

FILED
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Supreme Court No. 102938-1

SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,
Respondent,

v.

NICHOLAS EDWARD MILLER,
Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. ISSUES PRESENTED FOR REVIEW

Should review be accepted, concerning an allegation of ineffective assistance of counsel for the defense attorney's failure to object to testimony from a stepsister of the victim, K.W., and her friend, T.G., under RAP 13.4 (b)(3) or (4)?

II. STATEMENT OF THE CASE

Key witnesses in the case:

Niki Osborn: The off and on girlfriend of the defendant and mother of K.O., the alleged victim.

K.O.: Niki Osborne's daughter and the alleged victim.
DOB: 12/20/06. RP at 481.

Margarita Westfall: Aunt of K.O. and sister of Niki Osborn. RP at 364-65. The first adult that K.O. revealed the alleged sexual abuse to, witnessed K.O.'s demeanor, and who had the police called. RP at 410-11.

Kyler Westfall: Husband of Margarita. RP at 426. He called the police in response to Margarita's request and witnessed K.O.'s demeanor. RP at 434-35.

K.W.: 14-year-old daughter at time of trial of Margarita and Kyler and cousin of K.O. RP at 340, 342-43. K.O. revealed the sexual abuse to her earlier in the night when she told Margarita Westfall. RP at 346. Witnessed K.O.'s demeanor when revealing the sexual abuse. RP at 347.

Jonathan Westfall Stewart: Cousin by marriage of K.O., who was living with the Westfalls, and who K.O. told about the sexual abuse on the same night and encouraged K.O. to tell Margarita. RP at 354, 360. Also witnessed K.O.'s demeanor when telling him about the abuse. RP at 358-59.

Michael Osborn: The natural father of K.O. and who witnessed K.O.'s demeanor after she told Margarita of the abuse. RP at 439, 460.

T.G.: The stepdaughter of Michael Osborn, age 17 at trial. RP at 638-39. K.O. shared that she was being sexually abused twice, the first time saying she was joking and the second time asking her not to tell an adult. RP at 642-43.

M.G.: At the time of trial, a 15-year-old who was friends with K.O. RP at 676-77. K.O. told her someone was repeatedly sexually assaulting her and K.O. asked her not to tell anyone. RP at 678.

Dr. Shannon Phipps: Family medicine physician, she examined K.O. on February 28, 2020, and took a medical history from K.O. RP at 648, 654, 656-57.

Nicholas Miller: The defendant, who did not testify. The off and on boyfriend / fiancée of Niki Osborn and the father of her youngest child, K.A.L.M. RP at 510.

K.O.'s allegations:

Starting around the fourth grade, K.O. described a series of escalating sexual contact by the defendant, her mother's on-again, off-again boyfriend. RP at 656. First, he started touching her with just his fingers, with no penetration, but just outer stimulation of her vagina. RP at 708-09. She remembers on the night her mother delivered K.A.L.M., when her mother was still in the hospital, the defendant touched her on the vagina. RP at

710. She did not know what to do: “Should I just lay here and wait? Should I leave? Should I go to my room?” K.O. remembers thinking. RP at 710.

It escalated to touching under her clothing with the defendant’s fingers going inside her. RP at 711. At some point he began to rub her vagina with his penis. RP at 712. She remembers one time when her, her twin brother, A.O., and the defendant’s daughter, S.M., who is three years younger than K.O., and the defendant were playing video games with a blanket covering them and he began rubbing and penetrating her vagina. RP at 705, 715-16. This made K.O. feel disgusting: “My own family was there and that was going on. I almost felt ashamed in a sense.” RP at 727. She testified that she didn’t say anything to her brother or S.M. because she was scared. RP at 716.

When they moved residences to a Judson Street, Richland, WA address, the abuse was more frequent, and it escalated to the defendant putting his penis inside K.O. RP at 718. The defendant would move K.O. up and down or side to side, and

sometimes his hips would go up and down. RP at 726. She began wearing tight skinny jeans—which her mother liked to see her in—to prevent him touching her vagina. RP at 720. But K.O. remembers one time when the defendant told her to put on shorts. RP at 721. She changed into shorts, because although she knew what was going to happen, she felt obligated. RP at 721. Another escalation occurred when K.O.’s mother and the defendant had separated, he took her to his residence, told her to move to the bed, took off her clothes, and was preparing to penetrate her from behind with his penis when another roommate apparently knocked on the door. RP at 734-35. She testified that before the knocking she felt his penis between the lips of her vagina. RP at 737.

She said that the frequency of the defendant’s sexual contact or penetration of her varied, but she estimated it was two to five times a week. RP at 727.

K.O. revealed the sexual abuse to adults and the police on the night of February 17, 2020.

On February 17, 2020, when K.O. was away from her mother and the defendant and with the Westfalls, she told her cousin, K.W., who was younger than K.O. RP at 346, 467. K.W. testified that K.O.

was very serious. She made eye contact with me. I know her. She does not use a serious voice most of the time. . . . [S]he got my attention and she just made sure that I was listening to her. She . . . seemed kind of scared but also really wanted to tell me. Like it was on her heart to tell me.

RP at 346. K.W. said K.O. was about to cry. RP at 347. She had never seen K.O. act like that. RP at 347.

There was a point when K.W. and K.O. were with Margarita Westfall. RP at 348. K.W. wanted K.O. to tell Margarita right then, but she did not. RP at 348. Margarita said that K.O. showed her a list of reasons she did not want to be with her mother anymore, and sexual abuse was not on that list. RP at 396, 399. She could tell that her daughter, K.W., wanted K.O. to speak further. RP at 398. Margarita and her husband left to go get a pizza. RP at 431.

K.W. suggested telling Jonathan Westfall Stewart, her older cousin, to get his take. RP at 348.

Jonathan said that when K.O. told him she was nervous, shaking, and it was hard for her to get the words out. RP at 358. He texted Margarita asking to come home and that K.O. needed to have a conversation with her. RP at 360.

Margarita said that K.O. when telling her was physically shaking, and like a “wet puppy shaking, crying and mumbling.” RP at 410-11. Margarita’s husband, Kyler, also said that K.O. was crying. RP at 435. Margarita called K.O.’s father, Michael Osborn, and he went to be with K.O. RP at 458-59. He has never seen K.O. with that kind of demeanor and said, “You can just feel her body just like crumble. . . . release. . . . like pounds of built up . . . emotions.” RP at 460.

The sexual abuse started when K.O. was very young and she did not know this was not normal behavior. RP at 656. The touching started by the defendant touching K.O. over her clothing with just his fingers. RP at 708-09. She was raised by her

mother never to talk back, which left her with a feeling “You have to do this. . . . You can’t say no.” RP at 722.

K.O.’s reasons for not telling her parents about the sexual abuse and what ultimately caused her to tell her aunt.

A man named David Miller moved in with Niki Osborne in October or November 2019. RP at 509, 556. On December 8, 2019, Ms. Osborne had a major stroke, which caused her to be hospitalized in Spokane for 33 days. RP at 556, 558.

During her rehabilitation, the defendant basically replaced David Miller. RP at 565. He moved in with Niki when she returned to her residence in Richland. RP at 566. He proposed to her sometime in early 2020. RP at 567.

K.O. felt “definitely scary” about the defendant being back with her mother and was terrified seeing him. RP at 740. She thought as her mother said “yes” to his proposal, “I don’t know if this is going to get worse. I don’t know if it’s going to stop. I don’t know where it’s going to go from here.” RP at 741. She knew she had to tell somebody, especially with the defendant

having two daughters who were younger than K.O. RP at 703, 705, 742. She testified that she had not previously told her mother because K.O. was afraid of how her mother would react, especially because she was dating the man. RP at 737. She was worried that her parents would not believe her. RP at 737.

K.O. tried to tell other individuals before: Admission of the evidence under the fact--of-complaint doctrine and prior consistent statements.

In the summer of 2019, K.O. told her stepsister, T.G., who is the natural daughter of Michael Osborn's wife, that she was being sexually abused. RP at 639, 641. K.O. told T.G. that she was joking, so T.G. forgot about it. RP at 642, 769. In January 2020, K.O. again told T.G. that she was being sexually abused. RP at 642. T.G. testified that K.O. was very nervous and her body was shaking. RP at 643. K.O. told her not to tell anyone and T.G. did not break her trust. RP at 643.

She also told M.G., a friend, in the summer between their sixth and seventh grade that she was being sexually abused. RP

at 678. M.G. also did not tell an adult because K.O. asked her not to. RP at 678. When they testified in May 2022 both M.G. and K.O. said they were freshman at the time. RP at 676, 683. If they were in the 9th grade in 2022, that meant that the summer between their sixth and seventh grade would have been 2019.

The prosecutor in the motion in limine orally stated that the rule allowing hearing of prior consistent statements, ER 801 (d)(1)(ii), may apply if there was an allegation that K.O. was lying. RP at 27. The defendant in his opening statement made that allegation: “This case actually is about a vendetta. . . . (K.O.) told her friend, but then when it came time to say so, to write out all these list of reasons, it was not in there. Why? Cause it didn’t happen.” RP at 336, 338.

III. ARGUMENT

A. Review should not be accepted under either RAP 13.4 (b)(3) or (4).

- 1. There is no significant question of law under either the Federal or State Constitutions.**

This case involves a standard ineffective assistance argument where this Court must weigh the performance of the defense attorney, any tactical issues concerning his failure to object to fact-of-the-complaint testimony from T.G. and M.G., whether the objection would have been sustained, and whether the trial would have been different absent the testimony of T.G. and M.G. The defendant's argument depends on a detailed reading of the record: whether the K.O.'s statements to T.G. and M.G. were close to the time the events were reported. PRV at 9-11. This is not a significant question under either the Federal or State Constitutions.

The defendant interprets the fact-of-the-complaint rule as holding that the complaint must be close to the time of the sexual abuse. PRV at 9-11. However, as the opinion states, "A complaint is timely if it is made when there is an 'opportunity to complain.'" *State v. Martinez*, 196 Wn.2d 605, 614, 476 P.3d 189 (2020).

Martinez delved into the history of the rule. Although the misogynistic requirement that a rape victim must raise a hue and cry immediately after the sexual assault was eliminated in the mid-1700s, it widely persisted in cases of alleged sexual violence. *Id.* at 609. The rule evolved as a response to the common law requirement of hue and cry. *Id.* at 610. It plays an important function because many jurors still believe that “real” victims report sexual abuse promptly. *Id.* at 611.

Children especially do not raise an “hue and cry” immediately after being sexually abused. The *Martinez* court stated that under this logic, the “rule, like society, ignored some victims of sexual violence and treated others with unfortunate skepticism and demanded that they all behave in a like manner.” *Id.* at 610. *Martinez* set some limits of the “fact of the complaint” doctrine, including prohibitions against identifying the perpetrator and the evidence admissible to show the victim reported to someone, but did not limit the doctrine as far as making a timely complaint close to the event. *Id.* at 611.

The facts in *Martinez* are close to this case. In *Martinez* the defendant sexually abused his daughter for almost a decade starting when she was five years old. The daughter moved out of the family home when she was about 14 and told several people about the sexual abuse. A few months later she reported it to the authorities. *Id.* at 607-08.

Children and adults disclose sexual abuse at their own individual pace. As *Martinez* stated not all victims behave in the same manner. *Id.* at 610. The *Martinez* court noted that many jurors still subscribe to the myth that “real” victims report promptly after being raped. *Id.* at 611.

Martinez also recognized that the fact-of-the-complaint doctrine is inconsistent with the hearsay rules. *Id.* at 613. But the doctrine is long-standing, has been recognized since the hearsay rules were codified and provided an important supplement to those rules, the *Martinez* court stated. *Id.* There is no constitutional issue regarding the Court of Appeals decision in this case.

The defendant relies on *State v. Osborn*, 59 Wn. App. 1, 795 P.2d 1174 (1990), decided thirty years before *Martinez*. *Osborn*, in headnote 8, said that the “fact of complaint” doctrine may no longer be given credence as a legal doctrine and thus was dubious authority. In footnote 2, the *Osborn* court stated that the doctrine rests on the premise that a victim naturally complains promptly about offensive sexual activity and that a victim’s silence makes it more likely the offense did not occur. That was the reasoning the *Martinez* court wanted to put in the past.

If the defense attorney had raised an objection to the fact-of-the-complaint doctrine, it would have been overruled. Also, the evidence from T.G. and M.G. was admissible as a prior consistent statement under ER 801 (d)(1)(ii). The elements under ER 801 (d)(1)(ii) are: 1) The declarant testifies and is subject to cross-examination concerning the statement; and the statement is (ii) consistent with the declarant’s testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

K.O. testified. She told T.G. and M.G. that she was being sexually assaulted, starting in the third grade, and continuing in the fourth, fifth, and sixth grades. RP at 642, 678, 771. The defendant emphasizes that K.O. told T.G. that she was joking when making initially making the statement about sexual abuse in 2019. K.O. admitted she told T.G. that she was joking, and it might have been due to the defendant being out of her mother's life at that point. RP at 642, 769. But the second time K.O. told T.G. in January 2020, there was no doubt that K.O. was serious. This was before she told her aunt on February 17, 2020. The defense was that K.O. made up the allegations against the defendant in order to move to her father's residence.

2. There is no substantial public interest in the issue.

This is a plain ineffective assistance of counsel argument. This Court just weighed in on the fact-of-the-complaint doctrine in *Martinez*. Even without the doctrine, the evidence was admissible under the prior consistent statement rule. There has been no clamor by the public to clarify either issue.

IV. CONCLUSION

Accordingly, the petitioner for review should be denied.

This document contains 2,721 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 8th day of May,
2024.

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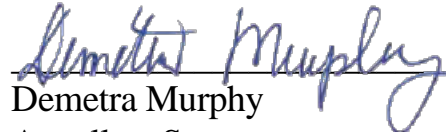
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BENTON COUNTY PROSECUTOR'S OFFICE

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