

No. 67114-6-1

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

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STATE OF WASHINGTON,

Respondent,

v.

JAMEL ADAMS,

Appellant.

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

The Honorable James D. Cayce

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

At Jamel Adams' trial on allegations that he had sexually assaulted his foster sister L.S., the trial court permitted the State to introduce extensive, highly inflammatory testimony that Adams' mother Sandra Sly cruelly abused L.S. while she was in her custody. The evidence was not relevant to prove any essential element of the charged offenses and was likely to sway the jury to overlook the State's significant problems with its case by tarring Adams with the brush of his mother's abuse.

In State v. Fisher, 165 Wn.2d 727, 202 P.3d 957 (2010), the Washington Supreme Court held that evidence of prior acts of abuse by the defendant are inadmissible unless the defense opens the door to the evidence by making an issue of the complainant's delayed reporting. Id. at 745. The State nevertheless broadly claims that evidence of prior acts of abuse by the defendant's mother, who was not a party to the case, was properly admitted to show L.S.'s "fear." Br. Resp. at 10-11. This contention is an effort to hedge the claim that the abuse explained L.S.'s delayed reporting. And L.S.'s delayed reporting would only have been pertinent if Adams made an issue of it.

In actuality, not only did Adams not make an issue of L.S.'s delayed reporting, he offered to stipulate to the evidence's exclusion and to the exclusion of L.S.'s recantation so as to avoid being stigmatized by his mother's abuse. Trial RP 31. L.S.'s 'fear' would only have been relevant if Sly was the defendant. But she was not, and the unfairly prejudicial evidence of her abuse of L.S. prevented Adams from receiving a fair trial. Adams' convictions must be reversed and this case remanded for a new trial.

**1. Evidence of Sly's abuse was not relevant to show the "context" of the allegations.**

The State first asserts that the evidence should have been admitted to set the "context" for the allegations against Adams. The State, however, is unable to provide a basis to "contextualize" the allegations that is in any way distinguishable from the "delayed reporting" theory addressed in Fisher. See Fisher, 165 Wn.2d at 745The State contends:

[T]he evidence was relevant to show how the circumstances in the home provided Adams the opportunity to commit the crimes. L.S. did not have friends, did not go to school, and rarely got to leave the home. Hence, she was isolated. She lived in a home where her mother beat her and favored the biological children. This created an ideal environment for Adams to sexually abuse L.S. with little fear she would tell anyone.

Br. Resp. at 12.

The problem with the State's theory is that, as the State concedes, Adams was not implicated in the abuse, Br. Resp. at 7, and the State cannot point to any evidence establishing that he even knew about the abuse. The State nevertheless asserts, in a footnote, "[c]learly, Adams was aware of what was happening in the home." Br. Resp. at 12 n. 4. But in the absence of evidence in the record – for example, testimony from the complainant establishing that Adams either witnessed the abuse or had some other reason to actually know about it – the State's theory of Adams' 'opportunism' is not viable. Absent a nexus between the abuse and Adams, the evidence was not relevant.

The State may have properly been permitted to introduce as "context" for L.S.'s allegations evidence that she rarely went to school and had few friends, or even that Sly favored her biological children over her foster children. This evidence could have helped the State explain why L.S. did not disclose the abuse when it occurred. Testimony that Sly beat L.S. with a belt, threw a metal can at her face, and would make her stand in stress positions as punishment, however, did not provide additional "context." It did not explain L.S.'s actions, it did not demonstrate that she was

fearful of Adams, and it did not make the allegations of sexual abuse more likely to be true.

At the same time, the evidence was extraordinarily prejudicial. Under ER 403, evidence must be excluded if its probative value is outweighed by its prejudicial effect.<sup>1</sup> As shown, the probative value of the evidence was minimal. Its prejudicial effect, however, was exceptionally great. The evidence was likely to have disposed the jurors to dislike Adams, and so believe he was capable of committing a sexual assault because “the acorn does not fall far from the tree.” Trial RP 32-33. The jurors may also have been induced to forgive L.S. the inconsistencies and gaps in her testimony because they felt sorry for her.

The State on the one hand responds that because Adams was not implicated in the abuse it did not prejudice him. Br. Resp. at 17, 20. But below the State used the evidence to promote its unsubstantiated theory that Adams somehow used his mother’s physical abuse of L.S. as an opportunity to sexually assault her, Trial RP 313, and the State makes the same inflammatory argument on appeal. Br. Resp. at 12. In short, the State cannot

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<sup>1</sup> The State asserts, again without citation, that Adams analyzed the court’s ruling under ER 404(b), but the State is simply wrong. See Br. App. at 1 (Issue 1 pertaining to Assignments of Error); Br. App. at 9 (analyzing issue under ER 403).

have it both ways: the State's plain purpose in presenting the evidence was to suggest that Adams was just as abusive as his mother, and thereby to encourage a conviction on improper grounds. The evidence should have been excluded under ER 403.

**2. The State fails to persuasively distinguish *Fisher*.**

The State alternatively claims that that evidence of Sly's abuse was relevant to prove L.S.'s "fear." The State reasons that absent the evidence of Sly's abuse, the jury would wonder why L.S. returned to the home after being removed by CPS, why she did not run away sooner, and why she did not immediately disclose the alleged sexual assaults. Br. Resp. at 13. The State's answer to these questions is that she was fearful. However the first two questions are not pertinent to the charged offenses, and the jury did not have to resolve them in order to reach a verdict. The third question is another way of saying the evidence was relevant to explain L.S.'s delayed reporting.

The State does not acknowledge that Adams was willing to stipulate to the exclusion of evidence of L.S.'s delayed reporting. Similarly, Adams was willing to agree to exclude evidence of L.S.'s recantation – another rationale proffered by the State for the

evidence's alleged "relevance"<sup>2</sup> – in order to keep out the incredibly prejudicial testimony about Sly's physical abuse.

The State emphasizes that Adams refused a limiting instruction, as if this vitiates the trial court's error. See Br. Resp. at 10. But in Fisher, the defense also declined a limiting instruction, and this tactical decision had no bearing upon the Supreme Court's resolution of the case. Fisher, 165 Wn.2d at 734.

The State also cites to several cases in which evidence of prior abuse was found to be relevant to the victim's state of mind. See Br. Resp. at 15-16 (citing State v. Nelson, 131 Wn. App. 108, 125 P.3d 1008 (2006), State v. Cook, 131 Wn. App. 845, 129 P.3d 834 (2006), and State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996)).

But at issue in each of these cases was the defendant's abuse of the victim. See Nelson, 131 Wn. App. at 115-16 (evidence of defendant's violent and abusive demeanor after drinking admissible to explain wife's recantation of assault allegation and inconsistent statements); Cook, 131 Wn. App. at 851-52 (evidence of defendant's prior domestic abuse of victim admissible to show her state of mind); Grant, 83 Wn. App. at 106-

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<sup>2</sup> Br. Resp. at 18.

07 (defendant's prior abuse probative of victim's credibility and why she told conflicting stories). This, in fact, is the precise constraint that the Washington Supreme Court has imposed upon the relevancy of such evidence: "prior acts of domestic violence, involving the defendant and the crime victim, are admissible in order to assist the jury in judging the credibility of a recanting victim. State v. Magers, 164 Wn.2d 174, 186, 189 P.3d 126 (2008) (emphasis added).

In short, there is no basis to distinguish Fisher; that case is controlling here. None of the authorities cited by the State support its argument that evidence of abuse by a person other than the defendant may be relevant to prove the victim's state of mind or assess her credibility. And the State has failed to address the Supreme Court decision which invalidates its argument.

### **3. The error was prejudicial and requires reversal.**

The State briefly tries to argue that the error in admitting the evidence was harmless. Br. Resp. at 19-21. The State does so primarily by defending the trial court's ruling, Br. Resp. at 20, but the court's ruling was legally erroneous regarding both the evidence's admissibility and its prejudicial effect. The State also notes that L.S. was the only witness to discuss Sly's abuse, but by

the same token L.S. was the only witness to discuss Adams' alleged assaults. The State last avers that the prosecutor did not overly emphasize the abuse, but in fact the prosecutor made Adams' alleged opportunism a theme of her opening statement and her closing argument. Trial RP 53-60; 313, 319.

In fact, the State's harmless error argument is disingenuous. It is inconsistent with its claim that the evidence was probative of Adams' opportunism and that he was "clearly aware" of Sly's abuse of L.S. Again, the State cannot have it both ways. The evidence was remarkably prejudicial and it was irrelevant. This Court should conclude that its improper admission requires reversal of Adams' conviction.

B. CONCLUSION

For the foregoing reasons, and for the reasons argued in Adams' opening brief, this Court should reverse his convictions and remand with direction that on retrial the inflammatory and irrelevant evidence of Sly's abuse of L.S. be excluded.

DATED this 13<sup>th</sup> day of February, 2012.

Respectfully submitted:

  
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Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 13<sup>TH</sup> DAY OF FEBRUARY, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] JEFFREY DERNBACH, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] JAMEL ADAMS 348335 WASHINGTON CORRECTIONS CENTER PO BOX 900 SHELTON, WA 98584	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 13<sup>TH</sup> DAY OF FEBRUARY, 2012.

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