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Supreme Court No. 97496-9
Court of Appeals No. 77776-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SIMON ORTIZ MARTINEZ,

Petitioner.

ON REVIEW FROM THE COURT OF APPEALS, DIVISION ONE

SUPPLEMENTAL BRIEF OF PETITIONER

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A. SUMMARY OF APPEAL

The common law “fact of complaint” or “hue and cry” exception to the hearsay rule is founded on—and perpetuates—archaic and discredited notions about how women and girls naturally respond when sexually assaulted. The doctrine is contrary to the Rules of Evidence, which generally exclude a witness’s prior consistent statements because repetition is not a valid test for veracity. A complainant’s prior statements are often admissible under other, established evidentiary rules, rendering the hue and cry exception unnecessary. This Court should abandon the hue and cry exception.

B. ISSUES PRESENTED

1. The common law hue and cry exception is founded on and perpetuates archaic and discredited notions about women’s credibility. Should this Court abandon it?

2. Prior statements alleging sexual assault are not admissible as hue and cry unless they are timely. Were the statements uttered years after the alleged abuse began untimely and inadmissible?

C. STATEMENT OF THE CASE

Simon Ortiz Martinez was charged and convicted of one count of first degree rape of a child, occurring between July 22, 2009, and

July 21, 2012. CP 1. The complainant was his daughter, Y.M., who was between the ages of nine and eleven during the charging period. CP 1.

Prior to trial, the State moved to admit Y.M.'s out-of-court statements to four witnesses alleging sexual abuse. The deputy prosecutor argued the statements were admissible to satisfy the jurors' natural expectation that a sexual assault victim would tell someone about the assault and, without the evidence, the jury would naturally conclude she did not tell anyone. RP 20. Although Y.M. made the statements after the end of the charging period, they were timely because the abuse was still ongoing. RP 20, 403. But the prosecutor never introduced any evidence to that effect. At the same time, the prosecutor acknowledged that in cases such as this, of sexual abuse within a family, victims typically do *not* timely complain. RP 31-32.

The defense objected, arguing Y.M.'s statements were inadmissible hearsay offered "for the sole purpose of buttressing the complaining witness's testimony." CP 11-12; RP 18-19, 23-25, 404-05. Moreover, allowing *four* witnesses to repeat the statements was unduly prejudicial. RP 19.

The court admitted the statements under the "hue and cry" exception to the hearsay rule to rebut any inference by the jury that

Y.M. was silent following the abuse. RP 341-43, 403-04. The court ruled the witnesses could testify as to the fact of the complaint but could not identify the supposed perpetrator. RP 343, 404. The court never instructed the jury about how to consider the evidence. See CP 18-34.

Thus at trial, Y.M.'s friend Alyssa testified that one day in 2014 while she was visiting Y.M.'s home, Mr. Ortiz Martinez became angry at the girls for talking to a boy. Y.M. began to cry and "told me that she was molested and raped." RP 507-09. Alyssa told Y.M. that either she must tell her mother or Alyssa would tell her own mother. RP 509.

Later that day, Y.M. told her mother "that I had been raped." RP 617. Her mother became upset and confronted Mr. Ortiz Martinez, who denied it. RP 617-18. No one called the police. RP 621. After that, Y.M. ran away from home for a period of time and slept in various locations. RP 622.

Y.M.'s friend Ciana testified that a few months later around Thanksgiving, Y.M. cried and told her that "[s]he had been raped." RP 436. Soon afterward, Y.M. told Ciana's mother "that she had been being abused and that she didn't want to go home." RP 455.

Soon afterward, Y.M. was sent to live with her aunt and uncle in Iowa. RP 623-24. Law enforcement did not learn of the sexual abuse allegations until they were notified by CPS in Iowa, who had heard about the allegations while investigating the uncle's family. RP 624-28.

In closing argument, the prosecutor did not argue that the timing of Y.M.'s disclosures had any relevance to her credibility. See RP 809-30. Instead, the prosecutor argued that the consistency and multiple repetitions of her statements showed that she was credible. RP 828-29. Likewise, defense counsel did not discuss the timing of the disclosures. See RP 839-49. Counsel argued it was unreasonable to believe the allegations because Y.M. could not have been abused for so long and so often without anyone finding out about it. RP 841-49.

D. ARGUMENT

This Court should abandon the common law hue and cry doctrine because it is founded on and reinforces faulty and harmful stereotypes about women and sexual assault victims.

1. Washington's hue and cry doctrine is a vestige of archaic and discredited notions about how female victims of sexual assault typically behave.

Historically, the prompt complaint doctrine was premised on the belief that a woman who was raped would notify a third party at the first opportunity. Dawn M. DuBois, A Matter of Time: Evidence of a

Victim's Prompt Complaint in New York, 53 Brook. L. Rev. 1087, 1087 (1988). The doctrine has its historical roots in the common law rule of "hue and cry." Id. at 1089. Traditionally, all victims of violent crimes were expected to alert the community in order to facilitate apprehension of the offender. Id. To sustain a charge, accusers had the burden of proving they had raised a hue and cry. Id. Their statements were admitted for substantive purposes as a necessary element of the prosecution's case. Id.

By the 1700s, when courts had refined many evidentiary standards, the "hue and cry" requirement was no longer a necessary part of a criminal prosecution, except in rape cases. Commonwealth v. King, 445 Mass. 217, 228, 834 N.E.2d 1175 (2005). The rationale for treating rape cases differently was the belief that "after becoming a victim of [sexual] assault against her will . . . [the victim] should have spoken out. That she did not, that she went about as if nothing had happened, was in effect an assertion that nothing violent had been done." Michelle J. Anderson, The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault, 84 B.U. L. Rev. 945, 978 & n.198 (2004) (quoting 4 J. Wigmore, Evidence § 1135 (3d ed. 1940)). American

courts in turn endorsed the belief that the failure of a rape victim to make a prompt complaint of a sexual assault was akin to an inconsistent statement at odds with the complainant's court room testimony about the rape. King, 445 Mass. at 229. Because of this belief, the prosecution was permitted to rebut any inference that the sexual assault charge was fabricated with evidence from "fresh complaint" witnesses to the effect that the complainant did in fact complain and that the complaint was "fresh" or prompt. Id.

This history still exists today in courts' allowing evidence that the complainant promptly complained in order to bolster her credibility. Anderson, The Legacy of the Prompt Complaint Requirement, *supra*, at 966 (and cases cited). "Fresh complaint" evidence is admitted in sexual assault trials as an exception to the usual rule that a prior statement of a witness that is merely repetitive of the witness's trial testimony is generally inadmissible except in limited circumstances. King, 445 Mass. at 229. The modern-day rule generally excludes the details of the complaint and allows the statement not to prove the truth of the underlying allegations but rather to negate any inference that the victim's failure to tell anyone she was raped renders her trial testimony unbelievable. State v. Hill, 121 N.J. 150, 159, 578 A.2d 370 (1990).

The present-day hue and cry doctrine embodies feudal notions about how female victims of sexual assault naturally behave, and reflects deep skepticism of women’s credibility. “The underpinning of the doctrine is a basic distrust of the sworn testimony of women.” Morrison Torrey, When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions, 24 U.C. Davis L. Rev. 1013, 1042 (1991). Matthew Hale, the eighteenth-century jurist, reflected the tone of his times when he stated that “[r]ape is . . . an accusation easily to be made and hard to be proved, and harder to be defended by the party accused.” M. Hale, The History of the Pleas of the Crown 635 (1778) (cited in Hill, 121 N.J. at 159). Professor Wigmore argued that rape complainants should be examined by a psychiatrist and the results of the examination revealed to a jury because “[rape complainants’] psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions.” 3A J. Wigmore, Evidence, § 924a, at 736 (Chadbourn rev. ed. 1970) (cited in Hill, 121 N.J. at 161).

Consistent with this history, Washington’s “hue and cry” or “fact of complaint” doctrine embodies these ancient notions about

female psychology by assigning probative value to the timing of a woman's complaint of sexual abuse. In State v. Hunter, 18 Wash. 670, 672, 52 P. 247 (1898), the Court held it was not error "to permit the mother to testify that the prosecutrix made complaint to her immediately, or at least within an hour, after the assault was committed." In State v. Griffin, 43 Wash. 591, 595-96, 600, 86 P.3d 951 (1906), the Court reiterated "that the government can prove fresh complaint as part of its original case," explaining that "it is the natural instinct of a woman to complain of an outrage of this kind at the first opportunity." If the woman "conceal[ed] the injury for any considerable time after she had opportunity to complain," or "made no outcry" when she could, "these and the like circumstances carry a strong but not conclusive presumption that her testimony is false or feigned." Id. at 597-98 (quoting 4 Blackstone, Com. 213). At the same time, the Court acknowledged that the fresh complaint rule is inconsistent with modern rules of evidence, which do not permit a party to corroborate the testimony of a witness by proof that he or she said the same thing before, when not under oath. Id. at 595-96.

Washington courts continue to apply the rule as articulated in these early cases. See State v. Ferguson, 100 Wn.2d 131, 135, 667 P.2d

68 (1983) (“The general rule in this state is that in criminal trials for sex offenses the prosecution may present evidence that the victim complained to someone after the assault.”); State v. Murley, 35 Wn.2d 233, 212 P.3d 801 (1949) (allowing State to show in its case-in-chief the timing of a woman’s complaint in order to bolster her credibility); State v. Chenoweth, 188 Wn. App. 521, 531-33, 354 P.3d 13 (2015) (statement not admissible under hue and cry doctrine because untimely when made one year after alleged incident); State v. Ackerman, 90 Wn. App. 477, 482, 953 P.2d 816 (1998) (statements admissible because “timely”); State v. Alexander, 64 Wn. App. 147, 151-52, 822 P.2d 1250 (1992) (disclosure made four days after last incident admissible because “timely made”); State v. DeBolt, 61 Wn. App. 58, 63, 808 P.2d 794 (1991) (“timely complaint” admissible); State v. Fleming, 27 Wn. App. 952, 957, 621 P.2d 779 (1980) (statement admissible where “made within a reasonable time after the commission of the crime”).

The prompt complaint rule is unique in “that it assigns probative value to the former silence of a woman who alleges rape.” DuBois, A Matter of Time, supra, at 1101. But it is incorrect to assume that a woman’s silence has probative meaning. Id. at 1107. In fact, many rape victims do *not* report sexual assault promptly, or never report a rape at

all. Torrey, When Will We Be Believed?, *supra*, at 1016, 1029.

Because of the social stigma associated with rape and the difficulties of prosecution, the crime of rape is notoriously underreported. DuBois, A Matter of Time, *supra*, at 1101; King, 445 Mass. at at 237-38.

Because the fact of complaint doctrine rests on a faulty and offensive premise about the psychology and credibility of women and erroneously assigns probative value to a woman's silence, it should be abandoned.

2. The hue and cry doctrine is contrary to the well-accepted evidentiary principle that repetition and consistency are not indicative of veracity.

The rationale of the hearsay rule is to “enhance the reliability of the fact-finding process,” as the reliability of un-cross-examined out-of-court statements is in doubt. Edward J. Imwinkelried, The New Wigmore: A Treatise on Evidence: Evidentiary Privileges § 1.3.8 (3d ed. 2020). The hearsay rule applies even to witnesses who testify in court because a witness's in-court testimony should usually be enough evidence on the point and a danger exists “that the ‘parade’ of credible witnesses might draw attention away from the fact that their incriminating testimony is derivative and dependent on another's credibility.” Roger Park & Tom Lininger, The New Wigmore: A

Treatise on Evidence: Impeachment and Rehabilitation § 9.4 (1st ed. 2020).

A witness's prior consistent statements are generally excluded because "[p]rior out-of-court statements consistent with the declarant's testimony are not admissible simply to reinforce or bolster the testimony." State v. Osborn, 59 Wn. App. 1, 4, 795 P.2d 1174 (1990). "That is because repetition is not a valid test for veracity." Id. "Evidence that a witness repeatedly told the same story is not admissible to corroborate her testimony, *unless* the defense attacks her credibility by suggesting her fabrication of the story or motive to lie." State v. Thomas, 150 Wn.2d 821, 867, 83 P.3d 970 (2004); ER 801(d)(1)(ii). Mere cross-examination is not alone sufficient to justify admission of prior consistent statements. Osborn, 59 Wn. App. at 7.

The general rule is that a witness's credibility may not be bolstered before any attempted impeachment. 1 McCormick On Evid. § 33 (7th ed. 2016). Mere contradiction of testimony is not an attack. Id. at § 47. "The rationale is that we do not want to devote court time to the witness's credibility and run the risk of distracting the jury from the historical merits unless and until the opposing attorney attacks the witness's credibility." Id. "Numerous repetitions of a complaining

witness' prior consistent statements artificially enhance the credibility of testimony offered against the defendant by endowing such proof with an undeserved aura of trustworthiness.” DuBois, A Matter of Time, *supra*, at 1109 (internal quotation marks and citation omitted).

The hue and cry or fact of complaint doctrine is inconsistent with this general rule. 1 McCormick on Evid. § 47, *supra*.

3. This Court should join other courts that have discarded the hue and cry rule because it has no rational underpinning and is harmful and unfair.

As discussed, the timely complaint rule is based on archaic and faulty notions about the psychology of women. It is also ineffective at exposing false complaints, as assigning probative value to the timing of a complainant's disclosures “will not thwart a shrewd manipulator.”¹ Anderson, The Legacy of the Prompt Complaint Requirement, *supra*, at 977.

In recognition of the faulty basis for the timely complaint doctrine, and the harmful notions it perpetuates, some courts have

¹ Studies show that false allegations of rape range from two to ten percent. David Lisak et al., False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases, 16(12) *Violence Against Women* 1318-34.

discarded it. Canada abrogated use of the doctrine in sexual assault cases in 1983. Morrison Torrey, When Will We Be Believed?, *supra*, at 1044.

In State v. Madigan, 199 Vt. 211, 228, 122 A.3d 517 (2015), the Vermont court “reject[ed] the ‘fresh-complaint rule’ as an independent evidentiary doctrine because the doctrine has been largely supplanted by rules of evidence.” For example, a witness’s prior consistent statements may be admissible if offered to rebut a charge of recent fabrication, or under hearsay exceptions for excited utterances, statements for the purpose or medical diagnosis or treatment, or the child hearsay statute. *Id.*; see also People v. Brown, 8 Cal.4th 746, 749-50, 883 P.2d 949, 35 Cal.Rptr.2d 407 (1994) (holding fresh complaint doctrine no longer applies and noting such evidence is often “properly admissible at trial under generally applicable evidentiary standards”).

In Browne v. State, 132 So.3d 312, 316 (Fla.Dist.Ct.App. 2014), the Florida court held the “fresh complaint” exception rule no longer applies following the adoption of the Florida Evidence Code which eliminated any common law hearsay exceptions not codified by statute. Washington has a similar rule which provides, “[h]earsay is not

admissible except as provided by these rules, by other court rules, or by statute.” ER 802.

And in State v. Livingston, 907 S.W.2d 392, 394-95 (Tenn. 1995), the Tennessee court held that the fresh complaint doctrine no longer applies to sexual assault cases involving child victims. That is because “[t]he expectation that ‘normal’ women will complain after a sexual offense, if ever applicable to anyone, is certainly not applicable to child victims of sexual offenses,” due to a child’s natural fear, ignorance and susceptibility to intimidation which naturally discourages children from complaining promptly. Id.; see Loree Beniuk & Pearl Rimer, Understanding Child Sexual Abuse: A Guide for Parents & Caregivers (Central Agencies Sexual Abuse Treatment (CASAT) Program, Toronto, Ont.) 2006, at 4-6 (children commonly wait to disclose sexual abuse for an indefinite period of time for various reasons, including that they are too young to understand what happened to them, have difficulty explaining what happened, or are fearful of the consequences of disclosure).

Many courts recognize that the prompt complaint doctrine rests on discredited notions about women’s psychology but nonetheless retain the doctrine because they assume jurors might continue to harbor

such wrongful, stereotypical beliefs. For instances, the Tennessee court has reluctantly retained the doctrine in adult cases in order to provide an avenue for rebutting social expectations of outcry, even though the court “would certainly prefer to abolish the doctrine in its entirety, given its genesis in the profoundly sexist expectation that female victims of sexual crimes should respond in a prescribed manner or risk losing credibility.” State v. Kendricks, 891 S.W.2d 597, 604 (Tenn. 1994) (cited in Livingston, 907 S.W.2d at 394).

Similarly, in Hill, the New Jersey court acknowledged “[i]t is true that the fresh-complaint rule does not necessarily contradict sexist notions of how a woman should act after she has been raped, but merely serves to establish that a woman acted in the ‘correct’ or ‘natural’ manner expected by society.” Hill, 121 N.J. at 164. But the court nonetheless chose to maintain the doctrine, explaining, “our judicial process cannot remove from every juror all subtle biases or illogical views of the world. The fresh-complaint rule responds to jurors on their own terms.” Id.; see also King, 445 Mass. at 229-30 (recognizing “sexist,” “outmoded” and “invalid” origins of the fresh complaint rule, and increasing public attention to the issue of sexual assault and its impact on victims, but choosing to continue to adhere to

the doctrine in a modified form because of concerns that jurors might still believe a rape victim will naturally disclose a sexual assault promptly).

Some courts attempt to deal with the faulty underpinnings of the doctrine by limiting its application to some degree. In Massachusetts, for instance, only one witness, the person to whom the complainant “first complained,” may testify as to prior consistent statements, regardless of the timing, and the court must instruct the jury as to the purpose of the evidence. King, 445 Mass. at 218-19. In New Jersey, fresh complaint testimony is inadmissible unless the court provides such an instruction. State v. Mauti, 448 N.J. Super. 275, 282-83, 153 A.3d 256 (N.J. Super. Ct. App. Div. 2017).

But although adhering to the timely complaint doctrine might “respond to jurors on their own terms,” Hill, 121 N.J. at 164, maintaining the doctrine is harmful because it reinforces and perpetuates the rape myths upon which it is based. Even if allowing evidence of a timely complaint may prevent jurors from drawing an erroneous conclusion that the complainant was silent following the assault, and therefore less credible, the rule “has the paradoxical effect of reinforcing the timing myth by giving the jury evidence that equates

promptness with veracity.” Kathryn M. Stanchi, The Paradox of the Fresh Complaint Rule, 37 B.C. L. Rev. 441, 443-44 (1996). “Moreover, the rationale for the rule gives the law’s endorsement to the timing myth and treats the testimony of sexual assault complainants as inherently suspect. The myth-reinforcing effects of the rule are also aggravated by archaic terms such as ‘fresh complaint’ and the history of the rule.” Id. At worst, the prompt complaint rule rewards perpetrators who are especially brutal or threatening and thereby procure their victims’ silence. King, 445 Mass. at 242.

For these reasons, “[s]tates should adopt rules for rape prosecutions designed to ensure fair rape trials, free from juror bias and prejudice resulting from beliefs in rape myths.” Morrison Torrey, When Will We Be Believed?, supra, at 1059. “When the prosecution of rape incorporates rape myths, it promotes sex discrimination and undermines women’s confidence in the legal system.” Id. at 1060. Since the foundation of the prompt complaint doctrine is based on false rape myths, courts should no longer utilize it in any fashion. Id. at 1066. Courts should not allow evidence regarding the timing of a complaint because it is not probative of a consequential fact. DuBois, A Matter of Time, supra, at 1107.

4. The court erred in allowing four witnesses to testify as to Y.M.'s prior consistent statements.

As discussed, the timing of Y.M.'s disclosures was not probative of any consequential fact. DuBois, A Matter of Time, *supra*, at 1101, 1107. They should not have been admitted under the prompt complaint doctrine.

Moreover, allowing *four* witnesses to repeat Y.M.'s out-of-court allegations "was not a valid test for veracity" and merely served to bolster her testimony unfairly. Osborn, 59 Wn. App. at 4. The numerous repetitions of her statements "artificially enhance[d] the credibility of testimony . . . by endowing such proof with an undeserved aura of trustworthiness." DuBois, A Matter of Time, *supra*, at 1109. The prosecutor compounded this error by urging the jury to conclude that the consistency and multiple repetitions of Y.M.'s statements showed that she was a credible witness. RP 828-29.

The court compounded the unfair prejudice caused by the repetitive statements by failing to instruct the jury on how to consider the evidence. Long ago in Griffin, this Court recognized that the jury must be "properly instructed" as to the purpose of prompt complaint evidence. Griffin, 43 Wash. at 598.

In Washington, numerous other rules provide avenues to admit a complainant's prior consistent statements in sexual abuse cases when the statements are relevant and the requirements of the particular exception are satisfied. Those include the following established hearsay exceptions: prior consistent statements to rebut a charge of recent fabrication, ER 801(d)(1)(ii); statements made for the purpose of medical diagnosis or treatment, ER 803(a)(4); excited utterances, ER 803(a)(2); and child hearsay, RCW 9A.44.120.

Admission of the testimonies of the prompt complaint witnesses was not harmless. In Commonwealth v. Arana, 453 Mass. 214, 228, 901 N.E.2d 99 (2009), the Massachusetts court held that had the jury not heard the erroneously admitted testimonies of three witnesses who testified "as to their tearful conversations" with the complainant about her father, which served no purpose other than to improperly bolster her in-court testimony, there was more than a slight possibility that the jury might have disbelieved some portion of her testimony, requiring a new trial. Similarly, here, had the jury not heard the testimonies of three witnesses who testified as to their "tearful conversations" with Y.M. about her father, which served no purpose other than to bolster her in-court testimony, there is more than a slight possibility the jury

would have reached a different outcome. The conviction should be reversed.

E. CONCLUSION

The hue and cry or prompt complaint doctrine rests upon and reinforces archaic and harmful notions about how female victims of sexual assault behave. This Court should abandon the doctrine. The erroneous application of the doctrine in this case requires reversal of the conviction.

Respectfully submitted this 10th day of January, 2020.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
) NO. 97496-9
 v.)
)
 SIMON ORTIZ MARTINEZ,)
)
)
 Petitioner.)

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