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JUN 03 2009

King County Prosecutor  
Appellate Unit

NO. 62305-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES J. LEWIS,

Appellant.

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Michael J. Fox, Judge

BRIEF OF APPELLANT

ANDREW P. ZINNER  
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

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A. ASSIGNMENT OF ERROR

Trial counsel was ineffective for failing to object to irrelevant, prejudicial "victim impact" testimony elicited by the prosecutor from the complainant and her mother.

Issue Pertaining to Assignment of Error

Defense counsel's theory was that the state failed to prove the appellant committed second-degree rape because the complainant's allegations of forcible sexual intercourse stood alone with no corroboration. Counsel nevertheless did not object to testimony from the complainant and her mother that after her encounter with the appellant, the complainant suffered sleepless nights, nightmares, weight gain, agoraphobia, and distractibility such that she could not work or care for her son. Nor did counsel object to the prosecutor's reiteration of the testimony during argument. Did counsel deprive the appellant of his constitutional right to effective representation?

B. STATEMENT OF THE CASE

1. *Summary of trial*

C.D. met the appellant, James J. Lewis, at her workplace. After a few telephone conversations between one another, C.D. accepted Lewis's

invitation to join him for lunch. RP4 4-15, 61-62.<sup>1</sup> When they met for the lunch date, Lewis told C.D. he had to go home to change clothes. RP4 17. C.D. followed Lewis in her car and accepted Lewis's invitation to come into his apartment. RP4 20.

Lewis pulled C.D. into the bedroom by her arm, threw her onto the bed, choked her, punched and hit her several times in the face, and had forcible penile-vaginal intercourse. RP4 27-28, 30-36, 38-45, 73-74. When the assault ended, C.D. put her clothes back on. She and Lewis left the apartment and C.D. entered her car. RP4 47-48.

C.D. drove herself to a nearby barbershop because she had known the barbers since she was born. RP2 151-52, RP4 50-51. She ran into the shop and announced she had been raped. RP2 152-53, RP4 50. A barber who knew C.D. from her birth observed no injuries on C.D.'s face. RP2 161-62.

C.D. used a phone and called her friend and her mother. RP4 51-52. Both arrived within about an hour after the calls. RP2 74-75, 80-81, 89, RP3 147-49, 151, RP4 52. C.D.'s mother immediately called 911 and an officer arrived shortly thereafter. RP2 91, 106-08, RP4 53.

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<sup>1</sup> The six-volume verbatim report of proceedings is cited as follows: RP1 (7/21); RP2 (7/23); RP3 (7/24) RP4 (7/28); RP5 (7/29); RP6 (8/15).

Aid personnel transported C.D. to the hospital, where she reported the details of her ordeal to a social worker and a nurse. C.D. also complained about soreness in her neck and face. RP2 16, 19-40, RP3 32, 35, 56-57. Neither the nurse nor the social worker, however, saw any bruises or marks on C.D.'s face or arms. RP2 48-49, RP3 69, 86-89.

C.D.'s mother testified she observed fingerprint impressions and redness on C.D.'s neck and a red mark and swelling on C.D.'s face. RP2 95, 99-100. C.D.'s mother did not, however, tell the nurse about the prints or redness. RP3 88.

During her thorough examination, the nurse observed abrasions inside C.D.'s vagina. RP3 61. Although C.D. reported Lewis ejaculated into her vagina, examiners found no semen in or on C.D.'s body. RP3 48, 87, 98-100. Lewis's sperm and DNA, as well as the DNA of a woman other than C.D., was found on Lewis's bed sheet that was on the bed during the incident with C.D. C.D.'s DNA appeared nowhere. RP3 130-34.

Meanwhile, police officers knocked on the door of the apartment and Lewis invited them in. RP2 65, 69. Lewis consented to a search of the apartment. RP2 66. The officers were specifically looking for a bra C.D. said she left in the bedroom. RP2 69. Lewis pointed to the bra,

which officers retrieved from an open closet. RP2 70-71. Lewis was arrested and taken to the police station. RP2 66.

Lewis did not testify. His defense theory was that C.D.'s uncorroborated allegations were not believable. RP4 110-21. During closing argument, defense counsel emphasized (1) the health professionals found no marks or bruising, despite C.D.'s assertion Lewis punched her face and choked her by the neck; (2) Lewis cooperated with police and pointed out the sought-after bra; and (3) examiners found no DNA on C.D., nor any of C.D.'s DNA on the bed sheet. RP4 112-20. Counsel argued that once C.D. claimed she was raped, she could not change her story even though it was untrue. RP4 114-15, 119-21.

A King County jury found Lewis guilty of second-degree rape by forcible compulsion. CP 109.

2. *Facts necessary for argument – "victim impact" testimony<sup>2</sup>*

During direct examination, the prosecutor asked C.D.'s mother whether C.D. "immediately [went] to work the next day." RP2 96. James did not object. The mother answered that her daughter tried to return to work but could not; she was not sleeping, had nightmares, and had trouble

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<sup>2</sup> The verbatim report of the pertinent questions and answers is attached as an appendix.

focusing on things other than the incident. RP2 96-97. The prosecutor asked whether these symptoms "just last[ed] for a week, []or longer." RP2 97. Counsel again did not object. The mother responded that C.D. remained affected at the time of trial; C.D. chain-smoked, sometimes went two or three days without sleeping, and slept insufficiently when she did sleep. RP2 97.

The prosecutor used a similar ploy with C.D. During direct examination, the prosecutor asked whether she went to work the next day. RP4 55. Defense counsel did not object. C.D. answered that she immediately called her employer, explained she had been raped, and went into work a few days later. RP 55-56. This was "hard" and "embarrass[ing]" for C.D. RP4 56. When she did return to work, she often had to step outside and, because she had met Lewis at work, "customers . . . starting looking like him." RP4 56-57. C.D. said she lasted less than two months at the job. RP4 57.

The prosecutor also asked how the offense "impact[ed] on you generally . . . [?]" RP4 57. James's counsel did not object. C.D. testified,

I have never been the same. I have isolated myself and I can't keep a job. I have gained weight due to stress, and I have gone through so many emotions up and down, I don't know what to do sometimes. It seems like everything, like I have 'raped' printed across my shirt.

I can't do anything. I can't take care of my son and I don't go anywhere. I don't go to the movies or to the mall or get my hair done. I don't drive the car. I just don't want anybody to talk to me. I have my brother, mom and my friends do all the stuff for me. I try to do the stuff and just can't.

I have problems sleeping. I have nightmares that I can't talk or that there is his friend and he said he would hurt me and tell the friends and I try to leave it alone.

RP4 57-58.

C. ARGUMENT

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO TESTIMONY DETAILING THE POST-INCIDENT EFFECTS ON C.D.

Lewis's counsel failed to object to irrelevant and prejudicial "victim impact" evidence elicited by the prosecutor during direct examination of C.D. and her mother. Given its inherent ability to generate much heat but little light, the evidence likely affected the jury's verdict. Counsel was therefore ineffective, and Lewis should be granted a new trial.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment and article I, section 22 of the Washington 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). Failing to object constitutes

ineffective assistance where (1) the failure was not a legitimate strategic decision; (2) an objection to the evidence would likely have been sustained; and (3) the jury verdict would have been different had the evidence not been admitted. In re Personal Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004); State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

*a. Failing to object was not reasonably strategic.*

Because defense counsel did not object, jurors learned C.D. suffered from sleeplessness, weight gain, distractibility, nightmares, agoraphobia and other maladies. Then, rather than ignoring the testimony and hoping jurors would do the same, counsel twice emphasized the evidence during closing argument. First, counsel said C.D.'s claims of being unable to work or to care for her son, and of having nightmares, were not corroborated. RP4 111-12. Perhaps realizing this was not true, counsel then said C.D.'s mother provided similar testimony because, like "all parents," the mother "[saw] some injury or harm to [her] child in a light different from some injury to" a stranger. RP4 112.

Counsel's reiteration and lame attempt to explain away the testimony distinguishes this case from Davis. In that case, the court concluded defense counsel's decision not to object to victim impact

testimony was legitimate trial strategy because "[c]ounsel may not have wanted to risk emphasizing the testimony with an objection." Davis, 152 Wn.2d at 714. Lewis's counsel emphasized the victim impact evidence not once, but twice. Counsel's failure to object was thus not a legitimate defense tactic under Davis or under any other rationale.

*b. The trial court would have likely sustained timely objections.*

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence." ER 401; State v. Magers 164 Wn.2d 174, 184, 189 P.3d 126 (2008). "Any circumstance is relevant which reasonably tends to establish the theory of a party or to qualify or disprove the testimony of his adversary." State v. Kelly, 102 Wn.2d 188, 204, 685 P.2d 564 (1984). Irrelevant evidence is not admissible. ER 402; State v. Zwicker, 105 Wn.2d 228, 235, 713 P.2d 1101 (1986). Even relevant evidence is inadmissible if its probative value is substantially outweighed by unfair prejudice. ER 403; State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009); State v. Saavedra, 128 Wn. App. 708, 716, 116 P.3d 1076 (2005).

Washington courts have not addressed in any depth the question whether victim impact evidence can be relevant during the guilt phase of

trial. State v. Gregory<sup>3</sup> perhaps comes closest. The prosecutor there asked how the rape complainant felt about "having to testify in court and ... be cross-examined?" Gregory, 158 Wn.2d at 805. The complainant testified she tried for two years to move on from the "horrific experience," hated having to recall the events, was angry, could not sleep, had nightmares, and would not want her worst enemy to have to endure what she did. Gregory, 158 Wn.2d at 805-06.

The prosecutor repeated the complainant's answer during closing argument. He then argued the complainant would not have put herself through the ordeal of trial merely to avenge a broken condom, which was the version of events testified to by Gregory. Gregory, 158 Wn.2d at 780, 806.

On appeal Gregory contended the prosecutor: (1) chilled his constitutional confrontation rights by asking how the complainant felt about cross examination and (2) improperly appealed to the jury's sympathy. Gregory, 158 Wn.2d at 806.

The court rejected each argument. First, the state did not specifically criticize Gregory's cross-examination of the complainant or suggest Gregory should have spared her the indignity of trial. The state

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<sup>3</sup> 158 Wn.2d 759, 147 P.3d 1201 (2006).

instead sought to rebut Gregory's challenge to the complainant's veracity by showing she did not relish having to testify and be cross-examined. Gregory, 158 Wn. 2d at 807. Second, the purpose in eliciting the complainant's testimony was to rebut Gregory's argument the complainant's version of events was not believable rather than to arouse the jury's sympathies. Gregory, 158 Wn.2d at 809.

The court in Gregory was not asked to decide, and did not decide, whether the victim impact evidence was relevant. While the prosecutor's cross-examination is factually analogous, the court's holdings are not. Lewis's trial counsel did challenge the validity of C.D.'s allegations, but did so by emphasizing the lack of evidence to corroborate. Furthermore, unlike Gregory, Lewis did not testify. Jurors were thus not required to determine whether the accused or the accuser should be believed. For these reasons, Gregory does not apply.

Other jurisdictions soundly condemn the practice of allowing the jury to consider victim impact testimony during the guilt phase of a trial. See, e.g., Clark v. Commonwealth, 833 S.W.2d 793, 796-97 (Ken. 1991) (characterizing victim impact testimony as “sensationalizing tactics which tend to pressure the jury to a verdict on considerations apart from evidence of the defendant’s culpability”); Justice v. State, 775 P.2d 1002, 1010-11

(Wyo. 1989) (victim impact testimony during the guilt phase must not be permitted “unless there is a clear justification of relevance.”); United States v. Copple, 24 F.3d 535, 545-46, cert. denied, 513 U.S. 989 (3rd Cir. 1994) (principal effect of victim impact testimony “was to highlight the personal tragedy they had suffered as victims of the scheme. The testimony was designed to generate feelings of sympathy for the victims and outrage toward Copple for reasons not relevant to the charges Copple faced.”).

In Justice, the victims of an aggravated robbery testified about how the robbery affected their lives after the crime. 775 P.2d at 1010. The court noted this information “could not in any way serve to establish any of the elements of the crime.” Justice, 775 P.2d. at 1010. As in Justice, C.D.'s and her mother's victim impact testimony was “absolutely irrelevant with respect to the issues before the jury.” See Justice, 775 P.2d at 1010. This testimony could not in any way serve to establish any element of second-degree rape. For these reasons, the trial court would have sustained timely relevance objections to the victim impact testimony.

c. *It is reasonably likely the "victim impact" evidence affected the jury's verdict.*

Given the irrelevance of the "victim impact" testimony, "[t]he only purpose must have been to attempt to arouse the passions of the jury." Justice, 775 P.2d at 1010. ER 403 forbids admission of evidence for such a purpose. Evidence is unfairly prejudicial "if it has the capacity to skew the truth-finding process." State v. Read, 100 Wn. App. 776, 782-83, 998 P.2d 897 (2000). C.D.'s and her mother's testimony about the lingering effects of C.D.'s encounter with Lewis encouraged the jury to convict Lewis out of sympathy for C.D.'s ongoing suffering rather than proper evidence tending to prove the elements beyond a reasonable doubt.

The prosecutor exploited her good fortune by emphasizing the improper evidence in rebuttal argument:

I don't have to have an expert get on the stand, that what this young woman told you from the witness stand is evidence that she suffered something traumatic, that she put on weight, that she can't fit into her pants, that she struggled with sleeplessness, and she feels everyone is looking at her. She feels degraded and humiliated  
.....

RP4 125. A prosecutor aggravates the prejudicial nature of improper evidence by accentuating it during closing argument. See, State v. Thang, 145 Wn.2d 630, 645, 41 P.3d 1159 (2002) (prosecutor "exacerbated" trial court's erroneous introduction of bad acts evidence by arguing from the

evidence during closing argument); State v. Severns, 13 Wn.2d 542, 552, 125 P.2d 659 (1942) (prosecutor aggravated trial court's erroneous jury instruction, which included uncharged alternative method of committing offense, by arguing evidence could have supported conviction based on alternative).

The irrelevant and unfairly prejudicial testimony deprived Lewis of a fair trial. “A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial.” State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). “Evidence likely to provoke an emotional response rather than a rational decision is unfairly prejudicial.” State v. Johnson, 90 Wn. App. 54, 62, 950 P.2d 981 (1998). The victim impact testimony falls squarely into this category.

Trial counsel was therefore ineffective for failing to object the "victim impact" evidence and the prosecutor's corresponding argument.

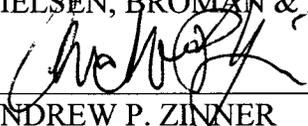
D. CONCLUSION

The "victim impact" evidence was irrelevant, the failure to object to the evidence was not reasonably strategic, and the evidence probably affected the jury's verdict. Counsel therefore deprived Lewis of his constitutional rights to effective representation. This Court should reverse Lewis's conviction and remand for a fair trial.

DATED this 3 day of June, 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

  
\_\_\_\_\_  
ANDREW P. ZINNER

WSBA No. 18631

Office ID No. 91051

Attorneys for Appellant

## APPENDIX

July 23, 2008 – C.D.'s Mother

1 tell us how long you waited or how you got home.  
2 Tell us about that.

3 A. We waited for a long time because I remember  
4 right before she had gotten there, they told me a  
5 little boy had come in and he needed to be seen,  
6 and so we waited for him because he was going  
7 through a lot. And I was there for her. I held  
8 her hand. She wouldn't let me hold her hand.

9 Q. You know earlier when you told us that she  
10 didn't want to be hugged. Had you tried, and it  
11 just didn't work out?

12 A. Yes. I tried at the barbershop, and I could  
13 tell by the way she tightened up that that wasn't  
14 the thing to do. I could just tell. A mother  
15 knows her child.

16 Q. Are you a family of touchers, huggers, that  
17 type of thing?

18 A. When appropriate. I mean, like, not every  
19 day, but, you know, we do hug.

20 Q. I want to talk to you about after, kind of  
21 days -- the days after this happened. Did Ciara  
22 immediately go back to work the next day?

23 A. Ciara tried to go back to work and realized  
24 she couldn't. Ciara was just, like, exhausted.  
25 She wasn't sleeping. She had nightmares. It was

1 hard focusing for her. She couldn't get what  
2 happened to her out of her mind.

3 Q. Did this experience that you have just  
4 described about inability to sleep and the other  
5 experiences that you saw in your daughter, did  
6 this just last for a week, for longer?

7 A. No. Ciara still is experiencing this.  
8 Different forms -- she doesn't shake as much  
9 physically, but now she, like, chain-smokes, and  
10 she wasn't like a big smoker before, but she  
11 chain-smokes. She doesn't sleep. She doesn't get  
12 six hours or four hours of sleep. There is some  
13 days she can go two or three days in a row and not  
14 sleep.

15 Q. You told us at the outset your daughter  
16 still lives with you, correct?

17 A. Yes.

18 Q. Give me a minute, okay?

19 A. Okay.

20 Q. Thank you, Ms. Robinson. I have no further  
21 questions. Okay?

22 A. Okay.

23 THE COURT: Mr. Flora.  
24  
25

July 28, 2008 – C.D.

1 I HAD TO.

2 Q WHEN YOU SAY YOU KNEW YOU HAD TO, THERE IS --  
3 SOMEONE IS FORCING YOU TO DO IT AND YOU HAVE GOT TO  
4 DO THIS BECAUSE?

5 A I HAVE GOT TO DO THIS BECAUSE I KNOW WHAT HE DID TO  
6 ME WAS WRONG, AND HE NEEDS TO BE PUNISHED FOR IT.

7 Q ONE THING WE DIDN'T TALK ABOUT, CIARA, WAS  
8 CARLITO. I TAKE IT YOU DIDN'T PICK HIM UP AT 4:00  
9 OR 4:30 THAT DAY AS PLANNED?

10 A RIGHT.

11 Q WHO PICKED UP CARLITO THAT DAY?

12 A THE DAYCARE LADY TOOK HIM HOME WITH HER AND IT  
13 COULD HAVE BEEN MY MOM OR JULIAN CALLED THE DAYCARE  
14 TO LET THEM KNOW WHAT HAPPENED.

15 Q WHEN DID YOU PICK HIM UP?

16 A 11:00 OR 12:00, AFTER I GOT OUT OF THE HOSPITAL.

17 Q TELL ME ABOUT THE KIND OF DAYS AFTER THIS HAPPENED,  
18 CIARA, DID YOU GO BACK TO WORK THE NEXT DAY?

19 A I WAITED A FEW DAYS AND THEN WENT BACK.

20 Q YOU SAID YOU WAITED A FEW DAYS. WERE YOU SUPPOSED  
21 TO BE BACK TO WORK THE NEXT DAY?

22 A YES.

23 Q WHAT DID YOU DO TO TELL YOUR EMPLOYER, DID YOU SAY  
24 YOU WERE SICK?

25 A I WAS IN THE AMBULANCE WHEN I CALLED MY JOB AND I

1 HAD ONLY BEEN THERE A MONTH, AND IF I WASN'T THERE  
2 FOR THE MORNING SHIFT, I WAS THE ONE -- AND I  
3 TALKED TO CARL AND TOLD HIM, "I'VE JUST BEEN RAPED  
4 AND I'M ON MY WAY TO THE HOSPITAL."

5 Q AND I TAKE IT THAT JOB WAS IMPORTANT TO YOU?

6 A YES.

7 Q AND HOW DID IT MAKE YOU FEEL TO HAVE TO TELL YOUR  
8 BOSS WHAT JUST HAPPENED TO YOU?

9 A IT MADE ME FEEL EMBARRASSED, I FELT I HAD TO TELL  
10 HIM WHAT WAS GOING ON SO HE WOULD UNDERSTAND IT IS  
11 NOT ME NOT WANTING TO GO TO WORK. IT WAS HARD; HE  
12 IS A MAN. A MAN, LIKE I KNEW IT WAS MY BOSS, AND I  
13 TOLD HIM THAT I HAD BEEN RAPED AND I DON'T THINK HE  
14 COULD EVEN UNDERSTAND IT AT FIRST.

15 Q HOW ABOUT AFTER A COUPLE OF DAYS, HOW WAS IT GOING  
16 BACK?

17 A IT WAS HARD, BUT I NEEDED THE MONEY SO I COULD PAY  
18 FOR MY SON. IT WAS HARD AND MY BOSS KNEW WHAT WAS  
19 GOING ON. I HAD TO GO OUTSIDE TO GET AIR AND THAT  
20 HAPPENED A LOT OF TIMES AFTER I WENT BACK TO WORK.

21 Q WHAT WAS IT ABOUT BEING AT WORK, DID YOU NEED TO  
22 TAKE THAT BECAUSE --

23 A I WAS THINKING ABOUT WHAT HAPPENED ON THE 29TH  
24 THERE, AND THE FACT THAT I MET HIM THERE, BEING IN  
25 THE AREA. BEING AT THE CASH REGISTER AND WHEN

1 CUSTOMERS CAME IN, PEOPLE STARTED LOOKING LIKE  
2 HIM. LIKE CUSTOMERS THAT WERE REGULARS, IT WOULD  
3 MAKE MY HEART STOP AND I WOULD HAVE TO BREATHE AND  
4 THEN HAVE TO LEAVE.

5 Q ARE YOU STILL WORKING AT B AND B?

6 A NO.

7 Q WHEN DID YOU STOP?

8 A A COUPLE OF MONTHS LATER, OR I DON'T EVEN THINK IT  
9 WAS THAT LONG.

10 Q WHAT ABOUT -- GO BACK FOR A MOMENT, WE SAW YOUR  
11 CLOTHES AND BRA, YOUR T-SHIRT AND YOUR JEANS AND I  
12 NEGLECTED TO ASK YOU ABOUT THE BOXER SHORTS. TELL  
13 ME, WE DIDN'T SEE THOSE, DID YOU BRING THOSE WITH  
14 YOU TO HARBORVIEW?

15 A NO. WHEN WE WERE DRIVING AROUND THE STREET I COULD  
16 FEEL THEM AND I PULLED THEM OUT AND PUT THEM IN THE  
17 BACK OF MY CAR.

18 Q YOU MEAN OVER TO [A-B]?

19 A RIGHT.

20 Q I ASKED YOU ABOUT YOUR JOB AND THE IMPACT ON YOU.  
21 WHAT ABOUT THE IMPACT ON YOU GENERALLY, FROM THAT  
22 DAY, MARCH THE 29TH?

23 A I HAVE NEVER BEEN THE SAME. I HAVE ISOLATED MYSELF  
24 AND I CAN'T KEEP A JOB. I HAVE GAINED WEIGHT DUE  
25 TO STRESS, AND I HAVE GONE THROUGH SO MANY EMOTIONS

1 UP AND DOWN, I DON'T KNOW WHAT TO DO SOMETIMES. IT  
2 SEEMS LIKE EVERYTHING, LIKE I HAVE "RAPED" PRINTED  
3 ACROSS MY SHIRT.

4 I CAN'T DO ANYTHING. I CAN'T TAKE CARE OF MY  
5 SON AND I DON'T GO ANYWHERE. I DON'T GO TO THE  
6 MOVIES OR THE MALL OR GET MY HAIR DONE. I DON'T  
7 DRIVE THE CAR. I JUST DON'T WANT ANYBODY TO TALK  
8 TO ME. I HAVE MY BROTHER, MOM AND MY FRIENDS DO  
9 ALL THE STUFF FOR ME. I TRY TO DO STUFF AND I JUST  
10 CAN'T.

11 I HAVE PROBLEMS SLEEPING. I HAVE NIGHTMARES  
12 THAT I CAN'T TALK OR THAT THERE IS HIS FRIEND AND  
13 HE SAID HE WOULD HURT ME AND TELL THE FRIENDS AND I  
14 TRY TO LEAVE IT ALONE.

15 Q CIARA, I'M GOING TO SHOW YOU A COUPLE OF PHOTOS AND  
16 THEN I WILL BE DONE, OKAY? SO WHEN I PUT THIS ON,  
17 IF YOU CAN'T SEE THAT LET ME KNOW AND I WILL ADJUST  
18 IT A LITTLE. I WILL PUT UP WHAT HAS BEEN MARKED AS  
19 STATE'S EXHIBIT 5, EXCUSE ME, ADMITTED AS STATE'S  
20 EXHIBIT 5. DOES THAT LOOK FAMILIAR?

21 A YES, THAT'S THE APARTMENT DOOR.

22 Q YOU HAD EARLIER DESCRIBED THAT THE KITCHEN WAS TO  
23 THE LEFT OR THE RIGHT?

24 A TO THE RIGHT.

25 Q AND THEN I WANT TO PUT UP STATE'S EXHIBIT 13 ON THE

