

64605-2

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No. 64605-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

BERTRAN CALCOTE,

Appellant.

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

The Honorable Michael Hayden

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

MR. CALCOTE'S ATTORNEY DID NOT PROVIDE THE  
EFFECTIVE ASSISTANCE OF COUNSEL  
GUARANTEED BY THE FEDERAL AND STATE  
CONSTITUTIONS

Mr. Calcote's attorney did not pose a single objection during the testimony of the State's witnesses, and on appeal Mr. Calcote argues he did not receive effective assistance of counsel because his lawyer did not object to (1) irrelevant testimony admitted under the "hue and cry" doctrine and (2) inadmissible evidence of other misconduct to show the defendant's "lustful disposition." Brief of Appellant at 12-24. The State responds that the evidence at issue was admissible. Brief of Respondent at 23-42. The State's argument is not well-founded.

1. Defense counsel should have objected to evidence that JH, JS, and MP told several people about the alleged sexual abuse. Prior to trial, the State indicated it intended introduce evidence of several specific times when MP, JH, and JS each told people they were sexually abused under the "hue and cry" doctrine. 11/9/09RP 28; CP 40-41. At trial the State elicited this testimony, as well as additional information not mentioned in the memo, without objection from defense counsel. 11/10/09RP 24-28, 31-32,

53-56, 63-64, 68-69, 76-77, 85, 87-89, 107-08, 139-41, 144-45;  
11/12/09RP 23, 28, 30-33, 46-49, 81-96, 99,104-09.

The “hue and cry” or “fact of the complaint” doctrine was described by the Ferguson Court:

[I]n criminal trials for sex offenses the prosecutor may present evidence that the victim complained to someone after the assault. The rule admits only such evidence as will establish that the complaint was timely made. Excluded is evidence of the details of the complaint, including the identity of the offender and the nature of the act.

State v. Ferguson, 100 Wn.2d 131, 135, 667 P.2d 68 (1983)

(citations omitted). Thus, evidence of a victim’s complaint is only admissible if it is “timely made” and does not include the identity of the offender or a description of the act. Id.; State v. Ackerman, 90 Wn.App. 477, 481, 953 P.2d 816 (1998). The evidence is admitted under a common law exception to the hearsay rule in order to rebut the inference that the complaining witness was silent following the offense and therefore consented. State v. Osborn, 59 Wn.App. 1, 7 n.2, 795 P.2d 1174, rev. denied, 115 Wn.2d 1032 (1990); State v. Fleming, 27 Wn.App. 952, 621 P.2d 779 (1980), rev. denied, 95 Wn.2d 1013 (1981).

Here, defense counsel did not object to evidence that each girl reported the alleged abuse to others, even when the evidence

concerning the disclosures revealed the defendant as the alleged abuser. For example, JS and JH each testified that they told each other what happened to them. JS said she was disappointed in Mr. Calcote as a result of the conversation, and JH said it was hard because Mr. Calcote was JH's father. 11/12/09RP 48-50, 99-101. This information, however, goes beyond the "hue and cry" doctrine. State v. Alexander, 64 Wn.App. 147, 153, 822 P.2d 1250 (1992) (testimony that victim was scared to talk about things that happened at the defendant's house not admissible as it revealed perpetrator's identity).

In addition, the Alexander Court found that testimony that a nine-year-old's description of her abuse was "very clear" and remained consistent throughout her counseling session was improperly admitted, because it invited the jury to conclude from her repeated disclosures that the victim was likely telling the truth. Id. at 152. Here, the State produced repeated evidence that each of the young women told someone about the alleged offenses. The court learned that MP's mother, father, JS, JH, Kanisha, and a detective; the evidence was elicited not just from MP but also from the parents, the detective, and JS and JH. 11/10/09RP 24-28, 32, 43, 53-56, 57-58, 7-77,139-41, 144-45, 147-48; 11/12/09RP 46-47,

104-09. Several witnesses told the court that JH told JS, MP, MP's mother, and the police. 11/10/09RP 87-88, 144; 11/12/09RP 48-49, 99, 107-10. And the court learned that JS told JH, Kanisha, her boyfriend, her mother, MP's mother, and a detective. 11/10/09RP 68-71, 90-91; 11/12/09RP 23, 30-33, 48, 53-54.

“Unless the defense directly attacks the victim's credibility by, for example, suggesting that she recently fabricated her allegations, evidence that she repeatedly told the same story out of court is not admissible to corroborate her testimony.” Alexander, 64 Wn.App. at 152. The evidence that each victim repeatedly told people about the alleged abuse was thus inadmissible, and defense counsel should have objected.

The State referred this Court to Ferguson as authority, but nonetheless claims Mr. Calcote's brief argument that the victim's complaint be “timely made” is offensive and antiquated. Brief of Respondent at 30, 31. In addition to evidence that the girls told other people about the alleged abuse, the State also elicited testimony that they did not initially tell anyone because they were scared no one would believe them, thus explaining any delay in reporting and also engendering sympathy for the young witnesses. 11/10/09RP 117, 144; 11/12/09RP 28-29, 32, 88, 97. Additionally,

the State's theory that the trial court judge might not have believed the crime victims in this case without evidence of who they reported the abuse to and when is itself offensive and outdated. In 2009, the experienced trial judge was capable of reviewing the evidence free from the burden of an "inference of fabrication" as argued by the State. Defense counsel should have objected to the repetitive testimony detailing every person each girl told she had been abused to understand why a child might not immediately report abuse by a loved and respected family member.

Finally, the State challenges Mr. Calcote's argument that competent defense counsel would have pointed out to the trial court that there is not an exception to the hearsay rules included in the Rules of Evidence (ER). ER 802 provides that hearsay is admissible as only provided by court rule or statute.<sup>1</sup> Evidence rules are interpreted in light of their purpose, and court rules are interpreted using traditional rules of statutory construction. ER 102; In re Disciplinary Proceeding Against Haley, 156 Wn.2d 324, 344, 126 P.3d 1262 (2006). Under "expression unius est exclusion alterius," a rule of statutory construction, to express one thing in a

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<sup>1</sup> ER 802 reads, "Hearsay is not admissible except as provided by these rules, by other court rules, or by statute."

statute implies the exclusion of others. State v. Delgado, 148 Wn.2d 723, 728, 63 P.3d 792 (2003). The “hue and cry” doctrine is a common law exception to the hearsay rule, Ackerman, 90 Wn.App. at 481, and ER 802 thus does not permit the introduction of hearsay under this exception. JS, JH, and MP were each capable of testifying as to who they told about the alleged abuse. There was no need for the State to admit what they reported to each other, to JS’s sister, their parents, or the police. Defense counsel should have objected to this repetitive hearsay testimony.

2. Defense counsel should have objected to evidence admitted for purposes of showing Mr. Calcote’s “lustful disposition.”

The State also argues the trial court necessarily would have admitted evidence of uncharged incidents where Mr. Calcote allegedly touched JS as they were admissible to show his lustful disposition to each girl. Under ER 404(b), however, the court must first determine if the evidence is relevant and tends to make any fact more or less probable. ER 401; State v. Dawkins, 71 Wn.App. 902, 908, 863 P.2d 124 (1993). If it finds the evidence relevant, the court then engages in a balancing test, determining if the probative value of the evidence outweighs its prejudicial effect. ER 403; Dawkins, 71 Wn.App. at 908-09. If the evidence is admitted, the

court provides the jury with an instruction explaining its limited purpose. Dawkins, 71 Wn.App. at 909. “These steps are particularly important in sex cases where the potential for prejudice is at its highest.” Id. (quoting State v. Bacotgarcia, 59 Wn.App. 815, 819, 801 P.2d 993 (1990), rev. denied, 116 Wn.2d 1020 (1991) and State v. Coe, 101 Wn.2d 772, 780, 684 P.2d 668 (1984)).

In Dawkins, the State appealed when the trial court found the defendant has received ineffective assistance of counsel and ordered a new trial on the charges of second degree child molestation. Dawkins, 71 Wn.App. at 904. The trial court’s ruling was based solely on defense counsel’s failure to object to uncharged incidents of touching. Id. at 906. This Court affirmed the trial court, noting that although “lustful disposition” evidence is often admissible, the decision to admit the evidence is normally made by the trial court after the proper analysis and it was ineffective of defense counsel to assume the evidence would be admitted. Id. at 910.

Though defense counsel was correct that “lustful disposition” evidence is generally relevant under ER 404(b), he failed to consider the axiomatic, fundamental principal that evidentiary rulings are assigned to the discretion of the trial court. Without

raising the objection, counsel was in no position to hypothesize that the court would not have excluded the evidence.

Id.

Here, too, Mr. Calcote's attorney assumed any evidence of Mr. Calcote's other bad acts would be admissible and did not pose an objection to any of the other misconduct evidence. The trial court therefore did not determine if the evidence was relevant and if its relevance was outweighed by prejudice. The court could have concluded the relevance was slight in light of the certainty of Mr. Calcote's identity and that the prejudice was great in a case where there were no eyewitnesses or physical evidence. See Dawkins, 71 Wn.App. at 909. And, even if the court had admitted the evidence, defense counsel's objection would have altered the court to its limited purpose. Trial counsel was ineffective for not posing an objection to prejudicial evidence of other incidents of sexual abuse.

3. Mr. Calcote's convictions must be reversed. Mr.

Calcote's lawyer did not object to repeated evidence that JH, JS and MP reported the offense to various people or to evidence of uncharged offenses against JS. The State was therefore given carte blanche to convict Mr. Calcote based upon evidence of his

bad character and propensity to commit sexual offenses. This Court cannot be convinced that the trial court's guilty findings might not have been different if the propensity evidence had been excluded. Mr. Calcote's convictions must be reversed and remanded for a new trial because he did not receive effective assistance of counsel

B. CONCLUSION

Mr. Calcote did not receive the effective assistance of counsel guaranteed by the federal and state constitutions. His convictions must be reversed and remanded for a new trial. In addition, for the reasons stated in the Brief of Appellant, the three convictions for indecent liberties must be reversed and dismissed.

DATED this 24<sup>th</sup> day of November 2010.

Respectfully submitted,



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DIVISION ONE**

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STATE OF WASHINGTON,	)	
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Respondent,	)	
	)	NO. 64605-2-I
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	)	
Appellant.	)	

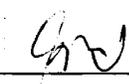
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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29<sup>TH</sup> DAY OF NOVEMBER, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> BERTRAN CALCOTE 336040 MONROE CORRECTIONAL COMPLEX-WSR PO BOX 777 MONROE, WA 98272	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2010.

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