

64605-2

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NO. 64605-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BERTRAN CALCOTE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

BRIEF OF RESPONDENT

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2010 OCT 14 AM 9:04
COURT OF APPEALS
DIVISION I
KING COUNTY
WA

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I. ISSUES PRESENTED

1. Was there sufficient evidence to support each of three counts of the crime of indecent liberties?

a. Does the “physically helpless” element of the crime of indecent liberties include the state of being asleep?

b. Does substantial evidence support the trial court’s finding that each of the victims in Counts III, IV, and V were asleep – or alternatively, “physically unable to communicate an unwillingness to act” – when the defendant touched them?

2. Was trial counsel ineffective?

a. Was evidence of “other bad acts” properly admitted to show the defendant’s “lustful disposition” toward one of the victims?

b. Was “fact of the complaint” testimony properly admitted?

c. Was any error in defense counsel’s electing not to object to this evidence harmless in this bench trial?

3. Should the matter be remanded to correct a scrivener’s error as to the date of the crime charged in Count V as it is listed in the judgment and sentence?

II. STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND.¹

Bertran Calcote was charged by amended information with the following five counts:

	Charge	Victim
I	Rape of a child in the first degree	MP
II	Rape in the second degree	MP
III	Indecent liberties (without forcible compulsion)	JH
IV	Indecent liberties (without forcible compulsion)	JH
V	Indecent liberties (without forcible compulsion)	JS

CP 6-8; 3RP 1-3. Calcote waived jury and a bench trial was heard before the Hon. Michael Hayden. CP 9; 2RP 14-17; 3RP 4-5. The court found Calcote guilty of attempted rape of a child on Counts I and II and guilty of indecent liberties as charged on Counts III, IV and V. CP 29 (CL 9-14); 6RP 86-89. Calcote received standard range sentence and now appeals. CP 24-25; 3RP 20-22, 24.

¹ The State will refer to the seven volumes of the Report of Proceedings as follows: 1RP (March 14, 2009); 2RP (November 4, 2009); 3RP (November 9, 2009); 4RP (November 10, 2009); 5RP (November 12, 2009); 6RP (November 16, 2009); 7RP (December 11, 2009).

B. FACTUAL BACKGROUND.

Bertran Calcote is married to Sophia Calcote. 6RP 3-4; CP 26 (FF 1). The three victims are related to Calcote as follows:

Victim JS (DOB July 25, 1987) is Sophia's biological daughter. Calcote is not JS's biological father, but is the only father she has known. JS called, and still does call, Calcote "Dad." 5RP 4, 54; CP 26 (FF1).

Victim JH (DOB February 13, 1990) is Sophia Calcote's sister. JS is 19 years younger than Sophia, and thus Sophia acted like a mother to JS. 5RP 78-80; CP 26 (FF 1).

Victim MP (DOB April 10, 1990) is the daughter of Sophia Calcote's sister, Jewell P. 4RP 19-43; CP 27 (FF1).

1. Counts I and II: victim MP.

At the time of trial, victim MP was 19 years old. 4RP 17, 41, 91. As a result of her large and extended family, MP would often spend time when she was younger with her maternal grandparents. 4RP 22, 43-47, 107-08.

One weekend night, when MP was approximately in the 4th or 5th grade, MP was at her grandparents' home and Calcote was there as well. 4RP 110-11. MP fell asleep on the couch. 4RP

111-12. MP was wearing a long nightgown. 4RP 112. In the middle of the night, MP woke and realized that someone was placing a finger in her vagina. 4RP 113-16. The hand was underneath her underwear, against her skin. 4RP 113-14. MP was certain that the finger was inside her vagina. 4RP 114. MP opened her eyes and saw Calcote standing next to her. 4RP 116. MP fell back asleep and did not see Calcote leave the room. 4RP 117. MP did not report this incident to her parents because she was scared and did not know that what had happened was wrong. 4RP 117-18.

Because MP did not tell anyone, as a child she continued to spend time in the company of her extended family, including Calcote, even though she felt uncomfortable being alone with him. 4RP 119-20.

On June 9-10, 2007, MP (who was now seventeen) was at the Calcotes' home. 4RP 123-24. JH was also there, and was doing MP's hair for a dance performance. 4RP 125-26. Other members of the extended family were also present, including: JS and Kanisha (Calcote's biological daughter). 4RP 49-53, 126. As it turned into evening, MP's hairdo was not complete, and she did not have a ride home. 4RP 127-28. MP decided that she would stay

the night at Calcote's home, even though she had a bad feeling about staying there. 4RP 126-28. MP stayed up late, and fell asleep in the same large bed as JH and JS. 4RP 129-30. The bed was large enough that the three girls slept at different angles and positions on the bed. 4RP 129-30.

In the middle of the night MP half-awoke to realize that Calcote was moving her off of the bed and walking her toward another bedroom. 4RP 131. MP, still half asleep, watched Calcote drag a mattress into the bedroom and put it on the floor. 4RP 130-31. Calcote guided MP toward the mattress and had her lay down on it. 4RP 133. As she had not been planning to spend the night, MP was wearing her jeans and a t-shirt. Calcote unbuttoned her pants and pulled them off. 4RP 130-35. MP was half awake when she felt Calcote penetrating MP's vagina with his finger. 4RP 135-36. MP woke in the morning confused and unable to understand why her uncle was doing this to her. 4RP 138.

The following afternoon MP told JH what Calcote had done to her the night before. 4RP 138-39. A few minutes later, MP told JS and Kanisha what had happened. 4RP 140. MP only mentioned what had happened that night, and did not discuss the prior incident. 4RP 140-41. Later that day, MP told her mother

what Calcote had done. 4RP 53-59, 143-45. She also told her father several days later. 4RP 24-29, 144-46. The family then contacted the police.² 4RP 31-32, 76-77, 147-48.

2. Counts III and IV: victim JH.

JH was 19 years old at the time of trial. 5RP 68. While growing up, it was common for JH to spend time with her older sister, Sophia, and her husband, Calcote. 5RP 78.

When JH was about fourteen years old, she spent the night at Calcote's home. 5RP 81. JH was sleeping in the downstairs bedroom with JS, her niece, and a third girl. 5RP 82-83. As JH lay in bed, asleep, she felt a hand underneath her underwear on the bare skin of her vagina, she described the hand as "cupping" her vagina. 5RP 83-85. JH awoke and saw (by the hall light) Calcote, who then walked out of the room. 5RP 86-87. JH did not report the touching to her parents or to any adult because she was concerned no one would believe her. 5RP 88-89.

On a different date, during that same time period, JH again spent the night at Calcote's residence. 5RP 91-92. JH again slept

² Subsequently, Calcote called MP's father and denied the allegations and asked to sit down to talk about it. 4RP 34-35. MP's father did not want to talk to Calcote and declined to meet with him. 4RP 35.

in the same bedroom as JS. 5RP 92. In the middle of the night, as JH lay asleep, she again felt a hand “cupping” her vagina. 5RP 92-93. JH could not recall at trial whether the hand was over her underpants, or on the bare skin of her vagina. 5RP 93. JH awoke and watched as Calcote moved away from her and then left the room. 5RP 95-96.

JH did not initially report the touching to her parents or to an adult because she felt that no one would believe her. 5RP 97. Eventually, JH told JS about what Calcote had done. 5RP 99. JS told JH what had happened to her first. 9RP 99-100. Later, when MP reported to JH (in June 2007) that Calcote had sexually assaulted her, JH told MP that she, too, had been sexually abused. JH told MP about Calcote’s abuse because she did not want MP to feel alone, or to feel as if no one believed her. 5RP 104-08. JH also discussed what had happened with MP’s mother. 4RP 64, 107-08.

3. Count V: victim JS.

JS was 22 years old at the time of trial. 5RP 3. When JS was in the 11th grade, she resided with her mother, Sophia, and Calcote. 5RP 11-12. At this time, JS was sixteen years old. 5RP 57-58.

One night when she was asleep in her downstairs bedroom, JS felt a breeze on her legs and then felt a hand on the bare skin of her vagina (under her nightgown and underpants). 5RP 14-18. As JS awoke, someone pulled the nightgown back down and replaced the covers over her. 5RP 19-20. JS opened her eyes and saw Calcote leaving the room. 5RP 21-22.

JS – upset, confused, and crying – fled to her younger sister’s room. 5RP 23-24. She woke her sister and told her what had happened. 5RP 23. JS was concerned that Calcote might have done the same type of things to her younger sister. 5RP 23.

The incident in 11th grade was the first time Calcote had touched JS directly on her vagina under her clothing. 5RP 24. JS also testified about additional incidents where Calcote, in the middle of the night, came into her bedroom and touched her vagina over her underwear. 5RP 25-29. The earliest memory she has of Calcote doing so occurred when she was in the 7th or 8th grade. 5RP 27. This would happen sporadically over the ensuing years. 5RP 27-28. In the past, JS hadn’t told anyone what Calcote had done because she didn’t think anyone would believe her. 5RP 28.

The morning after the incident in 11th grade, JS told her boyfriend what had happened. 5RP 29-30. He advised JS to tell

her mother and – although she was concerned that she would not be believed – several weeks later JS eventually did so. 5RP 29-33. JS also told MP and JH's mother what had happened. 5RP 48-49; 4RP 68-69.

In the interim period before JS worked up the courage to tell her mom, Calcote again entered her room in the middle of the night, while JS was sleeping, and touched JS's vagina over her underwear. 5RP 33.

JS's mother confronted Calcote about what had happened. 5RP 34-36. JS was present when this occurred. 5RP 35. In response, Calcote stated that the reason he had touched JS was to determine whether or not JS was still a "virgin." 5RP 36-37. Calcote told JS and her mother that he would move out of the house, but needed two weeks to do so. 5RP 37-38. Calcote never moved out of the house. 5RP 39-40.

4. Calcote's trial testimony.

Calcote testified and denied having any sexual or improper contact with JH, MP, or JS. 6RP 1-49. He claimed that he checked the children at night because they had asthma. 4RP 25. Calcote contended that the three girls had manufactured the allegations because he was a stern disciplinarian. 6RP 20-22.

III. ARGUMENT

A. **THERE WAS SUFFICIENT EVIDENCE TO CONVICT ON EACH COUNT OF INDECENT LIBERTIES.**

A person is guilty of indecent liberties if he or she has sexual contact with another person who is incapable of consent by reason of being “physically helpless.” It has long been recognized – and on appeal Calcote apparently does not dispute – that someone who is asleep is physically helpless. Calcote asserts, however, that the evidence was insufficient for a rational trier of fact to conclude that the victims in Counts III, IV and V were asleep when he had sexual contact with them. A review of the record demonstrates that this argument is without merit.

1. **Legal background: sufficiency of the evidence.**

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. State v. Hosier, 157 Wn.2d 1, 8, 936 P.3d 1358 (2006); State v. O’Neal, 126 Wn. App. 395, 424, 109 P.3d 429 (2005), aff’d, 159 Wn.2d 500 (2007). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn from it. State v. Sanchez, 60 Wn. App. 687, 693, 806 P.2d 782 (1991). Circumstantial evidence is considered as reliable as

direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004), abrogated in part on other grounds, Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

To affirm a criminal conviction, an appellate court need not be convinced of guilt beyond a reasonable doubt; instead, it must be satisfied only that substantial evidence supports the conviction. State v. Vickers, 148 Wn.2d 91, 116, 59 P.3d 58 (2002).

“Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.” Vickers, 148 Wn.2d at 116 (quoting Nordstrom Credit, Inc. v. Dep’t of Revenue, 120 Wn.2d 935, 939-40, 845 P.2d 1331 (1993)).

2. The “physically helpless” element of indecent liberties includes the state of sleep.

The relevant portion of the indecent liberties statute reads as follows:

(1) A person is guilty of indecent liberties when he or she knowingly causes another person who is not his

or her spouse to have sexual contact with him or her or another:

...

(b) *When the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless;*

...

RCW 9A.44.100 (emphasis added).³

“‘Physically helpless’ means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.” RCW 9A.44.010(4).

This Court has recognized that the “physically helpless” element of indecent liberties includes the state of sleep.⁴ State v. Puapuaga, 54 Wn. App. 857, 858-59, 776 P.2d 170 (1989).⁵

³ “Sexual contact” means “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.” RCW 9.94A.010(2). Calcote does not argue on appeal that the touching on Counts III, IV, and V does not constitute sexual contact.

⁴ On appeal, Calcote also cites cases discussing “mental incapacity.” See BOA, p. 27-28. The State did not argue, and the trial court did not find, that the victims of the indecent liberties counts were “mentally incapacitated” and the cases cited by Calcote discussing this proposition are thus irrelevant.

⁵ Similarly, Washington courts have recognized that a sleeping victim is “particularly vulnerable” and the crimes against individuals who are sleeping may accordingly justify an exceptional sentence. See, e.g., State v. S.H., 75 Wn. App. 1, 10, 877 P.2d 205 (1994) (sleeping victim may be particularly vulnerable due to inability to resist before being attacked); State v. Ross, 71 Wn. App. 556, 565, 861 P.2d 473, 883 P.2d 329 (1993) (cases dealing with vulnerability include sleeping victims); State v. Hicks, 61 Wn. App. 923, 931, 812 P.2d 893 (1991) (victim attacked as she slept was incapable of resisting and exceptionally vulnerable).

In Puapuaga, the defendant and victim were casual acquaintances who resided in a boarding house. At about 5 a.m., the victim awoke and found the defendant in her room, kneeling beside her bed with his hand under her covers touching her crotch area. The defendant admitted entering the victim's room and touching her while she slept, but he denied having any sexual contact. A jury found the defendant guilty of indecent liberties. Puapuaga, 54 Wn. App. at 858-59.

On appeal, Puapuaga argued that the evidence was insufficient to support a conviction of indecent liberties because his victim – who was asleep when the sexual touching occurred – was not “physically helpless” as required by statute. The Court of Appeals rejected this suggestion, noting:

None of the authorities cited by Puapuaga characterize the state of sleep as something different from unconsciousness for the purpose of sexual offenses. Puapuaga also fails to explain how a sleeping victim is not one who “for any other reason is physically unable to communicate unwillingness to an act.”

Puapuaga, 54 Wn. App. at 859.

The Court noted that at common law, rape occurred when a defendant attacked a victim who was asleep because the victim was incapable of manifesting consent. Puapuaga, 54 Wn. App.

at 860 (citing State v. Welch, 191 Mo. 179, 89 S.W. 945, 947 (1905); Harvey v. State, 53 Ark. 425, 14 S.W. 645, 646 (1890) and State v. Moorman, 320 N.C. 387, 358 S.E.2d 502, 504-05 (1987)).

The Court of Appeals concluded:

The state of sleep appears to be universally understood as unconsciousness or physical inability to communicate unwillingness. Therefore, any rational trier of fact could have found beyond a reasonable doubt that the victim was physically helpless based on the evidence that she was asleep.

Puapuaga, 54 Wn. App. at 861.

In sum, both the state of sleep and being “for any other reason is physically unable to communicate unwillingness to an act” satisfy the definition of being “physically helpless.”

3. Substantial evidence supported Count III.

Calcote argues that there was not sufficient evidence to convict on Count III because, during part of her testimony, JH stated that she became aware of Calcote’s hand on her vagina in the “middle period” between the time period when being asleep and being fully awake and alert. BOA, p. 29-30.

A review of all of JH’s testimony, however, establishes that she was asleep when Calcote first touched her and thus the trial

court's factual finding (FF 3, ¶ 1) and Conclusion of Law (CL 12) were both proper.

JH testified that she was asleep in a downstairs bedroom on a bed that she was sharing with another girl. 5RP 82-83. JH did not know what time of night it was, only that it was "nighttime." 5RP 82-83. The following exchange then occurred between the prosecutor and JH:

Q. Okay. What is the first thing that you can tell us happened that night?

A. *I was asleep*, and I felt something, I felt a hand in my private area and (pause) –

5RP 83 (emphasis added). Thus, contrary to Calcote's assertion on appeal, JH's testimony establishes that she was in fact asleep when she first felt somebody touching her.

The direct and logical implication of JH's testimony is that she was asleep on the bed when Calcote entered the room and put his hands underneath her underwear and began "cupping" her genital area. 5RP 83. As she felt this occurring, she moved from being asleep to the time period between being asleep and being fully awake and alert. 5RP 85-86. Even after Calcote left the room, JH testified she was not fully awake. 8RP 86-87. This transition – from asleep to being partially awake – is known to everyone from

common experience. What is significant here, of course, is that *prior to* JH becoming aware that someone was touching her, she was asleep. At that time, JH was both physically helpless (asleep) and also “physically unable to communicate unwillingness to an act.” Accordingly, there was sufficient evidence to convict Calcote of the crime of indecent liberties as charged in Count III.

4. Substantial evidence supported Count IV.

Calcote also asserts that a rational trier of fact could not conclude that JH was asleep for the charge in Count IV. Again, a review of JH’s testimony makes it clear that she was asleep at the time when the touching first began.

JH testified that she was in the same bed as the incident that constituted Count III. She testified that the first thing she remembered was the same “cupping” motion over her genital area.

5RP 92-93. JH then testified as follows:

Q. Okay. And when you felt the hand on your vaginal area, remember we talked about earlier, there’s asleep, there’s that moment between sleep and waking, and then there’s alert and awake.

A. Um-hum.

Q. Where were you? Were you asleep, were you in that middle period, were you alert and awake when the touching occurred?

A. Well, I was more so alert than last time, but I wasn’t like woke like up, you know, like.

Q. Okay. So when you say you were more so alert than the last time, did you see him when he adjusted and put his hand between --

A. No.

Q. -- your --

A. No, I mean, like this time, I seen -- like I wasn't -- like my eyes wasn't wide awake, but I seen him like move, and then I -- *when I woke up, he was standing by the radio, Jamila's radio that was on the right side of the bed.*

Q. Okay. Okay, because I wasn't there, I need to ask you a couple questions, all right?

A. Okay.

Q. So when you say that you saw him move, did you see him move before he touched you or after?

A. After.

Q. Okay, so he was moving away from you?

A. Yeah.

Q. At the time that you feel the touching on your body, are you asleep and waking up to the touching on your body? Do you understand what I'm saying? In other words, when you first realized that someone's touching your body --

A. Um-hum.

Q. -- doing the cupping on your vagina, are you waking up at that moment?

A. Yeah, *but not woke to where somebody could just see that I'm woke.*

Q. Okay, okay.

A. *Like I knew what was going on.*

Q. Okay.

A. *Like I wasn't just -- my eyes wasn't open like that.*

Q. All right. But just so we're -- we're operating off the same page, okay?

A. Um-hum.

Q. At the time that you are asleep, before you -- before you wake up, and I know it's not alert and awake, but *before you have that moment of awareness*, there's a hand on your vagina.

A. *Yeah.*

5RP 93-95 (emphasis added). JH then testified about how she felt when Calcote left the room:

Q. Okay. Once he left the room, how were you feeling inside?

A. Sleepy.

Q. Okay.

A. *Went back to sleep. I didn't -- I was never just like woken just sitting there like, you know, like I wanted to tell somebody right then and there.*

5RP 96-97 (emphasis added).

JH's testimony established that she was asleep when Calcote first touched her. Indeed, JH was clear that she didn't wake up until Calcote had moved away from her. Even then, JH testified that she never fully woke up. Again, there was sufficient evidence to convict Calcote of the crime of indecent liberties as charged in Count IV.

5. Substantial evidence supported Count V.

Finally, Calcote's argument that there was insufficient evidence to support a conviction on Count V (victim JS) is also without merit. A review of all of JS's testimony establishes that JS was asleep when Calcote first touched her vagina. Here is the relevant testimony:

Q. Can you tell me where you were when this something happened to you?

A. In my room.

Q. And when you were in your room, was it daytime, nighttime, something different?

A. Nighttime.

Q. *Were you alone asleep in your room?*

A. Yes.

Q. And would you tell me what happened when you were alone asleep in your room at night? What's the first thing you remember happening to you?

A. I remember feeling a breeze.

Q. And on what part of your body did you feel the breeze?

A. My legs.

Q. And can you tell me what the next thing you felt?

A. I felt a tapping.

Q. And tapping on what part of your body?

A. On my vagina.

5RP 14-15 (emphasis added).

Q. When you felt this breeze on your body and you felt this tapping in that area, can you tell me, were you awake or asleep at the time that you first felt these things?

A. *I was waking up.*

Q. Okay. When you say waking up, *that obviously assumes you had been asleep.*

A. Yes.

Q. And when you say waking up, you know, there's that moment between sleep and being fully awake and alert just as you are today. Was it in that interim period, that kind of between period that you felt these sensations?

A. Yes.

Q. Okay. Is it fair to say that you were not fully awake and alert at the time that you felt the tapping on your vagina?

A. That's correct.

Q. Okay. Did you have a sense of where your body was, in other words, what position your body was in when the tapping was going on?

A. Yes.

Q. Tell me about that.

A. I was at the bottom of my bed. My legs were hanging --

Q. Okay.

A. -- the edge.

...

Q. So when you say the bottom of your bed, normally where your feet kind of end up, right, is that what you mean by -- so the foot of the bed?

A. Yes.

Q. Okay. And when you say your legs were hanging off, were you at the point where, for instance, if you sat on the edge of the bed, your knees would be kind of right at the edge and they'd be hanging off; was it like that?

A. Yes.

Q. Okay. Was that how you had started sleeping that night?

A. No.

Q. Tell me how you had started sleeping. Was it in a unique position, or was it just kind of your normal sleeping position?

A. I don't remember exactly what position I was in, but I know I was at the top of the bed.

Q. Okay.

A. Laying on my pillow.

Q. The way one would normally fall asleep?

A. Yes.

Q. What was -- once the tapping that you said -- the pressing the gentle push was going on, tell me what the next thing was that you felt.

A. I moved.

Q. Okay.

A. And I felt the elastic from my underwear snap against my pelvic area.

5RP 17-19.

Q. At what point, [JS], are you fully awake and alert, just as you are today?

A. After he left out the room.

Q. Okay. So during this entire time period that you've described thus far, you're still in that state of sleep, or not fully awake and alert?

A. No, my eyes just weren't open all the way.

Q. They weren't open all the way, okay. So let me ask my question a little better: At the point when you're awake, and yet your eyes are still closed, what point in the sequence of events are you awake, yet your eyes are closed?

A. When the elastic snapped back on my waist.

Q. Okay, so after the touching on the vagina, okay. And why did you keep your eyes closed? Tell me -- tell me why.

A. I was scared.

5RP 21.

The testimony established that JS had fallen asleep in her bed with her head on her pillow. When she began to wake up, her feet were over the end of the bed, and Calcote already had his hand on her vagina. JS stated that she did not really begin to wake up until Calcote removed his hand and the elastic on her underwear snapped back into place. She did not become fully awake until after Calcote left the room.

This evidence is more than sufficient to establish that Calcote began to touch JS while she was still asleep. The fact that JS began to wake up after this occurred, or that she kept her eyes closed because she was scared after she became aware of what was going on, does not undermine the fact that she was asleep when Calcote first began touching her. There was sufficient

evidence to convict Calcote of the crime of indecent liberties as charged in Count V.

B. CALCOTE'S TRIAL COUNSEL WAS NOT INEFFECTIVE.

Calcote alleges that his trial attorney was ineffective for not objecting to two different categories of evidence: (1) that Calcote had on other occasions improperly touched JS, and (2) "fact of the complaint" testimony by the victims. These arguments are without merit.

1. Legal standard: ineffective assistance claims.

To prevail on a claim of ineffective assistance of trial counsel, a defendant must demonstrate both that counsel's representation was deficient and that the deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). The test for deficient representation is whether defense counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances. Thomas, 109 Wn.2d at 225. The prejudice prong of the test requires the defendant show a "reasonable probability" that, but for counsel's error, the result of the trial would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999).

Competency of counsel is determined upon a review of the entire record. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). There is a strong presumption that counsel's representation was effective. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). To overcome this presumption, a defendant must show that counsel had no legitimate strategic or tactical rationale for his or her conduct. McFarland, 127 Wn.2d at 336.

2. "Other bad act" evidence: no ineffective assistance of counsel.

Calcote asserts that trial counsel should have objected to testimony by JS that she was improperly touched by Calcote on several other occasions. Contrary to Calcote's assertion on appeal, this evidence was properly admitted to show Calcote's lustful disposition toward JS.

Washington courts have long held that evidence of sexual misconduct directed at the same victim is admissible under ER 404(b) to show "lustful disposition." See, e.g., State v. Ferguson, 100 Wn.2d 131, 134, 667 P.2d 68, 71 (1983); State v. Camarillo, 115 Wn.2d 60, 70, 794 P.2d 850 (1990); State v. Bernson, 40 Wn. App. 729, 737-38, 700 P.2d 758 (1985); State v. Guzman, 119 Wn. App. 176, 79 P.3d 990 (2003). The rationale for the admission of

this evidence is that the evidence is admitted for the purpose of showing the lustful inclination of the defendant toward the victim. This, in turn, makes it more probable that the defendant committed the offense charged. Id. at 547.

The law in this area is well-summarized by one noted commentator:

By long-standing tradition, the defendant's previous sexual contacts with the victim are admissible in prosecutions for rape, statutory rape, incest, seduction, sodomy, and indecent liberties.

The courts typically state that the defendant's "lustful disposition" towards the victim makes it more likely that the defendant committed the crime charged. Contacts before and after the act in question are admissible. Details may be brought out. Conceivably, contacts too remote in time might be irrelevant, but the courts have been disinclined to exclude the evidence on this basis.

Evidence of the defendant's lustful disposition towards a particular person borders on evidence of general propensity, barred by Rule 404(b). The courts have seldom articulated any way of reconciling the traditional lustful-disposition rule with Rule 404(b), but the traditional rule is so ingrained that it is unlikely to change. The traditional rule could perhaps be rationalized by analogy to cases admitting evidence of misconduct to show motive or lack of good faith.

....

Although a defendant's previous sexual contacts with the victim are generally admissible, the trial court should still weigh probative value against prejudicial value and should exclude the evidence if its probative value is outweighed by its prejudicial effect.

5 Wash. Practice: Evidence, § 404.26 (footnotes with citations omitted).⁶

In Ferguson, the Washington Supreme Court quoted another respected commentator with approval:

... The important thing is whether it can be said that it evidences a sexual desire for the particular female. 2 Wigmore on Evidence (3d ed.) 367, § 399, says:

“The *kind of conduct* receivable to prove this desire at such prior or subsequent time is *whatever would naturally be interpretable* as the expression of sexual desire.

“Sexual intercourse is the typical sort of such conduct, but indecent or otherwise *improper familiarities* are equally significant.”

Ferguson, 100 Wn.2d at 134 (emphasis in original).

In the present case, JS’s testimony established several incidents that demonstrated Calcote’s lustful disposition toward JS.

First, after JS testified about the charged incident (Count V, which occurred while JS was in 11th grade), the following testimony occurred:

Q. Okay. Were there other times when he would come to your bedroom late at night?

A. Yes.

Q. Can you tell me about those other times or one other time?

⁶ On appeal, Calcote cites to this language as suggesting evidence of lustful disposition is not admissible. See BOA, p. 22. But, clearly, the commentator agrees that lustful disposition evidence is admissible.

A. The other times, it would just -- I would feel my clothes being moved, or I would feel a touch on my vagina on top of my underwear.

Q. Okay. When you say the other times, do you have an idea of either approximately what grade you were in, or what house you were living in when it happened for the first time?

A. It was between the seventh and eighth grade.

5RP 25. JS then testified about the nature of this prior contact, which was similar to the tapping or pushing about which she had previously testified, although over her underwear. 5RP 25-27. The prosecutor then asked about the frequency of these incidents:

Q. Was that the only time again before the eleventh grade, was that the only time that any type of touching occurred at night, that time between the seventh and eighth grade?

A. No.

Q. How many times do you think that it happened, or do you know that it happened?

A. I don't know, I didn't tally.

Q. Okay. Was it a sporadic -- was it -- did it occur on a sporadic basis, or did it occur on a regular basis?

A. On a sporadic basis.

Q. And in terms of a sporadic basis, what did that look like? Would it be maybe a couple of times a month, a couple of times a week, once every other month?

A. A couple times a week.

5RP 28-29.

There was also brief testimony about an incident subsequent to the charged incident. JS had testified that it was several weeks before she told her mom what Calcote had done. JS then testified as follows:

Q. During that couple of week time period, [JS], had [Calcote] come back to your bedroom at night and done any additional touching of your body?

A. Yes.

Q. And was it similar to that which you've described earlier, the type of touching?

A. On top of the underwear, yes.

Q. Okay, so not beneath, but just on top?

A. Yes.

5RP 33.

This testimony was entirely proper to show Calcote's lustful disposition toward JS and its admission is consistent with Washington case law. See, e.g., State v. Guzman, 119 Wn. App. 176, 79 P.3d 990 (2003) (defendant was charged with Rape 3, evidence that six years prior to the rape the defendant had touched the victim's breast admissible as proof of his lustful disposition). It was not ineffective for Calcote's attorney not to object to testimony that was clearly admissible; nor can Calcote demonstrate prejudice from the failure to object to admissible evidence.

Finally, Calcote asserts that the introduction of the lustful disposition evidence was not justified because it was “not relevant to prove any element of the charged offense or to disprove any defense.” See BOA, p. 22. But, as Ferguson makes clear, this is not the test to be applied. In Ferguson, the defendant objected to testimony by his wife that she had once witnessed him having sexual contact with the child victim. The Supreme Court allowed this testimony as evidence of the defendant's lustful disposition. Significantly, just as in the present case, the defendant in Ferguson was charged with indecent liberties. The opinion never suggests that lustful disposition evidence is admissible only if it is directly related to an element of the crime or to disprove a defense. Ferguson, 100 Wn.2d at 133. In any event, because lustful disposition evidence makes it more probable that Calcote committed the charged crime, it is relevant to rebut his defense of general denial.

3. “Fact of the complaint” evidence: no error.

Calcote also asserts that it was ineffective for his attorney not to object to the introduction of “fact of the complaint” testimony; that is, testimony relating to when the victims reported the incidents to other individuals. Specifically, Calcote asserts that counsel

should have objected to testimony concerning untimely disclosures by JS, MP, and JH. This argument should be rejected because the “fact of complaint” doctrine as it currently exists should not require a timely disclosure in order to admit testimony regarding the circumstances of a disclosure.

In criminal trials involving sex offenses, the prosecution may present evidence that the victim complained to someone after the assault. State v. Ferguson, 100 Wn.2d 131, 135, 667 P.2d 68 (1983); State v. Murley, 35 Wn.2d 233, 237, 212 P.2d 801 (1949). Evidence of the details of the complaint, including the identity of the offender and the specifics of the act, is not admissible. Ferguson, 100 Wn.2d at 135-36, 667 P.2d 68.

The “fact of complaint” doctrine stems from the feudal “hue and cry” doctrine, and allows the admission of “hearsay” that a sexual assault victim complained after being assaulted. State v. Murley, 35 Wn.2d 233, 237, 212 P.2d 801 (1949); State v. Hunter, 18 Wn. 670, 672-73, 52 P. 247 (1898). Under this doctrine, Washington courts have long held that the fact that the victim complained is admissible because it bears upon the victim’s credibility. See, e.g., Murley, 35 Wn.2d at 237; Hunter, 18 Wn. at

672-73; State v. Alexander, 64 Wn. App. 147, 151-52, 822 P.2d 1250 (1992).

The parameters of such testimony were described as follows by the Washington Supreme Court in 1940:

We think the rule in this and the majority of states is well established that, in cases of this kind, the prosecuting witness may testify that she made complaint after the assault, and where, to whom and under what circumstances, but she may not detail the story that she told in making such complaint; and the person to whom she made complaint may also testify that she complained, and may state the time, place, and circumstances under which the complaint was made, but not what she said concerning the circumstances and details of the assault.

State v. Smith, 3 Wn.2d 543, 550, 101 P.2d 298 (1940) (citing Hunter, supra, and State v. Griffin, 43 Wn. 591, 86 P. 951 (1906)).

Calcote is correct that this doctrine has originally required that the victim's complaint be timely in order for testimony regarding the fact of the complaint to be admissible. See, e.g., Griffin, 43 Wn. at 598 (holding that "evidence of the complaint should be excluded whenever from delay or otherwise it ceases to have corroborative force"). But the underlying rationale for this timeliness requirement is both antiquated and offensive, i.e., that a woman or child who has been raped would certainly raise a "hue and cry" immediately, and that the failure to do so suggests that a rape did not occur.

Indeed, as the Washington Supreme Court recognized in 1949, the timelines of the complaint does not have any bearing on the credibility of the victim:

An exception to these exclusionary rules is that in criminal trial for sex offenses the credibility of the complaining witness, irrespective of whether it is assailed or unassailed, may be supported by evidence of her timely prior out-of-court complaint. This exception stems from the feudal doctrine of hue and cry. This doctrine rests on the ground that a female naturally complains promptly of offensive sex liberties upon her person and that, on trial, an offended female complainant's *omission of any showing* as to *when* she first complained raises the inference that, since there is no showing that she complained timely, it is more likely that she did not complain at all the therefore that it is more likely that the liberties upon her person, if any, were not offensive and that consequently her present charge is fabricated. **Thus, formerly, to overcome the inference, it became essential to the state's case-in-chief to prove affirmatively that she made timely hue and cry**

Modernly the inference affects the woman's credibility, generally, and the truth of her present complaint, specifically, and consequently we permit the state to show in its case-in-chief *when* the woman first made a complaint consistent with the charge.

State v. Murley, 35 Wn.2d 233, 237, 212 P.2d 801 (1949) (citations omitted, italicized emphasis in original, bold emphasis added); see also State v. Fleming, 27 Wn. App. 952, 957, 621 P.2d 779 (1980);

State v. Makela, 66 Wn. App. 164, 175, 831 P.2d 1109 (1992);

State v. Alexander, 64 Wn. App. 147, 151, 822 P.2d 1250 (1992).

In other words, even though the State no longer bears the burden to disprove the inference that delay in reporting means the victim fabricated the allegations, the Murley court acknowledged that, if the State were to remain silent as to when the victim complained, the inference of fabrication could still exist. Thus, the Court held that, because the inference affects the victim's credibility generally, "evidence of when the victim first complained is admissible." State v. Alexander, 64 Wn. App. 147, 151, 822 P.2d 1250 (1992) (citing Murley, 35 Wn.2d at 237).

Significantly, this Court has previously recognized that expert testimony that child sexual abuse victims often delay reporting their abuse may be properly admitted for the jury's consideration. State v. Graham, 59 Wn. App. 418, 422-25, 798 P.2d 314 (1990). As this Court correctly found, such evidence is admissible because it is helpful to the jury in assessing the victim's credibility – the same reason for admitting "fact of complaint" evidence. Id. at 425.

If *expert* testimony is admissible to explain that child sexual abuse victims often delay in reporting their abuse because such

testimony bears on credibility, it makes little sense to perpetuate an antiquated rule that *factual* testimony regarding the circumstances of the victim's disclosure is relevant and admissible *only* if the victim's report is timely. Indeed, it is difficult to imagine a child sexual abuse case where evidence regarding the circumstances of the victim's disclosure would *not* be relevant to the issue of the victim's credibility.

Thus, it is not surprising that courts in other jurisdictions have recognized this conundrum and rejected the timeliness requirement for "fact of complaint" evidence, especially in child sexual abuse cases. For example, in Woodard v. Commonwealth, 19 Va. App. 24, 27-28, 448 S.E.2d 328 (1994), the 13-year-old victim did not report that the defendant had raped her until several months after the rape. Despite the delay, the trial court admitted evidence of the circumstances of her disclosures under Virginia's "recent complaint" rule. Woodard, 19 Va. App. at 26.

On appeal, the Virginia appellate court observed that the traditional "hue and cry" rule is "now discredited," and that evidence of the victim's complaint should be excluded for lack of timeliness only if the delay "*is unexplained or inconsistent with the occurrence of the offense.*" Id. at 27 (emphasis in original). The court further

noted that the issue of timeliness is addressed to the sound discretion of the trial court, and thereafter, is a matter for the jury to consider. Id. Moreover, in holding that evidence of the victim's complaint was properly admitted in spite of the delay, the court observed:

The victim's delay was not "unexplained" or "inconsistent with the occurrence of the offense." To the contrary, her delay is explained by and completely consistent with the all too common circumstances surrounding sexual assault on minors – fear of disbelief by others and threat of further harm from the assailant. The decision whether to admit or suppress evidence of the fact of the victim's complaint of Woodard's assault was a matter committed to the discretion of the trial judge, and upon its admission, the timeliness of the complaint became a matter for the jury to consider in weighing the evidence.

Id. at 28. See also State v. P.H., 179 N.J. 378, 393, 840 A.2d 808 (2004) (noting that "fresh complaint guidelines had to be applied flexibly to children who allegedly have been sexually abused in light of the reluctance of children to report a sexual assault and their limited understanding of what was done to them").

These considerations should apply in this case as well. As in Woodard, the delayed disclosures by the victims were not "unexplained" or "inconsistent with the occurrence of the offense." Woodard, 19 Va. App. at 27. Rather, each of the victims testified

that any delay in reporting was stemmed from the fact that they were afraid that no one would believe them or they were scared to do so. See, e.g., 4RP 117-18 (victim MP); 5RP 97 (victim JH); 5RP 28 (victim JS). As recognized by this Court in Graham, these responses are common in the context of child sexual abuse.

Given that the underlying rationale for the timeliness requirement of the traditional “fact of complaint” rule is outdated and flawed, and given that the circumstances of victim's disclosures are relevant, the State asks this Court to find that this evidence was properly admitted. There was no misconduct in counsel electing not to object to admissible testimony.

4. Any error in admitting “fact of the complaint” evidence or “other bad act” evidence was harmless.

But even if this Court were to conclude that the defense counsel should have objected to “fact of complaint” testimony – and that that testimony was improper to the extent that it was untimely – a new trial is still not warranted because any error was harmless.

In evaluating whether the introduction of this testimony is harmless, it is important to remember that this was a bench trial. In a bench trial, appellate courts presume that the trial judge, knowing the applicable rules of evidence, will not consider inadmissible

evidence when making his or her findings. State v. Miles, 77 Wn.2d 593, 601, 464 P.2d 723 (1970). This is because “[i]n bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions.” State v. Read, 147 Wn.2d 238, 245, 53 P.3d 26 (2002) (quoting Harris v. Rivera, 454 U.S. 339, 346, 102 S. Ct. 460, 70 L. Ed. 2d 530 (1981)). Calcote can rebut this presumption by showing the verdict is not supported by sufficient admissible evidence, or the trial court relied on the inadmissible evidence to make essential findings that it otherwise would not have made. Read, 147 Wn.2d at 245-46; Miles, 77 Wn.2d at 601 (citing State v. Ryan, 48 Wn.2d 304, 293 P.2d 399 (1956)); State v. Palomo, 113 Wn.2d 789, 783 P.2d 575 (1989) (stating that had hearsay evidence admitted in bench trial violated the confrontation clause, which the Court ruled it did not, a harmless error standard was satisfied), cert. denied, 498 U.S. 826 (1990)).

On appeal, Calcote asserts that admission of the “fact of the complaint” testimony was prejudicial because “the repetition of a witness’s story does not make it more reliable or credible.” See

BOA, p. 18.⁷ Significantly, in its oral ruling the trial court made it abundantly clear that it was not relying on this improper inference to find that the victims were credible:

During argument, Mr. Davis [defense counsel] brought up the point, *which is true*, that an alleged victim who recounts over and over again to many different people the events of an alleged crime does not make it more or less likely that that alleged crime occurred. *Repetition does not increase reliability*. And I think that's the point Mr. Davis was making.

I don't think the State, however, was asserting that repetition equals reliability. I think they were asserting that corroboration equals reliability. Do different people, who apparently have not had an opportunity to speak and invent a story, when having parallel stories that come together at a point in time that support each other, does that make each of them -- are their stories more believable; and it does.

If you have three different people who observe the same thing from different vantage points and have with -- out talking to each other, have very, very close recollection of events, then it supports each of them, as long as they haven't gotten together and talked about it.

Here, there is no evidence, I'm not even sure I necessarily heard an inference that [MP], [JS] and [JH] got together before the first disclosure was made, and made a determination that, for whatever reason, they were going to make a concerted effort to get Mr. Calcote into deep legal trouble.

⁷ Calcote also asserts on appeal that he was not attacking the credibility of the three victims when he testified. This makes no sense at all given that the entire thrust of his testimony below was that he had done nothing wrong and that the victims were manufacturing their allegations.

In fact, it would appear, if anything is to be believed of their testimony, that the exact opposite happened.

That these events that they relate, although similar, happened at different places, at different times, and that the disclosures about the events were not connected until June of 2007 when [MP] finally spoke to [JS] and [JH], and everything came together as being similar.

The defendant's position is that they were all motivated, for whatever reason, to make up false assertions, that motivation flowed from the fact that Mr. Calcote was a stern disciplinarian.

Because of that, each of them had their own reason, separate and apart from the others, to make false allegations against him.

To believe that, I have to – would have to draw the inference that they, in fact, got together long before June 7th, 2007, they corroborated – collaborated and came up with a story to bring him down.

I don't believe, under the facts of this case, that that's a reasonable inference.

6RP 83-85. The trial court clearly understood that repetition does not equal reliability and did not rely on this improper inference when reaching its decision. Rather, the court used the testimony for the entirely proper purpose of rebutting the suggestion that the victims had corroborated in manufacturing false allegations about Calcote. Because the trial court properly considered this evidence, there was no prejudicial error stemming from defense counsel's decision not to object to "fact of the complaint" testimony.

The State concedes that the “fact of the complaint” testimony should not have identified Calcote specifically. However, any such references were clearly harmless. Most basically, it is assumed that in a bench trial the court ignored this inadmissible evidence. Moreover, the fact that the victims were referring to Calcote – even if his name had not been mentioned – would have been obvious by the subsequent actions of the victims and their families (i.e., confronting Calcote and making a report to the police). Lastly, the Washington Supreme Court has recognized that this sort of error is often harmless in the context of the introduction of “fact of the complaint” testimony:

A counterpart to this rule is that the weight of the harm claimed to have been caused by reference to the alleged offender’s identity may be too slight to constitute reversible error. State v. Conklin, 37 Wn.2d 389, 223 P.2d 1065 (1950). The court in Conklin held that a witness’ testimony which referred to the offender’s identity was not reversible error because “[t]here is no risk here, then, of bolstering a disputed identification in admitting the evidence in question. There was never any dispute over the offender’s identity. The issue was over what the appellant did or did not do.” Conklin, at 391, 223 P.2d 1065.

The rationale of Conklin applies in this case. Identity of the offender was never at issue. It was never contended that someone other than petitioner engaged in the acts complained of. There was no risk that the teacher’s testimony would bolster a disputed identification. The issue in this case was what petitioner did or did not do. The teacher’s inadvertent

reference to petitioner does not constitute reversible error.

Ferguson, 100 Wn.2d at 136.

Similarly, in the present case, there was no dispute about who the victims believed was the perpetrator and no suggestion that someone other than Calcote could have committed the crimes. Rather, the issue was whether Calcote actually did the acts complained of by the victims. In this context, brief references to Calcote during the “fact of the complaint” testimony were harmless.

Finally, assuming *arguendo* that the introduction of the “other bad act” evidence of Calcote’s lustful disposition toward JS was error, it was harmless. Again, the trial court is presumed to know the rules of evidence. In this case, there is no indication that the trial court used the “other bad acts” evidence for anything other than its proper purpose, i.e., to show Calcote’s lustful disposition toward JS.

But even if doing so was improper, Calcote has failed to show that the verdict is not supported by sufficient admissible evidence, or the trial court relied on the inadmissible evidence to make essential findings that it otherwise would not have made. The court never discussed the other bad acts in its oral ruling. The

written findings of fact and conclusions of law on this issue are limited to two sentences: "This was not the first time the defendant had paid a late night visit to JS while she was sleeping. This incident, however, is the one night JS remembers with the most clarity." CP 27 (FF2). In light of JS's testimony, and the trial court's rejection of Calcote's assertion that the testimony of the victim was fabricated, Calcote has not established by a "reasonable probability" that, but for counsel's alleged error, the result of the trial would have been different.

C. THE STATE AGREES THAT A SCRIVENER'S ERROR IN THE JUDGMENT AND SENTENCE SHOULD BE CORRECTED.

Calcote correctly points out that the trial court found that the crime of indecent liberties as charged in Count V occurred between July 25, 2003 and July 24, 2004. CP 29 (CL 14). This charging period is consistent with the State's second amended information. 5RP 113; 6RP 1. The judgment and sentence, however, indicates that this crime occurred between July 25, 2005 and July 24, 2007. CP 18. The Court should remand to correct this scrivener's error.

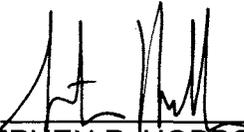
IV. CONCLUSION

For the reasons stated above, the State of Washington respectfully requests that this Court affirm all five of Calcote's convictions.

DATED this 13th day of September, 2010.

Respectfully submitted,

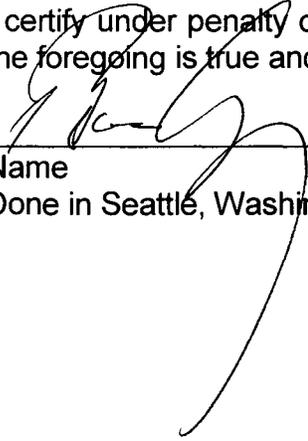
DANIEL T. SATTERBERG
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By: 
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to ELAINE WINTERS, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Respondent's Brief, in STATE v. BERTRAN CALCOTE, Cause No. 64605-2-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name

Done in Seattle, Washington

10-14-2010
Date