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DIVISION III

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STATE OF WASHINGTON

BY 
DEPUTY

No. 40226-2-II

IN THE COURT OF APPEALS - DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

ROE RAMIREZ-ESTEVEZ, Appellant

APPELLANT'S REPLY BRIEF

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- I. *The Trial Court improperly admitted inadmissible Hearsay testimony from Elizabeth Wilcox and Maria Hinojoza that failed to meet the requirements of the Excited Utterance Hearsay Exception.*

Elizabeth Wilcox and Maria Hinojoza testified about E.O.'s disclosure of the alleged rapes over the defendant's objection. Both witnesses testified about the substance of E.O.'s disclosure of being raped by Mr. Ramirez. There is no dispute from any party that the statements constitute hearsay. The question is whether the hearsay falls within the excited utterances exception. Evidence Rule 803(a)(2).

The State first asserts that "given the limited scope of the hearsay testimony, these statements were admissible under the *res gestae* exemption." RB¹ at 6. We can only respond to this argument by stating that there is simply no "Res Gestae" hearsay exception. The State cites to no authority that supports the argument that *res gestae* hearsay is a recognized exception to the hearsay rule. To make a "res gestae" hearsay exception would in effect permit any and all hearsay to be admitted since one can always make the creative argument that the out-of-court statements are necessary in order for the jury to understand the entire "transaction" of events. But more important, at trial the State argued for the admission of the hearsay statements as falling under the

¹ RB shall designate the State's "Response Brief"

“excited utterance” exception, not under a res gestae exception. As such, the trial judge admitted the statements under ER 803(a)(2) which must now be reviewed by This Court.

The second component of the State’s argument is that even if the statements are not admissible as “res gestae,” the statements fall within the ER 803(a)(2) exception because “E.O. was under the stress of the incident when asked about the sexual assaults by the school counselor and her aunt.” RB at 12. The fact that E.O. may have been “under stress” or upset when asked about the incidents is not the proper analysis.

There is no dispute that many crime victims remain upset or frightened for many hours, days and even months following the experience. *State v. Dixon*, 37 Wn. App. 867, 874 (1984). Being frightened and upset while making the statement does not meet the requisite criteria of the excited utterance exception. The utterance must be spontaneous, natural, impulsive, instinctive, and generated by an excited feeling which extends without breakdown from the moment of the event. *Dixon*, 37 Wn. App. at 872. Finally, “the more time that passes will usually increase the likelihood that the controlling stress of the event has lessened and the ability of the declarant to think and fabricate has been recovered.” *Id.*, at 873.

In our case, E.O. had approximately 2 years after the alleged incident to think about the event before discussing it with either Ms. Wilcox or her Aunt, Ms. Hinojoza. Equally important, E.O. had at least two weeks to reflect on the event from the time she apparently told her school friends about the incident up through the time she mentioned the incident to either Ms. Wilcox or Ms. Hinojoza. The facts of this case clearly establish that the hearsay testimony, as presented by both Ms. Wilcox and Ms. Hinojoza, do not meet the criteria of the excited utterance exception because the utterances were simply not spontaneous. Simply being upset and uncomfortable is insufficient to satisfy the hearsay exception.

The State further argues that even if the statements were admitted in error, the error was harmless. RB at 15. Specifically, the State asserts that “the scope of the hearsay testimony was extremely limited, and was independently confirmed by E.O.’s own testimony.” RB at 17. The State relies on *State v. Dixon*, cited above, to support its argument that any error must be deemed harmless.

The unequivocal fact is that the utterances were quite powerful in that they re-iterated to the jury, via two independent witnesses, that Roe Ramirez “raped” E.O. and that he “raped her” when they were all living together. The fact that the incident was explicitly described as a “rape” cannot be

characterized as insignificant since the word “rape” pretty much sums up the crime charged against Mr. Ramirez. The utterance “he raped me” is about as damaging as you can get.

The Division I Court of Appeals in Dixon found that the trial court erred in its excited utterance analysis, but found the error to be harmless. However, the harmless error reasoning in Dixon is distinguishable from the instant case because in Dixon the Court found that the testimony of the complaining witness went un-impeached whereas the testimony of the defendant was impeached by witnesses other than the victim. Dixon, 37 Wn. App. at 874.

Even assuming that E.O.’s testimony went un-impeached, there is nothing in the record to make a finding that the defendant’s testimony was impeached in any way by any witness, other than perhaps by the alleged victim. In our case, both the alleged victim and the defendant testified. Mr. Ramirez testimony was short and to the point-- he flat out denied having any sexual contact with E.O. in any way, shape or form. The State did not present any witness to impeach Mr. Ramirez’s testimony. In essence, and unlike Dixon, the case boiled down to the word of E.O. versus the word of Mr. Ramirez.

Finally, the State's argument that Dr. Davis's medical testimony about observable hymen notches effectively impeached Mr. Ramirez is without merit. That is because Dr. Davis also testified that the presence of notches "does not always mean sexual abuse," which can be consistent with the denial defense. Accordingly, the presence of notches, or trauma to the hymen, does not in itself impeach a denial of sexual penetration.

Moreover, the error is not cured because the hearsay is "independently confirmed" by the complaining witness. Even the *Dixon* ruling made it clear that the victim's testimony confirming the hearsay will not, in itself, cure the error:

Care must be exercised in this area because in those cases where it is the victim's word against that of the defendant, the State, when a statement in complete detail is admitted as an excited utterance, gets the victim's version before the jury twice—once through the direct testimony of the victim and a second time through the admission of the written statement or the testimony of a witness to whom the victim related the details of the offense.

Dixon, at 874.

Accordingly, without evidence that Mr. Ramirez was impeached, the error of admitting hearsay testimony through two independent witnesses stating that Mr. Ramirez "raped" E.O. cannot be considered harmless error. Reversal on this error alone is required.

- II. *The prior statement E.O. made to Detective Kolb about the alleged rapes served no relevant purpose other than to provide cumulative testimony to the jury in order to bolster the credibility of E.O. which is improper under Evidence Rule 801(d)(1).*

The challenged prior “consistent” statements involve E.O.’s statements to detective Kolb describing the alleged sexual assaults. We presented two arguments in support of our claim of error. First, defense counsel at trial did not “open the door” during cross examination of E.O. by impeaching E.O.’s accusations such that it would then be appropriate to permit the prior consistent statements to serve as “rebuttal” evidence to the inference of fabrication. Second, even if defense counsel’s examination created an inference that E.O. was making up the accusations, the “prior consistent statement” was made during the period of time when she had the motive to fabricate—specifically being made after the initial disclosure of abuse that was intended to “distract” from her poor grades and to further gain attention.

The State argues that there was no error in the admission of E.O.’s prior statements to Detective Kolb. RB at 18. The State first asserts that the evidence was properly admitted because the challenged statements “were first introduced by defense counsel on cross examination in an attempt to suggest fabrication.” *Id.* This is not accurate. The defense never introduced or

offered the victim interview with detective Kolb. In fact, the defense emphatically objected to its admission. Making reference during cross examination to prior statements made during a victim interview does not justify the admission of the interview into evidence.

The State claims that the nature, scope and duration of the defense's cross examination creates an inference of fabrication with the suggestion that the rape accusations were intended to "distract from poor grades and gain attention." RB at 19. The case law is clear that cross examining the witness in order to challenge with witness's credibility does not "open the door" to the introduction of prior consistent statements. *State v. Harper*, 35 Wn. App. 855, 858 (1983). For example, in *Harper*, the defense examination elicited testimony that the witness had lied in the past and further elicited testimony that the allegations of sexual abuse were motivated by the perception that the defendant had been an "unjust disciplinarian." *Id.* The nature, duration, and scope of this form of cross examination did not open the door to the admission of prior consistent statements.

Similarly in our case, at most defense counsel's cross examination merely suggested to the jury that the motive behind disclosing the abuse allegations was based on the intent to distract from poor grades and to further gain attention. Even if such were true, this suggestion does not necessarily

mean that E.O. was lying. All the examination does is present a theory as to what prompted E.O. to make the disclosure. The jury might have believed that E.O. would have continued to suppress the abuse, but that the pressures of poor grades and feelings of being neglected convinced her that now would be the right time to tell others about what happened. Counsel's cross examination strategy was not to get E.O. to expressly admit that she was lying about the abuse. But instead the cross examination strategy was intended to raise "reasonable doubt" in the minds of the jury by focusing on the timing of disclosure and her ability to recall details about to the number of times the alleged abuse occurred. Under the ruling and reasoning of *State v. Harper*, cited above, this cross examination strategy aimed at challenging the credibility of E.O.'s disclosure does not, in itself, justify the admission of prior consistent statements that merely serve to duplicate the testimony of E.O.

Even if This Court decides that defense counsel's cross examination created an express or implied charge of fabrication, the admission of the prior consistent statements to Detective Kolb is still reversible error. The reason is because the "charged fabrication" developed on or about April 23, 2009, when E.O. disclosed to Ms. Wilcox the sexual abuse in order to "distract" from poor grades and gain attention. If such is the case, then the statements to Detective

Kolb on April 28, 2009, clearly were prior statements made during the period of the charged fabrication where the motive to lie would still exist. With that, the time of the prior consistent statements (being April 28th 2009) necessarily means that the prior statements were tainted by a motive to fabricate. The prior statements are therefore inadmissible.

III. *Each of the five to-convict instructions were constitutionally defective in that they failed to distinguish each of the separate charges against Mr. Ramirez.*

Each of the to-convict instructions (Court's instructions 11-15) allege the same charging period of "on or between January 1, 2006 and April 23, 2009." The to-convict instructions also use the same language for each of the 5 charges except the charged counts are re-numbered respective to each subsequent instruction. CP 69. We are challenging the instructions because they fail to instruct the jury that each of the charged 5 counts must be "separate and distinct" from one-another. Simply instructing the jury that they must find that each charged count occurred "on an occasion different than" the other named counts does not sufficiently protect the defendant from a double jeopardy violation. Acts that occur on separate occasions do not necessarily mean that the acts are distinct from one-another. And in order to protect against a double jeopardy violation, the trial court must instruct the jury to

find that each charged count is “separate and distinct” from one-another.

State v. Carter, 156 Wn. App. 561 (2010).

The State argues that “the totality of the circumstances in which the jury instructions were conducted provided adequate protection against double jeopardy, based on standards articulated in the relevant case law.” RB at 25. However, the case law giving guidance on to-convict instructions that violate double jeopardy do not involve a “totality of the circumstances” analysis. In fact, a “totality of the circumstances” analysis is immaterial if the trial court submits incorrect jury instructions on how “to convict” the defendant.

In State v. Carter, the defendant challenged the “to-convict” instructions on multiple charges of sexual assault because the trial court did not give a “separate and distinct act” instruction or otherwise require the jury to base its verdict on each conviction on a “separate and distinct” underlying act. State v. Carter, 156 Wn. App. at 567. Specifically, each of the “to-convict” instructions essentially mirrored the same charging period (being between March 1, 2007 through May 6, 2007). Since there was no language in the jury instructions requiring a finding of “distinct” acts, the instructions were determined to be constitutionally defective.

The State, in Carter, presented a counter-argument similar to what the prosecutor in our case is submitting. That is, the State in Carter argued

that “Carter’s argument fails because the charging documents, evidence presented, jury instructions, and closing arguments all made clear that each count required proof of a separate act.” *Id.*, at 566. This Division rejected that argument where the “two convict” instructions failed to separate and *distinguish* each act of sexual abuse. *Id.*, at 567-568. Although the trial judge gave a unanimity instruction, “no instruction conveyed the requirement that the jury find a ‘separate and distinct act’ for each count of child rape . . . The jury instructions did not make the relevant legal standards manifestly apparent to the average juror and exposed Carter to the possibility of multiple convictions for the same criminal act.” *Id.*, at 567-568. Without the “separate and distinct act” language in the “to convict” jury instructions, the instructions to the jury violated the protection against Double Jeopardy notwithstanding the closing arguments of counsel and the existence of the unanimity instruction.

In the instant case, just as in the *Carter* case, the State relied on *State v. Ellis*, 71 Wn. App. 400 (1993), to support its argument that the “to convict” jury instructions were sufficient. RB at 27. In *Ellis*, the Court of Appeals was satisfied with the language in the “to-convict” instructions for multiple counts of child molestation and child rape. The instructions required the jury to find that the conduct for the respective count occurred “on a day other than” the

other counts. *State v. Ellis*, 71 Wn. App. at 402. However, what distinguishes *Ellis* from our case is that the “to convict” jury instructions in *Ellis* also gave different dates. *Id.* Therefore the reviewing court was satisfied that the “separate and distinct act” requirement had been met. *Id.*

The two convict instructions in our case presented the jury with the exact same time period of being “on or between January 1, 2006, and April 23, 2009.” The instructions failed to require a finding that the conduct in each count must be “*distinct*” from one-another. Accordingly, Mr. Ramirez’s protection against Double Jeopardy was violated.

IV. *Dr. Davis’s testimony invaded the province of the jury when she testified that the physical examination of E.O. was consistent with penetrating trauma and further consistent with E.O.’s medical history. Because the medical history documented the claim of being raped by Mr. Ramirez, the testimony amounted to an improper opinion that the cause of the penetrating trauma was consistent with being raped.*

The defense objected to Dr. Davis testifying that the hymeneal notches observed during the physical examination were consistent with the medical history of E.O. RP 595. The medical history documented E.O.’s claim of being raped specifically by Mr. Ramirez. Exhibit 2. Over the defense’s objection, Dr. Davis testified that the hymeneal notches were indicative of penetrating trauma. RP 594. Therefore the opinion that the physical examination was consistent with the medical history equates to an opinion that

the notches were caused by sexual penetration. We submit this opinion invades the province of the jury.

The State argues that Dr. Davis' testimony was permissible "as it falls within the ER 803(a)(4) exemption for hearsay pertaining to medical diagnosis." RB at 34. However, ER 803(a)(4) does not permit witnesses to give opinions that invade the province of the jury. The issue presented is not whether Dr. Davis' testimony is admissible under the medical records exception. Instead, the question is whether her opinions invaded the province of the jury. And there is no authority that would permit the State to elicit opinion testimony from a sexual assault physician that the complaining witness's claims of rape are credible. We submit Dr. Davis' testimony crossed that line and prevented Mr. Ramirez from having a fair trial.

The State relies heavily on the State Supreme Court case of State v. Kirkman, 159 Wn.2d 918 (2007), to support its position that Dr. Davis' testimony was appropriate. In Kirkman, the prosecutor asked the sexual assault examiner/expert about her opinions on the result of the victim's physical examination. State v. Kirkman, 159 Wn. 2d 918, 928 (2007). Defense counsel *did not* object, unlike the instant case where Ramirez objected to the expert's testimony. The expert in Kirkman responded as follows:

I'm trying to think of how to phrase this. I found nothing on the physical that would make me doubt what she'd said, or was there anything that would necessarily confirm it. There was no damage, it was a normal examination.

Id. at 928.

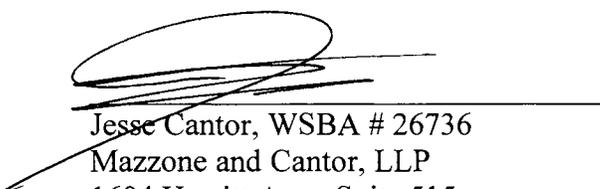
In our case, we can distinguish Kirkman in two important ways. First, unlike Kirkman, Mr. Ramirez made a timely objection to Dr. Davis's testimony. Comparing the opinion testimony in Kirkman with the opinion testimony in the instant case, one can certainly draw the conclusion that the Kirkman defense strategically chose not to object. This leads to the second distinction, being that the expert's opinion in Kirkman was potentially helpful to the defense. That is, the opinion was neutral in that it gave the defense the evidence to argue that the results were "normal" and that there was nothing to confirm the victim's account of abuse. Dr. Davis, on the other hand, gave opinion testimony that *bolstered the credibility* of E.O. Dr. Davis testified that the physical examination (i.e., the notches and observations of penetrating trauma) was consistent with E.O.'s medical history (i.e., the interview where E.O. claimed that she was "raped" by Roe Ramirez). The only conclusion that the jury can draw from this testimony is that in her expert opinion, and based on the physical examination, Dr. Davis finds E.O.'s story of being raped credible.

Dr. Davis' opinion invaded the province of the jury by improperly bolstering the credibility of the alleged victim. And defense counsel made a timely objection to this very prejudicial opinion testimony. Accordingly, a new trial should be granted.

CONCLUSION

For the reasons presented in this Reply, and further presented in our opening brief, the Appellant respectfully requests reversal with an order remanding This Case for a new trial. Alternatively, we respectfully request dismissal of all counts but count 1.

DATED: This 31st day of AUGUST, 2010



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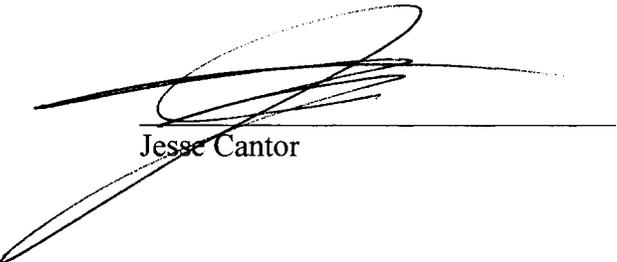
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CERTIFICATE OF SERVICE

I, Jesse Cantor, attorney for the Appellant, hereby certify that on This 1 Day of SEPTEMBER, 2010, I served a true and correct copy of the foregoing opening brief by U.S. First Class Mail, correct postage paid, on the following parties:

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