

NO. 66574-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

KENNETH SWEET,

Appellant.

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

The Honorable Ronald Kessler, Judge

REPLY BRIEF OF APPELLANT

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**A. THE STATE'S PRESENTATION OF SUBSTANTIVE FACTS OMITTS CRITICAL FACTS AND IGNORES THE WEAKNESS OF THE EVIDENCE OF ALL BUT TWO OF THE CHARGED COUNTS.**

Respondent State of Washington begins its presentation of "substantive facts" with the assertion that Mr. "Sweet sexually abused his stepdaughter, L.A, when she was in the fourth grade until 2009, when she was 15 years old." Brief of Respondent (BOR) at 4. Of course, no authority is cited for this "substantive fact." This was the issue for the jury and the conclusion that Mr. Sweet is challenging on appeal. Moreover, in overstating the case against Mr. Sweet throughout its "Substantive Facts" presentation, Respondent also omits some critical evidence that was admitted at trial.

Most significantly, throughout the "Substantive Facts" and "Argument" portions of the Brief of Respondent, the State presumes that the evidence supporting each of the charges and the aggravating circumstances is of equal strength; and that because of the videos and DNA evidence related to, at most, two charges, the evidence supporting each of the eight rape of a child counts is strong.

In fact, with regard to the earlier first degree rape of a child allegations, L.A., herself, told the staff at Overlake Hospital only that Mr. Sweet had "tried to do stuff" when she was 10 or 11 years old and was "totally gross." RP 319. She told the police that same day that Mr. Sweet had

fondled her but that there was no penetration at this earlier time. RP 540-541. Further, Detective Mellis testified that when he interviewed L.A. back in 2006, L.A. confirmed the things she had told her friends, but denied that they were true. RP 131. Detective Mellis did not recall the word "rape" being used in the conversation with L.A. at that time. . RP 136, 138.

L.A. told the staff at Overlake and the police who interviewed her that Mr. Sweet had had sex with her over the *past two weeks*. RP 282-283,318-319, 608. The psychiatric interventionist at Overlake noted, as well, that L.A. was worried about Mr. Sweet and thought he would cry when arrested. RP 284.

The state omits that although Mr. Sweet sent a text message saying that he felt like killing himself (RP 6411-642; 262), he also sent one explaining that "[b]eing a good person will not keep me from spending the rest of my life in jail if anyone repeats the things she says when mad at me." RP 642. The state omits that although two of L.A.'s friends testified that they recalled seeing messages from Mr. Sweet saying that if L.A. wanted him to pick her up, he expected 30 minutes of sex with her, RP 192-195, 259-260, L.A. testified at trial that she could not recall such a message and no such messages were recovered by the police. RP 530.

And even with regard to the videos obtained from the computer, the state omits that the computer was not found by the police, but was

reported to have been found by Mr. Sweet's wife's nephew in the crawlspace of the house after the police had searched it. RP 328-329, 613, 645. The first detective to examine the hard drive of this computer found nothing on it. RP 600. Approximately one year later, Chuck Pardee, a forensic examiner for the prosecutor's office, examined "a hard drive from the King County Sheriff's Office that contained an image of another two devices"-- two hard drives taken from one computer. RP 645. It was Mr. Pardee who allegedly recovered the two videos. RP 647-648. Mr. Pardee, however, never saw either the actual computer or the original hard drives. RP 668. Thus, while Mr. Pardee could testify that he was confident that he made an exact copy of the hard drive he received, he apparently had no way of determining if this was an exact copy of the hard drive taken from a computer found in Mr. Sweet's house. RP 647.

**B. ARGUMENT IN REPLY**

- 1. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF MR. SWEET'S BAD TEMPER AND ACTS OF VIOLENCE AGAINST OTHERS WHERE THE DEFENSE DID NOT IMPEACH L.A. WITH HER DELAY IN REPORTING OR EARLIER RECANTATION AND THE PROSECUTOR USED THE EVIDENCE TO ARGUE THAT MR. SWEET HAD A BAD CHARACTER.**

The trial court erred in admitting evidence of Mr. Sweet's having a bad temper and committing physical violence towards L.A.'s mother and brothers. First, in the authority cited by the state, evidence of prior bad acts

committed *against the alleged victim* was admitted to explain inconsistent reports about the abuse by the victim. In State v. Cook, 131 Wn. App. 845, 129 P.3d 834 (2006), for example, the evidence of prior domestic violence was held to be properly admitted to explain the wife's inconsistent reports in a battered partner syndrome case. In State v. Powell, 126 Wn.2d 244, 893 P.2d 615 (1995), the ER 404(b) evidence was similarly evidence of prior assaults and threats *against the victim* wife, which was held to be relevant to *motive*, or the *defendant's* state of mind.. Even in State v. Nelson, 126 Wn.2d 244, 893 P.2d 615 (1995), where the admission of evidence of violence against someone other than the victim was upheld, it was admitted to establish that the defendant became violent while drinking, which was relevant to the victim's fear of him. In this case, the alleged violence was neither against L.A., nor was it akin to becoming violent when drinking in Nelson. To the contrary, the witnesses testified consistently that Mr. Sweet treated L.A. differently and better than her siblings or mother and that she was not punished or yelled at as they were. See, RP 412-413 (Penny Arneson Sweet's testimony that Mr. Sweet treated L.A. differently and was stricter with the boys); RP 488-493, 514 (L.A.'s testimony about how Mr. Sweet treated her mother and brothers, but that he treated her better than he treated them); RP 442 (Anton Arneson's testimony that L.A. was never punished, yelled at or hit); RP 454 (Ben Arneson's testimony that L.A. was

never punished, but was sometimes yelled at); RP 463 (Johnny Sweet's testimony that Mr. Sweet sometimes argued and yelled when L.A. was present, not that he yelled at or argued with her).

Second and most importantly, because the defense did not argue in this case that L.A. was not credible either because of a delay in reporting or her earlier recantation, the evidence was neither relevant nor admissible.

State v. Fisher, 165 Wn.2d 727, 746, 202 P.2d 937 (2009).

Prior to trial defense counsel informed the court that the defense would not be impeaching L.A. with her recantation:

What I'm saying is the State's offer is that there is some connection between the violence and L.A.'s allegations in this case, or that we would tend to impeach her with some kind of prior recantation and that she would say, "Well I recanted because I was afraid of him or he threatened to kill me or he was violent towards my mother." This is not how we anticipate impeaching her, if at all.

My understanding is the reason for the prior recantation is the death of the child -- that there is nothing -- that there is no -- that the violence that may or may not have been going on at home is not relevant to the charges, and it is not relevant to motive, it is not relevant to opportunities, it is not relevant to intent, and it is not relevant to impeachment, because I don't impeach her on that one.

RP 69. The court then indicated that if the prosecutor did not bring out the recantation, it assumed defense counsel would. RP 69. To this, counsel responded, "I don't know, Your Honor . . . depending on how it unfolds."

RP 69. The court then admitted the evidence to "explain the reason for the

delay” without any condition that the defense first try to impeach L.A. because of the delay. RP 71.

At trial the defense made no opening statement, did not cross-examine witnesses to challenge L.A.’s credibility or argue in closing that L.A. was not credible either because she recanted or delayed in reporting abuse. Counsel argued only that each count was separate and that L.A. was *inconsistent in her reports* of whether or not there was penetration for the earlier incidents. RP 729-733. The defense simply did not focus on the delay in reporting or the recantation at trial.

As set out in State v. Salterelli, 98 Wn.2d 358, 361-362, 655 P.2d 697 (1982), before 404(b) evidence may be admitted, the court must find that the purpose for admitting the evidence is not only relevant to prove an essential element, but also is of consequence to the particular action. Salterelli, at 361-362. Similarly, in State v. Powell, 126 Wn.2d 244, 262, 893 P.2d 615 (1995), the court held that “prior misconduct evidence is only necessary to prove intent when intent is at issue or when proof of the doing of the charged act does not itself conclusively establish intent.” In other words, ER 404(b) evidence is admissible only if it is relevant to a material determination that is actually put at issue in the particular case. Here, the evidence of other bad acts was not of consequence to Mr. Sweet’s case.

Under State v. Fisher, *supra*, it was error to admit the evidence of physical violence.

The state attempts to limit the holding in Fisher to a rule that a trial court may, but does not have to, condition the admission of evidence of violence to explain a delay in reporting on the defense's first actually impeaching the complaining witness with the delay. BOR at 19-20. This limitation is not supported by the decision of the Washington Supreme Court in Fisher. The Court held: "The trial court did not err in ruling the evidence of physical abuse . . . . was admissible conditioned upon the defendant making an issue of Melanie's delayed reporting." Fisher. 165 Wn.2d at 746. As the Fisher court explained, "Only if defense counsel made an issue of Melanie's delayed reporting did the physical abuse become relevant to the determination of whether sexual abuse occurred." State v. Fisher, 165 Wn.2d at 746. This could not be clearer – the evidence was properly admissible only if the defense made an issue of delayed reporting; otherwise it was not relevant.

As in Fisher, the ER 404(b) evidence in this case should not have been admitted unless and until the delay in reporting or recantation was used by the defense to attack L.A.'s credibility. Neither of these things occurred and the ER 404(b) evidence was admitted in error. As set out in the Opening Brief of Appellant, the error was overwhelmingly and unfairly

prejudicial. Because the evidence served no relevant purpose, it could serve only to persuade the jury that Mr. Sweet was the type of person who would commit the crimes charged because it was his character to do so -- the impermissible inference under ER 404(b).

Contrary to the assertion by Respondent (BOR at 21-22), the error in admitting the evidence of explosive temper and violence was not harmless. Even though the state had direct evidence of two charges, the defense challenge at trial was centered on the weakness of the evidence of other charges and the fact that the evidence of those counts rested substantially on the improper inferences. If that were not the case, the state would not have spent so much time eliciting the evidence and describing it in argument.

**2. THE PROSECUTOR'S MISCONDUCT IN NOT LIMITING THE STATE'S USE OF THE ER 404(B) EVIDENCE TO THE PURPOSE FOR WHICH IT WAS ADMISSIBLE, DENIED MR. SWEET A FAIR TRIAL.**

The state did not wait until the defense challenged L.A.'s credibility to introduce evidence of alleged physical violence in the family, nor limit its use of the evidence to explaining the delay or recantation. On appeal, the state notes instances when the trial prosecutors linked the violence to the recantation or the delay. BOR at 23-25. These few instances, however, do not excuse the pervasive and continuing argument to the jury which focused on the violence generally and on Mr. Sweet's character for violence in particular.

The state introduced the case to the jurors in opening statement by telling them that L.A. lived in a home with violence and yelling. RP 104. The prosecutor began opening statement by describing Mr. Sweet as a man with a temper that “none of you would want to see,” which “could go from 0 to 60 with the slightest provocation.” RP 104-105. In closing argument, the prosecutor again returned to the theme of violence, emphasizing that L.A. did not have a safe or loving home. RP 715. The prosecutor’s later statement that this was one of the reasons why L.A. had recanted earlier did not dispel the long, general descriptions of a violent home and violent character. RP 715-717, 720, 722-723.

As in Fisher, the evidence was not *limited to* the purpose for which it was admitted. Fisher, at 747-748. As in Fisher, the physical violence was equated to the sexual abuse as part of Mr. Sweet's character, and the jury was encouraged to convict to obtain justice for the other children as well.. Fisher, at 749. As in Fisher, the misconduct should require a new trial. The mere fact that at some point the prosecutor linked the alleged violence and “explosive” temper to the delay in reporting and the recantation, did not reduce the unfair prejudice of the general argument that Mr. Sweet must be guilty of the charged acts because of his character for violence. This is particularly true where the whole concept of delay and recantation was

introduced by the state to summon up a picture of Mr. Sweet which it asked the jury to punish him for.

Again, contrary to the argument of the state, BOR at 27-28, the error was not harmless. Mr. Sweet was charged with many more crimes than those with direct evidence. Mr. Sweet was unfairly prejudiced by the arguments of the prosecutor.

**3.. THE TESTIMONY THAT MR. SWEET HAD BEEN IN AND OUT OF JAIL FOR CHILD ABUSE WAS UNTRUE, IMPROPER UNDER ER 609 AND A VIOLATION OF THE COURT'S RULINGS IN LIMINE; THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION IN LIMINE ONCE THIS TESTIMONY WAS READ TO THE JURY.**

The trial court erred in denying a defense motion for mistrial after the notes of Nurse Waddleton were read to the jury as past recorded recollections, and the notes included the statement that L.A. "reports that he [Mr. Sweet] was in and out of jail a couple of times for child abuse." RP 319. In fact, Mr. Sweet had not been jailed for child abuse; the allegation was false. 344-347. And, contrary to the argument of the state, BOR at 28-29, Mr. Sweet's prior criminal history had been excluded prior to trial.

Trial counsel noted, in moving for a mistrial, "I do think that that testimony is violative of the motions in limine with respect to 404(b) and 609 evidence," RP 345. Counsel noted that "prior criminal history was deemed to not be admissible," and that the ruling admitting prior bad acts

had been “crafted” to avoid such evidence. RP 346. The state, in fact, admits that the trial court’s ER 404(b) ruling excluded “specific instances of misconduct.” BOR 13.

This irregularity in Mr. Sweet’s case is even more egregious than in State v. Escalona, 49 Wn. App. 251, 742 P.2d 190 (1987), where the reviewing court reversed Mr. Escalona’s conviction for assault after a witness testified that he had a “record” and had stabbed someone in the past. In Escalona, the testimony was unexpected. In Mr. Sweet’s case, it was the prosecutor, who knew of the trial court’s ruling excluding criminal history and specific acts of misconduct, who specifically elicited the evidence. The prosecutor offered the notes and asked that they be read to the jury. This was a serious irregularity.

As the Court noted in Escalona:

While it is presumed that juries follow instructions, see [State v.] Weber [99 Wn.2d 158, 659 P.2d 1102 (1983)], no instruction can “remove the prejudicial impression [created by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.” State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968).

Escalona, at 256. Similarly, in State v. Wilburn, 51 Wn. App. 832, 755 P.2d 842 (1988), the court reversed a conviction based on a reference to the defendant’s prior criminal act, in violation of a motion in limine. The court held that such an error cannot be cured by an instruction where the defendant’s credibility is a central issue in the case.

Under Escalona and Wilburn, a mistrial should have been granted. The irregularity was serious; the prosecutor deliberately elicited evidence of prior criminal history and specific instances of misconduct, knowing such testimony had been excluded. The evidence that Mr. Sweet had allegedly been incarcerated for conduct similar to the charged crime was not cumulative of other properly admitted evidence, and it could not be cured by an instruction. Weber, 99 Wn.2d at 158.

Second, the reference to jail associated Mr. Sweet with criminality and robbed him of the presumption of innocence. Holbrook v. Flynn, 475 U.S. 560, 567, 89 L. Ed. 2d 525, 106 S. Ct. 1340 (1986) (as a matter of due process of law, every person accused of a crime is entitled to the presumption of innocence); State v. Stanford, 128 Wn. App. 280, 286, 115 P.2d 368 (2005) (introduction of booking photo associated the defendant was criminality). This was constitutional error and not harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Mr. Sweet's convictions should be reversed and his case remanded for retrial.

**4. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. SWEET OF SEXUAL EXPLOITATION OF A MINOR AS HE WAS CHARGED AND THE JURY INSTRUCTED.**

Mr. Sweet urges this Court to accept the state's proper concession that the evidence was insufficient to support Mr. Sweet's convictions for

sexual exploitation of a minor. BOR at 36-38. There was insufficient evidence to support these convictions, as he was charged and the jury instructed.

**C. CONCLUSION**

Appellant respectfully submits that his convictions should be reversed and his case remanded for retrial. On remand, his convictions for sexual exploitation of a minor should be dismissed.

DATED this 27<sup>th</sup> day of December, 2011

Respectfully submitted,

  
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