NO. 45124-7-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JEREMIAH CROWELL,

Appellant.

BRIEF OF APPELLANT

John A. Hays, No. 16654
Attorney for Appellant

1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084

TABLE OF CONTENTS

Page

A. TABLE OF AUTHORITIES iv

B. ASSIGNMENT OF ERROR

1. Assignment of Error 1

2. Issue Pertaining to Assignment of Error 2

C. STATEMENT OF THE CASE

1. Factual History 3

2. Procedural History 10

D. ARGUMENT

I. THE TRIAL COURT'S RULING ALLOWING THE STATE TO ELICIT UNFAIRLY PREJUDICIAL AND INADMISSIBLE HEARSAY EVIDENCE OVER DEFENSE OBJECTION DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT 16

II. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN THE STATE ELICITED INADMISSIBLE HEARSAY REPEATING THE ALLEGATIONS OF THE COMPLAINING WITNESS DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNDER UNITED STATES CONSTITUTION, SIXTH AMENDMENT 23

E. CONCLUSION 29

F. APPENDIX

1. Washington Constitution, Article 1, § 3 30

2. Washington Constitution, Article 1, § 22 30

3. United States Constitution, Sixth Amendment 31

4. United States Constitution, Fourteenth Amendment 31

5. ER 803 21

TABLE OF AUTHORITIES

Page

Federal Cases

Bruton v. United States,
391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968) 16

Church v. Kinchelse,
767 F.2d 639 (9th Cir. 1985) 24

Strickland v. Washington,
466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984) 24

State Cases

State v. Acosta, 123 Wn.App. 424, 98 P.3d 503 (2004) 17, 18

State v. Baldwin, 109 Wn.App. 516, 37 P.3d 1220 (2001) 17

State v. Brown, 127 Wn.2d 749, 903 P.2d 459 (1995) 20, 21

State v. Chapin, 118 Wn.2d 681, 826 P.2d 194 (1992) 20

State v. Cobb, 22 Wn.App. 221, 589 P.2d 297 (1978) 24

State v. Dixon, 37 Wn.App. 867, 684 P.2d 725 (1984) 25, 27

State v. Ford, 137 Wn.2d 472, 973 P.2d 472 (1999) 16

State v. Johnson, 29 Wn.App. 807, 631 P.2d 413 (1981) 24

State v. Kendrick, 47 Wn.App. 620, 736 P.2d 1079 (1987) 17

State v. Neal, 144 Wn.2d 600, 30 P.3d 1255 (2001) 17

State v. Sua, 115 Wn.App. 29, 60 P.3d 1234 (2003) 19

State v. Swenson, 62 Wn.2d 259, 382 P.2d 614 (1963) 16

Constitutional Provisions

Washington Constitution, Article 1, § 3 16

Washington Constitution, Article 1, § 22 . . . . . 23, 28

United States Constitution, Sixth Amendment, ... 23, 24, 28

United States Constitution, Fourteenth Amendment 16

Statutes and Court Rules

ER 403 . . . . . 16, 18

ER 801 19

ER 802 19

ER 803 19

Other Authorities

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) 17

ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court's ruling allowing the state to elicit unfairly prejudicial and inadmissible hearsay evidence over defense objection denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

2. Trial counsel's failure to object when the state elicited inadmissible hearsay repeating the allegations of the complaining witness denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

Issues Pertaining to Assignment of Error

1. In a case of alleged rape in which no evidence supports the state's claim other than the inconsistent allegations of the complaining witness, does a trial violate a defendant's right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it allows the state to call five separate witnesses to tell the jury what the complaining witness told them had happened to her?

2. In a case of alleged rape in which no evidence supports the state's claim of rape other than the inconsistent allegations of the complaining witness, does a trial counsel's failure to object when the state elicits inadmissible hearsay on multiple occasions repeating those allegations deny a defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment when the jury would have acquitted but for the admission of that improper evidence?

STATEMENT OF THE CASE

Factual History

During the evening of November 30, 2012, 15-year-old JR of Carson, Washington, went to the Christmas parade in Stevenson with her mother Sara Slack, her "aunt" Kendra Latimer, and Kendra's two young nieces. RP II 62-65.[1] Although JR and her mother are not related to Kendra, they were all such close friends that JR and her mother consider Kendra her "aunt." *Id.* After the parade Kendra asked JR if she wanted to spend the weekend with her and her two nieces; Kendra said she did. *Id.* She had done so on many prior occasions. RP II 23-26. As a result after the parade she went with Kendra and her two young nieces to Kendra's small double-wide trailer in Carson. RP I 175-176, 182; RP II 66-67. After they arrived 21-year-old defendant Jeremiah Crowell showed up with pizza and spent the evening with them watching television. RP II 68-69. He was driving a small car loaned to him by a friend of his named Lori Thayer. RP I 147-152.

Eventually Kendra's two nieces fell asleep and she and JR put them on Kendra's bed for the evening. RP II 74-75. Kendra, who suffers from

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[1]The record on appeal includes three separate volumes of verbatim reports of the jury trial held on May 28th, 29th and 30th, 2013. Since the court reporter did not number them continuously, they are referred to herein as "RP I [page #]," "RP II [page #]," and "RP IIII [page #]," respectively. The remaining volumes of verbatim reports are referred to by the date of the hearing transcribed.

insomnia, then spent the evening and early morning hours working her in-home job as a polysomnographic technologist. RP I 195. JR and the defendant remained in the living room watching television and talking. RP I 195-197; RP II 77. According to Kendra she was awake all night working, she could see into the living room and neither JR nor the defendant left the trailer. RP I 183-187. In fact, she eventually went back out into the living room in the morning where she found JR asleep on the couch and the defendant asleep in a chair. RP I 185-186, 197.

By contrast, according to JR at some point later in the evening or early in the morning the defendant asked her if she wanted to go down to the "blue hole," which was a swimming place on the river. RP II 84-88. She responded that she did and so the two of them left in the small car the defendant had borrowed from Lori Thayer. *Id.* JR claimed that once they got to their destination they found a truck parked where they were going to stop. RP II 90. As a result, the defendant drove a short distance away and parked on a spur road. *Id.* Once parked, the defendant asked if she wanted to get in the back seat so they did. RP II 93-94. The defendant then repeatedly ordered her to take her clothes off and finally took them off her after she refused to comply. RP II 96-97. At this point he took his own clothes off and forced her to put her mouth on his penis. RP II 96-112, 113-117. He then had intercourse with her without her consent. RP II 118-122. Afterwards he

put his clothes back on and told her to get dressed,which she did. *Id.* They then got back in the front seat where the defendant smoked a cigarette before he drove them back to Kendra's trailer. RP II 124-128.

JR was specific about the following facts concerning the incident: (1) that the defendant had not kissed her or she him, (2) that she had initially physically resisted but later complied with his demands because she was afraid of him, (3) that she had repeatedly said "no" and told him to stop during the entire encounter, and (4) that she did not consent to any contact with the defendant at all. RP II 96-97, 106-128.

Once back at Kendra's trailer JR took a bath and put her clothes in the hamper to be washed. RP II 127-128. During this time she knew that the defendant was present in the trailer. *Id.* According to both JR and Kendra, once everyone got up on Saturday the defendant left and they spent the day cleaning the trailer, doing the laundry and spending time with Kendra's two nieces. RP I 198-199; RP II 133-141. The next day on Sunday they all "hung out" at the trailer and watched television with the defendant who had come over for a while. RP II 141. The next morning Kendra took JR to Stevenson High School so she could attend her classes. RP II 141.

Once at school JR spoke at different times with three friends during the day. RP II 143-151, 172-185, 185-190, 190-196. The first was Brenda Frohs. RP II 185-190. According to Brenda she and JR had a morning

English class together and that the Monday after the parade JR told her that she got drunk, that she'd got kicked out of her house, that her Aunt was going to buy her a truck and that she had sex with someone. RP II 186-187. When Brenda asked about how it happened JR told her she had sex with someone but could not tell her his name because he was older. *Id.* JR then told her it was "Jeremiah." *Id.* Brenda stated that JR seemed happy and proud of what she had done. *Id.* In fact she had a smile on her face when she related what happened and she appeared excited. *Id.*

The second person with whom JR spoke was Stacy Bondurant. RP II 172-185. That Monday after the parade Stacy had a shop class with JR. RP II 172. During the class Stacy asked JR about her weekend and JR told her excitedly that she had "lost her virginity" to Jeremiah. RP II 173-174. Stacy reported that JR's mood was happy and excited when she told her this and that she had a smile on her face. *Id.* Stacy also remembered that a few days later at school JR asked to borrow Stacy's cell phone and that JR used it to text a message to someone saying that she had lied about anything happening between her and "Jeremiah." RP II 176.

The third friend with whom JR spoke that Monday was Maddison Rankin. RP II 190-196. Maddison stated that during the day JR told her that she'd had sex with someone but couldn't tell her who because he was "older." RP II 191-192. Eventually JR told Maddison that the person was

Jeremiah. *Id.* According to Maddison JR appeared quite proud of the fact that she had sex. *Id.* By contrast, the next day she claimed that he had raped her. *id*

At some point during that Monday the defendant went over to Kendra Latimer's trailer complaining that he had received text messages from a friend stating that JR was telling people that she and the defendant had sex over the weekend and that it was untrue. RP I 209-210. According to Kendra, JR had repeatedly made false allegations in the past about having been sexually involved with various persons. RP I 213-215. Kendra then texted and called JR's mother Sara, told her that JR was making up stories about having been sexually involved with Jeremiah and that she knew that nothing had happened. RP I 191-194; RP II 28-29. Sara responded that she would talk with JR when she returned home from school. *Id.*

Once JR returned home from school her mother Sara confronted her about Kendra's call. RP II 35-36. JR responded by crying and running into her bedroom. *Id.* Although she would not tell her mother or her mother's boyfriend Chris Smiley what she was claiming had happened, she did spend some time writing out a statement for them. RP I 129-130 ; RP II 38-40. In that statement she claimed that the defendant had taken her out to the "blue hole" on Friday night and raped her. RP II 150. After reading this statement Sara and Chris did two things. First they called the sheriff's office. RP I

134; RP II 47. Second, they ripped up the statement ostensibly because they did not want to get Kendra into trouble for providing JR with alcohol. RP II 150.

A little while later that evening Deputy Mike Hepner responded to JR's home and eventually spoke with JR, whom he stated was crying and upset. RP I 59-65. Although she wouldn't say anything in front of her mother, she did outline for him her claim that the defendant had driven her down to the "blue hole," that he had forced her to perform oral sex on him, and that he had then anally raped her. RP I 65-75, 77-78. After taking this statement Deputy Hepner made a report and passed it on to a detective by the name of Deputy Tim Garrity. RP I 69-70.

After receiving the report Deputy Garrity arranged to have JR and her mother Sara come to the Sheriff's office for interviews. RP I 84-88. According to Deputy Garrity, during her interview JR claimed that while at her "Aunt" Kendra's house on the night of the Christmas parade she had drank alcohol without her aunt's knowledge, that she had voluntarily gone to the "blue hole" with the defendant, that once at that location he had forced her to perform oral sex on him and that he had then vaginally raped her. RP I 93-95. However, she did not claim any injuries from the incident. RP I 97.

At Deputy Garrity's suggestion JR later went for a physical examination by Dr. Linnea Wittack. RP I 106. Dr. Wittack initially

interviewed JR and listened to her allegations of forced oral sex and vaginal rape. RP I 222-224. She also asked JR whether or not she had been physically injured and JR denied any injuries other than an little pain. RP I 227-228. Finally, Dr. Wittack did an examination of JR's external genitalia. RP I 228. Ultimately Dr. Wittack found no evidence to either support or refute JR's claims. RP I 233.

During the investigation in this case Deputy Garrity did not go to the "blue hole" to see if he could find any evidence or information, he did not attempt to retrieve the clothes JR had been wearing (because they had been washed), and he did not attempt to interview any of JR's friends from the high school. RP I 108-112. He did retrieve a number of taped calls that the defendant made to Kendra while in jail in which the defendant spoke about the allegations against him. RP I 102-103.

However he did interview Lori Thayer about the defendant's use of her car. RP I 101. Lori explained that she was very particular about keeping her car clean, that she had allowed the defendant to use it over the weekend, and that the defendant had returned it on time. RP I 147-150. She then inspected and observed that it was in the same condition upon return, that there was no mud on it, that nothing had been disturbed in the back seat including her children's car seats, and that no one had smoked in the vehicle. RP I 157-162. According to Lori she is allergic to cigarette smoke and that

if anyone had smoked in the car she would have been able to tell. RP I 159-162,

Procedural History

By information filed January 3, 2013, and amended on April 22, 2013, the Skamania County Prosecutor charged the defendant Jeremiah Crowell with one count of Third Degree Rape of a Child, one count of Second Degree Rape and a count of Second Degree Assault with sexual motivation. CP 1-2, 67-69. The case later came on for trial before a jury with the state calling eight witnesses, including JR, her mother Sara, Sara's ex-boyfriend Chris Smiley, Kendra Latimer, Lori Thayer, Dr. Wittack, and the two deputies involved in the case. RP I 59, 80, 120, 147, 175, 216, 234; RP II 19, 56. The defense then called four witnesses including Stacy Bondurant, Brenda Frohs, and Maddison Rankin. RP II 172, 185, 190, 196. These witnesses testified to the facts contained in the preceding Factual History. *See* Factual History.

In addition, during the trial the state elicited six separate versions of JR's claims of sexual assault. RP I 59-80, 80-120, 120-147, 216-235; RP II 19-55, 56-171. The jury heard the first rendition of JR's claims from Deputy Mike Hepner when he testified to the following on direct examination concerning his initial call to Sara Slack's house: (1) that Sara Slack and Chris Smiley told him that a person by the name of Jeremiah had raped Sara's 12-year old daughter a few nights previous, (2) that JR had then stated that

something had happened on the night of the 30th, (3) that JR then said the defendant had driven her to a place called the "blue hole" where he forcibly took her clothes off, that he had forced her to put her mouth on his penis, and that he had anal sex with her. RP I 63, 66-67, 69-70, 71-73. The defense did not object to the admission of any of this evidence. *Id.*

The jury heard the second rendition of JR's claims of sexual assault during the testimony of Deputy Timothy Garrity. RP I 80. While on direct the state elicited the fact that Deputy Garrity had conducted a videotaped interview with JR about a week after the alleged incident. RP I 84. The court then allowed the state to play that taped interview for the jury. RP I 92. In that recorded interview the jury heard JR claiming that (1) the defendant had driven her down to the river, (2) that she had got in the back seat of the car at the defendant's request, (3) that he forcibly took her clothes off, (4) that he forced her to "give him a blow job," (5) that "he tried fingering me," and (6) that she had kept telling him to stop but he refused. RP I 93-95. The defense did unsuccessfully object to this evidence as inadmissible hearsay and cumulative. RP I 93.

The jury heard the third rendition of JR's claims of sexual assault from Chris Smiley, Sara Slack's boyfriend of the time. RP I 120. Mr. Smiley told the jury that after Sara confronted JR about Kendra's allegations JR started crying and refused to say anything in front of her mother. RP I 122-

126. However, when her mother left the room she still wouldn't say anything so he had her write down her allegations. RP I 129-130. Without objection from the defense Chris Smiley then told the jury that JR had written the following: (1) that she and the defendant had been drinking at Kendra's house, that the defendant had then driven her to the "blue hole" by the river, (2) that they had got into the back seat of the car, that they had started "making out," that things got too "hot and heavy" so she told him to stop, (3) that he refused to stop and forced her to have intercourse with him, and (4) that she was afraid of him. RP I 132-134. The defense did not object to the admission of any of this evidence as either inadmissible hearsay or cumulative. *Id.*

The jury heard the fourth rendition of JR's claims of sexual assault from Dr. Linnea Wittack. RP I 216. During her testimony Dr. Wittack told the jury that she interviewed JR prior to performing an external examination of her genitalia. *Id.* During that interview JR told her that (1) the defendant had forced her to have oral sex with him, (2) that the defendant had forced her to have vaginal intercourse with him, (3) that it happened on November 30, 2012, and (4) that she had been uninjured. RP I 222. The defense made no objection to this evidence either as hearsay or as cumulative. *Id.*

JR's mother Sara Slack gave the jury the fifth repetition of JR's claims when she told them what JR wrote about her alleged abuse. RP II 19-

55. She testified that on December 1st Kendra texted and said that JR wouldn't be allowed to come over any more because she was making up allegations against Kendra's friend Jeremiah Crowell. RP II 28-29. She then called Kendra and conversed on a speaker phone with both Kendra and the defendant. RP II 33. Sara believed their claims that JR's allegations were false. *Id.* As a result she later confronted JR. *Id.* When she did she was mad and irate. RP II 35-36. JR responded by bursting into tears and running into her room. *Id.* Eventually JR wrote out her allegations. RP II 37-38. Sara told the jury that JR wrote the following about her claims: (1) that Kendra had given her alcohol to drink the prior weekend, (2) that Jeremiah took her to the "blue hole," (3) that Jeremiah had sex with her, and (4) that while she did not state that she consented she also did not state that she was forced. RP II 38-40. The defense made no objection to this evidence. *Id.*

After these five renditions of JR's claims the jury finally got to hear from JR herself. RP II 56-171. In her testimony she claimed the following: (1) that while at her "Aunt" Kendra's house on the Friday evening of the parade she drank alcohol provided by the defendant, who was watching television with her, (2) that after Kendra went to sleep the defendant drove her down to the "blue hole," (3) that he parked on a turnout road by the "blue hole" because a truck was already parked there, (4) that she got in the back seat of the car because the defendant asked her to do so, (5) that the defendant

repeatedly told her to take off her clothes and then finally took them off himself when she continued to refuse, (6) that he put his head between her legs and licked her vagina, (7) that he then took his clothes off, (8) that he forced her to put her mouth on his penis, and (9) that he then had intercourse with her. RP II 80-122.

In addition to these witnesses, the state also called a convicted sex offender by the name of Jayson May to testify that while in jail the defendant confessed to him that he had engaged in consensual sexual intercourse with JR. RP I 234-246. At the time Mr. May was in the jail after having failed a polygraph administered to verify his compliance with a SOSSA sentence the court had previously given him. *Id.*

Following JR's testimony the state rested its case and the defense then called Stacy Bondurant, Brenda Frohs and Maddison Rankin to testify concerning JR's statements the next Monday at school about what had happened. RP II 172, 185, 190. The defense also called Deputy Garrity for clarification on the parking area near the "blue hole." RP II 198-201. The state then presented brief rebuttal, after which the court instructed the jury. RP II 198-201, 204-220, 221; CP 159-188. Although neither party voiced any objections to the instructions given, the defense did take exception to the court's refusal to give a defense on an affirmative defense that the defendant

had reasonably believed JR's claims that she was 16-years-old. RP 204-204.[2]

At this point the court read the jury the instructions, both parties presented closing argument and the jury retired for the remainder of the day to deliberate. RP II 260-263. The next day the jury recommenced deliberations and asked that the court replay the tape of one of the defendant's recorded jail phone conversations with Kendra concerning the allegations JR had made. RP III 1-2. The court agreed and the jury returned to court to again listen to the recording. RP III 2-4. They then retired for further deliberations. *Id.* Eventually the jury returned verdicts of "guilty" to third degree rape of a child, "not guilty" to second degree rape, and "not guilty" to second degree assault with sexual motivation. CP 192-196. The court later sentenced the defendant within the standard range on his conviction, after which the defendant filed timely notice of appeal. CP 246-263, 266-287.

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[2]During her testimony JR stated that during the evening she had repeatedly told the defendant that her sixteenth birthday would be next month. RP II 73. The defense argued that the defendant could have misheard this as a claim that she was sixteen at the time. RP II 204-220.

ARGUMENT

I. THE TRIAL COURT'S RULING ALLOWING THE STATE TO ELICIT UNFAIRLY PREJUDICIAL AND INADMISSIBLE HEARSAY EVIDENCE OVER DEFENSE OBJECTION DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). It also guarantees a fair trial untainted by unreliable, prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999). This legal principle is also found in ER 403, which states that the trial court should exclude otherwise relevant evidence if the unfair prejudice arising from the admission of the evidence outweighs its probative value. This rule states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative

value, a court should consider the importance of the fact that the evidence is intended to prove the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987) . In Graham's treatise on the equivalent federal rule, it states that the court should consider:

> the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

For example, in *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503 (2004), the defendant was charged with first degree robbery, second degree

theft, taking a motor vehicle, and possession of methamphetamine. At trial, the defense argued diminished capacity and called an expert witness to support the claim. The state countered with its own expert, who testified that the defendant suffered from anti-social personality disorder but not diminished capacity. In support of this opinion, the state's expert testified that he relied in part upon the defendant's criminal history as contained in his NCIC. During direct examination of the expert, the court allowed the expert to recite the defendant's criminal history to the jury. Following conviction, the defendant appealed arguing in part that the trial court had erred when it admitted his criminal history because even if relevant it was more prejudicial than probative under ER 403.

On review the Court of Appeals first addressed the issue of the relevance of the criminal history. The court then held:

> Testimony regarding unproved charges, and convictions at least ten years old do not assist the jury in determining any consequential fact in this case. Instead, the testimony informed the jury of Acosta's criminal past and established that he had committed the same crimes for which he was currently on trial many times in the past. Dr. Gleyzer's listing of Acosta's arrests and convictions indicated his bad character, which is inadmissible to show conformity, and highly prejudicial. ER 404(a). And the relative probative value of this testimony is far outweighed by its potential for jury prejudice. ER 403.

State v. Acosta, 123 Wn.App. at 426 (footnote omitted).

In the case at bar, the court denied the defendant a fair trial when, over

defense objection that the evidence was inadmissible hearsay and cumulative, it allowed the state to play Deputy Garrity's video-taped interview with JR to the jury. In that video-taped interview JR repeated the allegations she orally made to Deputy Hepner, Deputy Garrity, and Dr. Wittack, and which she made in writing to her mother Sara Slack and her mother's then boyfriend Chris Smiley. As the following explains the video tape of the interview between Deputy Garrity and JR was both inadmissible hearsay and inadmissible as cumulative.

Under ER 802, hearsay "is not admissible except as provided by these rules, by other court rules, or by statute." Under ER 801(c) hearsay is defined as follows:

> (c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

ER 801(c).

The phrase "other than one made by the declarant while testifying at the trial or hearing" includes an out-of-court statement made by an in-court witness. *State v. Sua*, 115 Wn.App. 29, 60 P.3d 1234 (2003).

Numerous exceptions to the general rule on the inadmissibility of hearsay are found in ER 803 and ER 804. The only one that could potentially apply in the case at bar is that of "excited utterance" listed in ER 803(2). Under ER 803(2), an "excited utterance," is a "statement relating to a

startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Given the particular indicia of reliability that surrounds the lack of opportunity to reflect or speak from self-interest, "excited utterances" are not excluded by the hearsay rule, and can be received as substantive evidence. *State v. Brown*, 127 Wn.2d 749, 903 P.2d 459 (1995). In *State v. Chapin*, 118 Wn.2d 681; 686, 826 P.2d 194 (1992), the court, quoting Wigmore, states the proposition as follows:

> "[U]nder certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control." The utterance of a person in such a state is believed to be "a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock," rather than an expression based on reflection or self-interest.

State v. Chapin, 118 Wn.2d at 686 (quoting 6 J. Wigmore, Evidence § 1747, at 195 (1976)).

For example, in *State v. Brown, supra*, the defendant was convicted of first degree rape, and appealed, arguing, *inter alia*, that the trial court erred when it admitted a "911" tape into evidence and played it to the jury. Specifically, the defendant argued that since the alleged victim admitted that she had decided to lie in her statement to the "911" operator, and in fact did then lie about a portion of what she said during the "911" call, it could not be an excited utterance, regardless of how excited or upset she sounded on the tape. However, the Court of Appeals disagreed, and affirmed.

Upon further review, the Washington Supreme Court reversed, stating as follows:

> [T]he "key determination is 'whether the statement was made while the declarant was still under the influence of the event to the extent that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.'" *State v. Strauss*, 119 Wn.2d 401, 416, 832 P.2d 78 (1992) (quoting *Johnston v. Ohls*, 76 Wn.2d 398, 406, 457 P.2d 194 (1969)). It is thus apparent that T.G.'s testimony that she had the opportunity to, and did in fact, decide to fabricate a portion of her story prior to making the 911 call renders erroneous the trial court's conclusion that the content of her call was admissible as an excited utterance. Therefore, the 911 tape is to be excluded on remand.

State v. Brown, 127 Wn.2d 758-59.

In the case at bar JR's taped interview was given more than a week after the alleged event and after she had repeated her claims on a number of occasions. Thus, by the time she gave the taped interview a significant time had passed during which she could reflect upon the substance of her statement. This time for review and reflection far exceeded that from *Brown*. In addition, in *Brown* the complaining witness had admitted that she had been untruthful in the 911 call. Although JR in this case did not take the stand and admit such deception, according to one witness she had admitted that she had lied about the incident. *See* Testimony of Stacy Bondurant at RP II 176. In addition, JR's various renditions of what happened included a number of glaring inconsistencies on critical issues as opposed to minor facts. The following gives a partial list of those inconsistencies.

First, in JR's alleged written version of the events, as related by her mother's boyfriend and her mother, she stated that she and the defendant had been making out the back seat of the car, that things got too hot and heavy, and that she had told the defendant to stop. By contrast, in every other version of the events and during her trial testimony she adamantly denied that the defendant had ever kissed her or even tried to kiss her. Second, in her rendition to Officer Hepner she specifically told him that the defendant had anally penetrated her. In none of her other renditions of events did she claim anal penetration. Third, while on the witness stand JR claimed that during the sexual assault the defendant put his head between her legs and licked her vagina. This was the only version of the six given to the jury in which she claimed that the defendant had performed oral sex on her. Fourth, JR denied during cross examination that she had ever indicated to any of her friends at school that she had voluntarily engaged in any sexual contact with the defendant. By contrast three separate friends testified that on the Monday after the parade JR bragged to them that she had engaged in sexual contact with someone. Fifth, in each of the six versions claiming sexual assault JR claimed that the event happened in a very small vehicle by the river. By contrast, Stacy Bondurant testified that JR told her that she and the defendant had sex at her aunt's house.

In the same manner that the admission of untruthfullness of the

complaining witness in *Brown* militated against finding her 911 call to be an excited utterance, so in the case at bar JR's admission of falsity in front of one of her friends and the gross inconsistencies in her claims, as well as the passage of time, all strongly militate against a finding that her taped statement to Officer Garrity constituted an excited utterance. Thus, in the case at bar the trial court erred when it admitted this evidence. This error also caused prejudice to the defendant because it did perform one function for the state. In essence it allowed JR to testify twice. Given the lack of any evidence supporting JR's claims and given the significant inconsistencies in her testimony, it is more likely than not that absent the admission of this evidence the jury would have found that the state had failed to prove the existence of any sexual contact between the defendant and JR. As a result, this court should reverse the defendant's conviction and remand for a new trial.

II. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN THE STATE ELICITED INADMISSIBLE HEARSAY REPEATING THE ALLEGATIONS OF THE COMPLAINING WITNESS DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for

judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based

upon trial counsel's failure to object when the state elicited Chris Smiley and Sara Slack's testimony repeating the claims JR made to them via her one and one-half page written statement detailing what had happened. As with the tape of JR's statement to Officer Garrity, there should be little question that this evidence constituted hearsay. In addition, as with the statement to Officer Garrity examined in the preceding argument, the only possible hearsay exception that would allow its admission of this evidence would be as an "excited utterance" under ER 803(2). A review of the decision in *State v. Dixon*, 37 Wn.App. 867, 684 P.2d 725 (1984), explains why this exception does not apply in the case at bar.

In *Dixon*, *supra*, police officers were called out to a claim by an adult woman that the defendant had just sexually assaulted her and then fled her apartment when she screamed for help. At the time the officer spoke with her she was crying, distraught, and having a difficult time breathing. Over the next two hours one of the officers obtained a four page written statement setting out her claims about what had happened. At trial the court allowed the police officer who took the statement to introduce the substance of the claims as an excited utterance given the officer's testimony that the complaining witness had been crying and very upset while writing. Following conviction the defendant appealed, arguing in part that the trial court had erred in finding that the written version of events qualified under

the excited utterance exception to the hearsay rule. The Court of Appeals agreed, holding as follows:

> The 4-page statement given by Ms. M. to Officer Lane covers fully the details of this incident from Dixon's arrival at her front door to her being able to break away from him and escape from the apartment. At the end of the statement, several lines of additional details are added with the explanation that Ms. M. remembered them after giving 3 1/2 pages of her statement. The statement, because of its length and completeness, would be impossible to distinguish from a statement routinely given police by crime victims.
>
> If Ms. M.'s statement to the police were to be admissible as an excited utterance simply because she was "upset", virtually any statement given by a crime victim within a few hours of the crime would be admissible because many crime victims remain upset or frightened for many hours, and even days and months, following the experience.
>
> A declarant who is able to give a detailed and complete description of an event is giving a "narrative of a past, completed affair" which *Beck v. Dye, supra* at 9, 92 P.2d 1113, did not permit. Beck also required the statement to be "a spontaneous or instinctive utterance of thought, dominated or evoked by the transaction or occurrence itself, and not the product of premeditation, reflection, or design". 200 Wash. at 9–10, 92 P.2d 1113. A reading of Ms. M.'s statement makes it obvious that she had the ability to recall and narrate the details of her experience with Dixon. Other than being described as "upset", there is nothing to indicate that her ability to reason, reflect, and recall pertinent details was in any way impeded. The statement gives every indication that, if motivated to do so, Ms. M. could have fabricated some of the details. Under these circumstances, we have no basis for finding a guaranty of trustworthiness, which is the ultimate basic ingredient which must be present in order to qualify a statement as an excited utterance.
>
> We conclude that the trial court went too far in admitting this detailed 4-page statement as an excited utterance. 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 admission of the written statement or the testimony of a witness to whom the victim related the details of the offense.

State Dixon, 37 Wn.App. at 873-874.

The same conclusion also applies in the case at bar. In this case JR made the purported written statement more than three days after the event. In addition, it apparently ran for a page and a half and contained a number of details of the alleged event as related to the jury by both Chris Smiley and Sara Slack. Thus, in the same manner that the trial court in *Dixon* erred when it allowed the officer to testify to the substance of the written statement, so the trial court in the case at bar would have erred had it allowed Chris Smiley and Sara Slack to testify to the substance of JR's alleged written statement over a defense objection.

In this case there was not tactical reason to allow two witnesses to repeat JR's claims to the jury. As a result trial counsel's failure to object fell below the standard of a reasonably prudent attorney. Indeed, in the instance of JR's taped statement to Deputy Garrity defense counsel had objected. Thus, counsel's failure fell below the standard of a reasonably prudent attorney. In addition, as was set out in the previous argument, the evidence supporting JR's claims of any sexual contact with the defendant was unsupported by any physical evidence, flatly contradicted by Kendra Latimer,

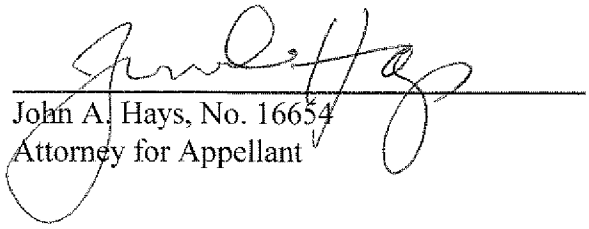
and inconsistent on many key points. Thus, it is highly likely that but for the admission of this evidence the jury would have found JR's claims of any sexual contact unproven. As a result counsel's failure to object caused prejudice and denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. Consequently this court should reverse the defendant's conviction and remand for a new trial.

CONCLUSION

The erroneous admission of three additional versions of JR's claims of sexual assault denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, and also denied him effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. As a result this court should reverse the defendant's conviction and remand for a new trial.

DATED this 18th day of February, 2014.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

WASHINGTON CONSTITUTION
ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

UNITED STATES CONSTITUTION, SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

EVIDENCE RULE 803

(a) Specific Exceptions. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present Sense Impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of Regularly Conducted Activity. [Reserved. See RCW 5.45.]

(7) Absence of Entry in Records Kept in Accordance With RCW 5.45. Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of RCW 5.45, to prove the nonoccurrence or nonexistence of the

matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public Records and Reports. [Reserved. See RCW 5.44.040.]

(9) Records of Vital Statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of Public Record or Entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of Religious Organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, Baptismal, and Similar Certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family Records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, tattoos, engravings on urns, crypts, or tombstones, or the like.

(14) Records of Documents Affecting an Interest in Property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorized the recording of documents of that kind in that office.

(15) Statements in Documents Affecting an Interest in Property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in Ancient Documents. Statements in a document in existence 20 years or more whose authenticity is established.

(17) Market Reports, Commercial Publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned Treatises. To the extent called to the attention of an expert witness upon cross examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation Concerning Personal or Family History. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of a person's personal or family history.

(20) Reputation Concerning Boundaries or General History. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to Character. Reputation of a person's character among associates or in the community.

(22) Judgment of Previous Conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of 1 year, to prove any fact essential to sustain the

judgment, but not including, when offered by the prosecution in a criminal case for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to Personal, Family, or General History, or Boundaries. Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

COURT OF APPEALS OF WASHINGTON, DIVISION II

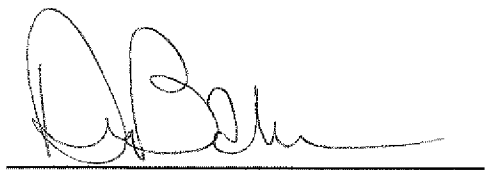
STATE OF WASHINGTON, **Respondent,** **vs.** **JEREMIAH CROWELL,** **Appellant.**	**NO. 45124-7-II** **AFFIRMATION OF OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On this day, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Adam N. Kick
   Skamania County Prosecuting Attorney
   240 NW Vancouver Ave.
   Stevenson, WA 98648
   kick@co.skamania.wa.us

2. Jeremiah Crowell, No. 358359
   Washington Corrections Center
   P.O. Box 900
   Shelton, WA 98584

Dated this 24th day of February, 2014, at Longview, Washington.



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kick@co.skamania.wa.us
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