified to information about which he admittedly had no personal knowledge. He brought no expertise to bear on the information, which, by itself, inculpated Wilson, for it was the statistics that gave the Y-STR profiles meaning. As argued by the State during closing:

[A] major profile from the waistband of the inside of her sweatpants was a complete profile that matched the defendant. And the chances of that profile appearing in the general population, taken at random, was one in 7700. Now if you turn that into a percentage, that’s .01 percent. About one tenth of 1 percent. so turn that around, we’re about 99.99 percent sure of where it came from.

....

The same with the DNA that was found inside of her vagina. That was only a partial profile because there wasn’t as Much of the DNA to work with. It was consistent with his profile, and the chance of that partial profile appearing is 1 in 26. Equate that to a percentage that’s 3.8 percent. So, in other words, you’re around 96.4 percent sure we know where that came from.

[RP 406].

The statistical information was generated and prepared for use in a criminal proceeding, and its admission violated Wilson’s right of

confrontation and cannot be deemed harmless error under the facts of this case.

02. IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO ADMIT K.N.C.'s ALLEGATION THAT WILSON HAD PREVIOUSLY SHOWN HER THE COVER JACKET OF A MOVIE THAT DEPICTED A NAKED LADY WHILE ASKING HER IF SHE WANTED TO WATCH THE MOVIE.

As previously indicated, K.N.C. testified that Wilson had shown her a cover jacket of a movie showing a naked lady while asking her if she wanted to watch the movie. This was admitted over objection [RP 122], with the court ruling:

I'm finding by a preponderance of the evidence that it occurred, based on her (K.N.C.'s) testimony. The purpose is to show this grooming behavior. I do think it is a - - relevant to the evidence to prove an element of the crime and the probative value, the - - of the evidence outweighs its prejudicial effect.

[RP 123].

Following the testimony, the court read the following instruction to the jury:

Ladies and gentleman of the jury, I want to give you a little instruction here. I'm allowing this evidence, but you may consider the evidence's answers only for the purpose to evaluate the defendant's disposition towards (K.N.C.). You must not consider the evidence or answers for any other purpose.

[RP 129].

“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” ER 404(b). To admit such evidence, the trial court must first determine whether the evidence is relevant and, if so, whether its probative value outweighs its potential for prejudice. ER 401; State v. Kelly, 102 Wn.2d 188, 198, 685 P.2d 564 (1984); ER 403; State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982). When determining the admissibility of “prior bad act” evidence, the trial court must always begin with the presumption that the evidence is inadmissible. State ex rel. Carol v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); State v. DeVincerntis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Given the extraordinary prejudicial effect of “prior bad act” evidence involving sexual misconduct, any doubt about whether such evidence should be admitted, should be resolved in favor of exclusion of the evidence. See State v. Myers, 49 Wn. App. 243, 742 P.2d 180 (1987).

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).

Evidence of prior crimes, wrongs, or acts may be admissible

for other purposes where there is proof by a preponderance of the evidence of the commission of the alleged wrong or act and the defendant's connection to it. State v. Tharp, 96 Wn.2d 591, 594, 637 P.2d 961 (1981). Here, the State did not carry its burden. Wilson denied he had shown K.N.C. the cover of a pornographic movie [RP 350] and no evidence was presented relating to the content of the movie. K.N.C. alleged that the cover of the movie depicted "a naked lady(,)" which could mean anything or nothing. How was the person displayed? Any particular position? Completely naked? Partially? Frontal view? There was no evidence of any of this, just the allegation that "I glanced at it." [RP 129]. K.N.C. didn't remember the title of the movie [RP 129], and guessed that she had glanced at the cover "[p]robably not longer than a few months" before the alleged incident. [RP 143]. The court found that the purpose of this testimony "is to show this grooming behavior," and instructed the jury that it could consider the evidence in evaluating Wilson's disposition toward K.N.C. [RP 123, 129]. K.N.C.'s statement did not show "grooming," which is a "process by which child molesters gradually introduce their victims to more and more explicit sexual conduct." State v. Quigg, 72 Wn. App. 828, 833, 866 P.2d 655 (1964). The trial court abused its discretion in admitting this evidence under ER 404(b). See State v. Gresham, 173 Wn.2d 405, 419, 269 P.3d 207 (2012).

The erroneous admission of evidence of non-constitutional error is prejudicial only if within reasonable probability the outcome of the trial would have been materially affected. State v. Kelly, 102 Wn.2d at 199. In this context, harmless error occurs when the evidence is of “minor significance in reference to the overall, overwhelming evidence as a whole.” State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

The admission of the evidence here at issue was not harmless, especially where the prosecutor used the evidence during closing to argue that it was “part of a grooming process.” [RP 400]. The prejudicial effect of such evidence is recognized to be very great in sexual abuse cases where the question of guilt necessarily turns on the credibility of the defendant’s testimony. See State v. Dawkins, 71 Wn. App. 902, 909-10, 863 P.2d 124 (1993). Since Wilson denied the allegations made by K.N.C., the prejudice is self-evident. As in most sexual cases, credibility was a crucial factor in this case. And it is on this point that the court’s admission of the evidence at issue cuts the deepest, causing prejudice, causing interference with the jury’s duty to make relevant credibility determinations, and, in the process, precluding it from making a fair determination of Wilson’s guilt or innocence. In the end, this case essentially turned on the answer of whom the jury was to believe, and the likelihood that the effect of the introduction of the evidence at issue

having a practical and identifiable consequence on the jury's determination of this issue is substantial. There is a reasonable probability that absent the highly prejudicial evidence of Wilson's alleged prior sexual misconduct, the jury's verdict would have been materially affected. The introduction of the evidence of the alleged prior misconduct was not of minor significance, with the result that this court cannot say that the admission of the evidence was harmless error. The prejudice resulting from this denied Wilson his right to a fair and impartial jury trial. See State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Oughton, 26 Wn. App. 74, 612 P.2d 812 (1980).

03. IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO RULE THAT THE TESTIMONY OF OFFICER HASKE THAT REPEATED K.N.C.'s ALLEGATION THAT WILSON HAD PREVIOUSLY ASKED HER IF SHE WANTED TO WATCH A PORNOGRAPHIC MOVIE WAS ADMISSIBLE AS AN EXCITED UTTERANCE.

During the direct examination of Officer Jamie Haske, who had interviewed K.N.C. the morning of the alleged incident, the following occurred:

Q. Did (K.N.C.) mention anything about a -- some type of porn movie incident with the defendant?

A. Yes.

(DEFENSE COUNSEL): Objection.

THE COURT: I'll allow it.

Q. (By PROSECUTOR) You can answer.

A. Okay. She said that her and her sister think that - -

Q. Well, let me ask you something different. Did she mention something about a couple of weeks ago something about him bringing out a porn movie?

A. Yes, and asked if she wanted to watch it with him.

Q. Did she say where he brought it out to?

A. I believe she - - I think so. She said the living room.

[RP 199].

At the completion of the officer's testimony, the court put its reasoning for overruling the above objection on the record:

During the testimony of Officer Haske, she was asked about what (K.N.C.) had been saying to her. There was an objection, I overruled the objection, and I allowed it under the hearsay exception excited utterance.

And I just want to say, it appears, based upon the testimony, that she continued to be excited by the startling event. We have corroboration supported by her demeanor, her appearance, the way she's behaving, reacting. It's relatively close in time, not that we need - - you can have - - excited utterance

can be fairly close in time and sometimes fairly quite out in time. It all depends on the circumstances. But I would note here it's fairly close in time. The event occurred, she's with her father. Her father calls the police fairly quickly, 10 minutes maybe, or 5, 15, somewhere in that range. Officer responds fairly quickly. And so we have this ongoing. There was no testimony throughout this trial yet of anyplace where there was kind of a calming down period, a time to reflect. I'm going to give you a chance to make - - state for the record. So I'm finding that, you know, you have cases where there's the time of excitement, then they calm down. They maybe get re-excited later on, explaining, again, where the Court have denied that, but we really don't have that here. Mr. (Defense Counsel).

(DEFENSE COUNSEL): I just want to know for the record, the reason I made that objection is because Joshua Cox testified during direct that (K.N.C.) was calming down when the police arrived. He specifically said that.

THE COURT: He did say she was calming down, but the manner in the context in which I took it, is that she was coming down, but still talked about - - because - but, yes, you're correct in noting that. I think that's appropriate.

[RP 207-09].

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is inadmissible unless it falls within certain exceptions. ER 802. One such exception is an "excited utterance." ER 803(a)(2). There are three requirements that must

be met before a statement may be admitted as an excited utterance: (1) a startling event or condition must have occurred; (2) the declarant must have been under the stress of excitement caused by the event or condition at the time the statement is made; and (3) the statement must relate to the startling event or condition. State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992). Wilson disputes the third element of this test.

A trial court's determination on the admissibility of an excited utterance is reviewed under the abuse of discretion standard. State v. Strauss, 119 Wn.2d 401, 417, 832 P.2d 78 (1992). An abuse of discretion occurs when a trial court makes a decision not supported by the facts or makes a decision that is contrary to law. State v. Williamson, 100 Wn. App. 248, 257, 996 P.2d 1097 (2000).

Here, the trial court abused its discretion in admitting the hearsay statement of Office Haske that simply reiterated K.N.C.'s allegation that Wilson had previously asked her if she wanted to watch a pornographic movie, which had nothing to do with the alleged startling event that morning and which therefore fails to satisfy the third element of the excited utterance test.

For the sole purpose of avoiding needless duplication, the argument presented previously in this brief regarding the prejudicial effect of the admission of evidence relating to K.N.C.'s allegation vis-à-vis

Wilson and the the cover jacket of a movie depicting a naked lady, supra at 19-20, is hereby incorporated by reference, for the prejudicial effect is the same if not greater in the context of the admission of the evidence, given that it additionally and impermissibly bolstered K.N.C.'s credibility and should not have been allowed.

04. WILSON WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO TO SPECIFICALLY OBJECT THAT THE TESTIMONY OF OFFICER HASKE THAT REPEATED K.N.C.'s ALLEGATION THAT WILSON HAD PREVIOUSLY ASKED HER IF SHE WANTED TO WATCH A PORNOGRAPHIC MOVIE WAS INADMISSIBLE AS AN EXCITED UTTERANCE BECAUSE THE STATEMENT DID NOT RELATE TO A STARTLING EVENT OR CONDITION.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a

reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of error caused by the defendant, See State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)); RAP 2.5(a)(3).

Should this court determine that Wilson's attorney waived the issue regarding Officer Haske's statement by failing to specifically object that it was inadmissible as an excited utterance because it did not relate to a startling event or condition, then both elements of ineffective assistance of counsel have been established.

First, the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have failed to object for the reasons argued in the two preceding sections. The prejudice, also for the reason argued in the two preceding sections, is self-evident. But for counsel's failure to specifically object, the evidence would have been inadmissible.

05. WILSON WAS DENIED A FAIR TRIAL WHERE DURING CLOSING ARGUMENT THE PROSECUTOR ENGAGED IN PREJUDICIAL MISCONDUCT BY PRESENTING ARGUMENTS CALCULATED TO INFLAME THE PASSIONS OR PREJUDICES OF THE JURY.

The law in Washington is clear, prosecutors are held to the highest professional standards, for he or she is a quasi-judicial officer who has a duty to ensure defendants receive a fair trial. See State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). Violation of this duty can constitute reversible error. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

Where, as here, a defendant fails to object to improper comments at trial, or fails to request a curative instruction, or to move for a mistrial, reversal is not always required unless the prosecutorial misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the resultant prejudice. State v. Ziegler, 114 Wn.2d 533, 540, 789

P.2d 79 (1990). The defense bears the burden of establishing both the impropriety and the prejudicial effect. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). “The State’s burden to prove harmless error is heavier the more egregious the conduct is.” State v. Rivers, 96 Wn. App. 672, 676, 981 P.2d 16 (1999).

A prosecutor’s obligation is to see that a defendant receives a fair trial and, in the interest of justice, must act impartially, seeking a verdict free of prejudice and based on reason. State v. Belgarde, 110 Wn.2d 504, 516, 755 P.2d 174 (1988). The hallmark of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury and thus deny the defendant a fair trial guaranteed by the due process clause? Smith v. Phillips, 455 U.S. 209, 210, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982). In this context, the definitive inquiry is not whether the error was harmless or not harmless but rather did the irregularity violate the defendant’s due process rights to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

The prosecutor started his closing argument with a flagrant appeal to passion:

In his eyes she wasn’t his best friend’s little girl. She was an opportunity for sex. His best friend trusted him to live in his house and be around his daughter. He betrayed that trust for the sake of his own selfish sexual desire. He is the reason she had

to lay there smelling the smoke on his clothes, listening to heavy breathing, crying silently in the dark just hoping and waiting for him to stop violating her body.

He is the reason she had to go to the hospital and take part in an embarrassing medical examination. He is the reason that a 20-plus year friendship ended in the blink of an eye. (K.N.C.) did not deserve what happened to her that night. And the person that inflicted that on her needs to be held accountable for his actions.

[RP 397-98].

The prosecutor ended his argument in the same manner:

We don't have the ability to go back in time and stop bad things from happening. We don't have the ability to take bad memories out of someone's mind. (K.N.C.'s) been left to deal with what's happened to her. Now the time has come for him to deal with it as well. Thank you.

[RP 430].

A prosecutor commits misconduct when he or she asks a jury to “decide guilt on something other than the evidence,” such as sympathy for the victim. Moore v. Morton, 255 F.3d 95, 117 (3d Cir. 2001). And it is improper for a prosecutor to “use arguments calculated to inflame the passions or prejudices of the jury.” In re Glasman, 175 Wn.2d 696, 704, 286 P.3d 673 (2012) (quoting AMERICAN BAR ASS'N STANDARDS FOR CRIMINAL JUSTICE, std. 3-5.8(c) (2d ed. 1980)). As set forth above, the prosecutor's message was that the jury needed to convict

Wilson in order to ensure that he deals with consequences in the manner of his alleged victim, thus implying that the jury could convict Wilson for reasons other than the strength of the evidence, either sympathy or revenge, which was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice’ incurable by a jury instruction.” See State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (quoting State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)). This cannot be framed as a fleeting remark or a momentary slip during a hearted argument. By opening and then closing his argument on the same theme, the prosecutor invited the jury to render its verdict on an emotional basis, rather than on the merits of the evidence presented, with the result that the prosecutor’s misconduct requires reversal of Wilson’s convictions.

06. WILSON WAS PREJUDICED BY HIS COUNSEL’S FAILURE TO OBJECT OR TO MOVE FOR A MISTRIAL OR REQUEST A CURATIVE INSTRUCTION IN LIGHT OF THE STATE’S IMPROPER CLOSING ARGUMENT.¹

Assuming, arguendo, this court finds that counsel waived the error claimed and argued in the preceding section of this brief by failing to object or to move for a mistrial or request a curative

¹ For the sole purpose of avoiding needless duplication, the prior discussion relating to the test for ineffective assistance of counsel presented earlier in this brief is hereby incorporated by reference.

instruction in light of the prosecutor's improper closing argument, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to do so. For the reasons and under the law set forth in the preceding section of this brief, had counsel done so, the trial court would have granted the objection, motion or request for a curative instruction. Trial counsel's failure to exercise due diligence in this context cannot be deemed a tactical decision and falls below an objective standard of reasonableness.

Second, the prejudice here is self evident. Again, as set forth in the preceding section of this brief, the prosecutor's argument invaded the province of the jury and in the process precluded the jury from making a fair determination of Wilson's guilt or innocence. Counsel's performance was deficient and Wilson was prejudiced, with the result that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his convictions.

07. THE CUMULATIVE EFFECT OF THE ERRORS CLAIMED HEREIN MATERIALLY AFFECTED THE OUTCOME OF WILSON'S TRIAL AND REQUIRES REVERSAL OF HIS CONVICTIONS.

An accumulation of non-reversible errors may deny

a defendant a fair trial. State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426 (1997). The cumulative error doctrine applies where there have been several trial errors, individually not justifying reversal, that, when combined, deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Here, for the reasons argued in the preceding sections of this brief, even if any one of the issues presented standing alone does not warrant reversal of Wilson's convictions, the cumulative effect of these errors materially affected the outcome of his trial and his convictions should be reversed, even if each error examined on its own would otherwise be considered harmless. State v. Coe, 101 Wn.2d at 789; State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963).

E. CONCLUSION

Based on the above, Wilson respectfully requests this court to reverse his convictions and remand for retrial.

DATED this 29th day of January 2016.



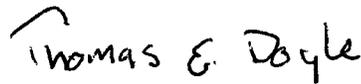
THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

Anne M. Cruser	Stanley S. Wilson #383190
Prosecutor@Clark.wa.gov	Coyote Ridge Corrections Center
	1301 N. Ephrata Ave.
	P.O. Box 769
	Connell, WA 99326

DATED this 29th day of January 2016.



THOMAS E. DOYLE

Attorney for Appellant
WSBA NO. 10634

DOYLE LAW OFFICE

January 29, 2016 - 12:15 PM

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