



The Steven Nowicki Case: Reviewing Another Questionable Dobbs Ferry Conviction On Appeal

By Jeff Deskovic

On January 17th, the Appellate Division, Second Department, of State Supreme Court, heard oral arguments in the appeal of Steven Nowicki, former grammar school teacher in the Dobbs Ferry School District. Convicted of child molestation in 2000 and serving 16 years in state prison.

Mr. Nowicki's present appeal is based largely upon ineffectiveness of trial counsel, however, there were several issues involving police and prosecutorial misconduct, not the least of which included the disappearance of nearly two dozen e-mail correspondences between the alleged victims' mother and teacher Nowicki as well as serious issues of expert witness credibility and chain of custody with respect to DNA evidence presented at trial.

On Dec 31, 1998, Steven Nowicki, a 5th grade Dobbs Ferry grade school teacher, was invited to an impromptu New Years Eve gathering at the home of Peter and Nancy Losee and their three children - two sons and a daughter. Mrs. Losee had previously exchanged numerous e-mail communications with Nowicki prior to the event.

Nowicki arrived at approximately 4:30 p.m. and remained the entire evening, along with approximately 25 guests and their children. At approximately 12:15 a.m., when most of the other guests had left, Nancy picked up her daughter and the two went to the master bedroom. Nowicki, the last remaining guest, sat for another 20

minutes with a wine glass in his hand watching television with Peter and his grade-school-aged boys.

Suddenly, Nowicki stood up from his chair and left the house without saying a word; uneasy on his feet and stumbling as he rounded the corner to go out the door. It was Peter Losee's impression that Nowicki was drunk. Several minutes later, Peter went outside and found Nowicki slumped in the driver's seat of his vehicle with his head on the steering wheel.

Believing him to be too drunk to drive, Peter awakened him and invited him back into his home to sleep it off. Nowicki stumbled back into the house where he laid down on a loveseat. Peter gave him a blanket and told him to sleep on the couch in the living room. Meanwhile, both of the Losee boys had gone to sleep in their bunk bed. There were two different versions of what then followed by one of the alleged juvenile victims:

One son originally reported that he was asleep in his bunk when he was suddenly awakened in his dark bedroom by the sound of the ladder that led up to his brother's upper bunk, banging against the bed. He said he went back to sleep because he was scared. He was awakened the second time when he felt someone touching him. He claimed he did not know how his pajamas came to be pulled down. He claimed that he told the man to stop.

While being touched, he felt scared that "he would just throw me back," but the man did not hurt him or threaten to hurt him. He then saw the man climb up the ladder towards his brother's bunk, and then somehow fell back asleep. However, he woke up a third time when the man left the room, and claimed that he realized that the man was Nowicki.

At trial, the same boy, on cross examination, testified that he was awakened by the sound of someone banging into the ladder and then fell

asleep when he saw the shape of a person standing on the ladder going to his brother's bed. After this, he claimed he was awakened the second time by the sound of footsteps and saw the man leaving the room. In this second version, he repeatedly made no mention of anyone touching him.

His brother testified that he was asleep in bed when he was awakened by a hand rubbing his chest. He claimed that he realized that a man was on top of his legs, his feet were at the end of the bed, and he was on top of him. He said he did not yell because he was too shocked. He was then touched. After the man stopped touching him, he left the bed, walked out of the room, went to the bathroom, and turned on the light in the bathroom. The boys reportedly asked each other if they were okay, replying yes.

Then one victim went to sleep. The other saw Nowicki reenter the room and lay down on the floor, and thereupon gave him a stuffed animal to use as a pillow. After several minutes, one of them left the bedroom and went to tell the mother what happened.

Steven Nowicki testified in his own defense at trial and denied ever having molested the boys.

There are allegations that Nowicki made admissions to police officers, which the police say were never signed nor recorded; Nowicki denies having made them.

In his brief before the Appellate Division, Nowicki raises the principle issue that his lawyer was ineffective. The standard for evaluating whether a lawyer has been ineffective is not merely whether strategy was unsuccessful and a defendant was therefore found guilty, but rather whether the performance of the lawyer fell below an objective standard of reasonableness, and, whether that performance prejudiced the defendant. The actions that Nowicki points to, in his claim of ineffective representation, include:

1) Failure to object to inadmissible and highly prejudicial hearsay testimony concerning prior consistent

statements made by child witnesses to each other, to their parents, police, and medical personnel.

2) Failure to object to inadmissible expert testimony that Nowicki's DNA was found on one of the children's genitals, because no foundation had been laid to establish the integrity of the samples tested, and an unaccounted for saliva sample that could have cross contaminated the tested samples.

Note: With regard to this claim, there are serious questions with regard to the integrity of the DNA sample used to convict Mr. Nowicki. In fact, the District Attorney's Office was not able to get either the Westchester County Forensic Laboratory nor any testing facility on the East Coast to test and certify the origin and integrity of the samples. The Prosecution's expert witnesses consisted of a technician and her supervisor from the State of Washington, each of whom promptly and intentionally disappeared following their testimony at trial. However, even those witnesses acknowledged that the sample was contaminated in that it contained female as well as male DNA.

3) Wrongly conceding the presence of Nowicki's saliva on the child's genital area, when in fact the evidence did not establish that his saliva was there.

4) Failure to object to the Prosecutor's repeated and improper efforts on direct examination and cross-examination of Nowicki, to adduce otherwise inadmissible evidence regarding his post-Miranda silence.

5) Failure to object to inadmissible lay opinion testimony from party guests that Nowicki was involved in inappropriate behavior with an alleged child victim prior to the alleged sexual contact.

6) Failure to object to a jury charge request made by the Prosecutor, that shifted the burden of proof from the Prosecution to the Defense.

The Westchester District Attorney's brief counters these claims, arguing:

1) The fact that his trial attorney told the Judge that there was a reason that he was not objecting, and therefore letting inadmissible evidence in

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was proof that it was strategy, in that by allowing all of these accounts to be testified to it showed discrepancies.

2) That the DNA had proper foundation, and that this, too, was strategy.

3) That the Defendant chose to waive his Miranda rights and answered some questions, and therefore could be cross-examined about his failure to inform the police about exculpatory circumstances.

4) That the questioning of the lay persons was within the limit of what the judge allowed, and to the extent that it went beyond it, it was a strategic decision by the lawyer.

5) That the People had a right to request the jury instruction.

This is a case of egregious prosecutorial misconduct. The Assistant District Attorney was well aware that it was improper to elicit hearsay testimony against Nowicki. The trial judge was even concerned about this, stating, "I'm getting disturbed here, because, first of all, you're bringing in the victim's stories through every single witness, and no objection."

Similarly, it was improper to preempt any of Nowicki's defenses before he even asserted them. By the Prosecution asking police officers if Nowicki ever mentioned this or that, it served to head off any defense before he even got a chance to raise it. The reason that this is improper to do is because it would require a Defendant to set forth every fact that they possibly could before they were ever arrested. It would punish defendants from exercising their Fifth Amendment Right to remain silent, or even to choose which questions to answer. It would punish suspects for declining to speak to the police until represented by a lawyer, because at trial when testifying as to what happened, an adverse inference could be drawn because they didn't speak previously.

This reporter is a big proponent of DNA. Were it not for DNA having matched the real perpetrator, I would not be free. DNA does not yield false negatives. When the test is performed correctly, the results of a match are unassailable. That, however, presumes that all of the correct protocols have been exercised, and that there has been no contamination.

Nationwide, out of the 212 DNA exonerations to date, there were three

people who were wrongfully convicted by contaminated DNA, which subsequent tests, years later, went on to clear. A big part of ensuring the accuracy of tests is the maintaining of the chain of custody so that the evidence, at all times, is accounted for, thus insuring that no contamination takes place.

The Crime Lab in Houston, Texas, for example, has contributed to many wrongful convictions because that lab does not practice proper protocols during testing. That is why it has repeatedly been audited and warnings have been issued that it was not following correct protocols.

In the Nowicki case, as the trial judge pointed out in his questioning of the Prosecution DNA expert witness regarding the condition of the packaging of the samples; whether the integrity of the packaging was ensured, there was a possibility that Nowicki's saliva contaminated other samples. The following exchange by the Judge and Prosecutor, taken from the trial transcript, is most telling:

Judge: "I just have a question about this very important evidence. I feel I need to know what happened to the sealed package."

ADA: "What sealed package, Judge?"

Judge: "What happened to the package which the material arrived in?"

ADA: "Do you mean the Federal Express box?"

Judge: "Yes."

ADA: "Ask her."

Judge: "No. I'm not the prosecution. This is important evidence for the chain of custody, it is extremely significant."

ADA: "Judge, I really don't know why you're going here. She has explained these items arrived in their own packaging."

Judge: "If you don't know where I am going, you better go back and read a book."

Following this exchange, the expert testified that she did not see any leakage or evidence of contamination or tampering. However, no questions were asked regarding the steps to safeguard the saliva tube to prevent cross-contamination prior to being placed in the evidence freezer.

Thus, the DNA result in Nowicki's case should be discounted.

The Prosecution argued that there

was "overwhelming evidence of guilt." This phrase is, in general, a favorite catch-all phrase that most prosecutors resort to. In the process of 'rubber-stamp denial' of appeals, many Appellate Courts often side with prosecutors on this issue regardless of the facts or evidence.

As an example of this, in my own direct appeal, the Prosecution argued that there was "overwhelming evidence of guilt", and actually got the Appellate Division, Second Department, State Supreme Court, to agree with them 5-0.

The reason that prosecutors often make this argument is because they are asking courts, and the public, to overlook errors, in fact implying that "this error does not matter, because he would have been convicted anyway."

That line of reasoning is fallacious and highly prejudicial because once an error has occurred, it impacts upon the fairness of a trial; changing the entire proceeding, what happens afterwards, and how subsequent evidence is viewed.

There is no telling how cases would turn out but for intentional and honest errors. In fact, if many of the errors that are intentionally committed nationwide by overzealous prosecutors were "harmless", the prosecutors would not bother to commit them.

In this case, given the fact that the jury deliberated for four days weighing the evidence, which essentially pitted Nowicki's testimony vs. the alleged victims', not really corroborated by the DNA and all of the questions surrounding its preservation from contamination, it is a blatant miscategorization to say that there was overwhelming evidence of guilt. Rather, it is clear that for the jury this was a close case, otherwise the deliberations would only have lasted for a short time.

Reflecting upon the theory as set forth by the Prosecution:

1) that Nowicki feigned being drunk, stumbling out of the door, and then again in his car putting his face on the steering wheel pretending to sleep, in hope that Peter Losee will come out and invite him back inside the house so that he can molest the children; I find that it defies all logic, common experience, and is borderline absurd.

2) That while in bunk beds, one boy was molested by Nowicki, and then as Nowicki climbs up the ladder and molests the other one, the first victim

does not get up and run to his parents, scream, or holler, to me, seems too big a stretch to be believed.

3) That one boy gives two different accounts of what happened, one of them clearing Nowicki by not mentioning any criminal conduct on his part, and the other implicating him suggests that they are not truthful witnesses. The accounts they give of a claimed traumatic event may contain minor differences because of memory not being perfect, particularly due to trauma, shock, and the ability to recall everything, down to the very last detail, completely on point, time after time; but it will not alternately characterize an assailant as innocent, and then guilty.

4) Finally, considering the fact that Nowicki was found by the father sleeping in the doorway of the boys' room, it defies logic that someone would molest, and then subsequently go to sleep, as if nothing had happened.

There are reportedly two million people currently entangled within the web of the criminal justice system in this country, whether in prison, on parole, or on probation. If we are ultra-conservative and say that a mere five percent of all persons arrested are innocent, the number of wrongfully convicted and imprisoned is staggering.

In the 16 years that I served in state prison for a crime for which I was wrongfully convicted, six inmates that I personally knew were cleared before before I was, and another was cleared immediately after me. That having been said, I am not so naïve as to believe that everybody who is in prison is innocent. Neither do I say that everyone who states that they are innocent is, in fact, innocent.

However, the Steven Nowicki case has all of the hallmarks of a wrongful conviction, and I personally believe, based upon the facts set forth, that Steven Nowicki deserves a new trial, with competent counsel, and without all of the errors that occurred in his first one, and, most importantly, without the prosecutorial misconduct that occurred in his first one. For his trial attorney to have allowed all of the unobjected to occurrences to go on at trial, it is clear that he was not protecting his clients rights, nor affording him the counsel that all of us are entitled to under the Sixth Amendment to the Constitution. ■