

64605-2

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No. 64605-2-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BERTRAN CALCOTE,

Appellant.

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

The Honorable Michael Hayden

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Mr. Calcote did not receive the effective assistance of counsel guaranteed by the federal and state constitutions when his defense counsel failed to object to evidence of who the victims reported the incidents to under the “hue and cry” doctrine.

2. Mr. Calcote did not receive the effective assistance of counsel guaranteed by the federal and state constitutions when his defense counsel failed to object to other misconduct admitted for purposes of showing Mr. Calcote’s “lustful disposition” toward JS.

3. The State did not prove beyond a reasonable doubt that JH was mentally or physically incapacitated, an essential element of indecent liberties as charged in Count 3.

4. The trial court erred by concluding JH was “physically helpless and incapable of consent.” Conclusion of Law 12.

5. Appellant assigns error to Finding of Fact 3, paragraph 1.

6. To the extent it is really a finding of fact, appellant assigns error to Conclusion of Law 12.

7. The State did not prove beyond a reasonable doubt that JH was mentally or physically incapacitated, an essential element of indecent liberties as charged in Count 4.

8. The trial court erred by concluding JH was “physically helpless and incapable of consent. Conclusion of Law 13.

9. Appellant assigns error to Finding of Fact 3, paragraph 2.

10. To the extent it is really a finding of fact, appellant assigns error to Conclusion of Law 13.

11. The State did not prove beyond a reasonable doubt that JS was mentally or physically incapacitated, an essential element of indecent liberties as charged in Count 5.

12. The trial court erred by concluding JS was “physically helpless and incapable of consent.” Conclusion of Law 14.

13. Appellant assigns error to Finding of Fact 2, paragraph 1

14. To the extent it is really a finding of fact, appellant assigns error to Conclusion of Law 14.

15. The Judgment and Sentence contains the incorrect dates for Count 5.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A criminal defense attorney is obligated to thoroughly investigate the law and the facts of his client’s case. Mr. Calcote’s attorney did not object when the prosecuting attorney elicited testimony that MP, JH, and JS each told several people about the alleged offense. Repetition of a story is not indicative of its truth,

and no Washington Evidence Rule permits the introduction of a witness's prior statements when the defendant has not challenged her credibility. Did Mr. Calcote receive effective assistance of counsel when his attorney did not object to testimony concerning the many times the three young women reported they were sexually abused? (Assignment of Error 1).

2. A criminal defense attorney is obligated to thoroughly investigate the law and the facts of his client's case. Mr. Calcote's attorney did not object when the prosecuting attorney elicited JS's testimony that Mr. Calcote committed similar act of indecent liberties both before and after the charged incident to show his "lustful disposition" towards her. Where the evidence showed that Mr. Calcote had the propensity to commit indecent liberties, did Mr. Calcote receive effective assistance of counsel when his attorney did not object to testimony of several similar acts of sexual misconduct against JS? (Assignment of Error 2).

3. A defendant may not be convicted of a crime unless the State proves every element of that crime beyond a reasonable doubt. Mr. Calcote was convicted of indecent liberties, Count 3, on the grounds JH was asleep and therefore physically helpless and incapable of consent, but JH testified she was not asleep, but

between sleep and wakefulness. Viewing the evidence in the light most favorable to the State, must Mr. Calcote's conviction for indecent liberties be dismissed in the absence of proof beyond a reasonable doubt that JH was physically or mentally incapacitated? (Assignments of Error 3-6).

4. A trial court's finding of fact will be upheld if there is substantial evidence to support it. Where JH testified that she was between being asleep and awake when the incident occurred, was there substantial evidence to support the trial court's finding that JH was asleep when she felt the defendant touching her and saw the defendant leave the room as she awakened? (Assignments of Error 5-6).

5. A defendant may not be convicted of a crime unless the State proves every element of that crime beyond a reasonable doubt. Mr. Calcote was convicted of indecent liberties, Count 4, on the grounds JH was asleep and therefore physically helpless and incapable of consent, but JH testified she was not asleep, but between sleep and wakefulness. Viewing the evidence in the light most favorable to the State, must Mr. Calcote's conviction for indecent liberties be dismissed in the absence of proof beyond a

reasonable doubt that JH was physically or mentally incapacitated?
(Assignments of Error 7-10).

6. A trial court's finding of fact will be upheld if there is substantial evidence to support it. Where JH testified the incident occurred when she was between being asleep and awake but more alert than for Count 3, was there substantial evidence to support the trial court's finding that JH was asleep when she felt the defendant touching her and saw the defendant leave the room as she awakened? (Assignments of Error 9-10).

7. A defendant may not be convicted of a crime unless the State proves every element of that crime beyond a reasonable doubt. Mr. Calcote was convicted of indecent liberties, Count 5, on the grounds JS was asleep and therefore physically helpless and incapable of consent, but JS testified she was not asleep, but between sleep and wakefulness. Viewing the evidence in the light most favorable to the State, must Mr. Calcote's conviction for indecent liberties be dismissed in the absence of proof beyond a reasonable doubt that JS was physically or mentally incapacitated?
(Assignments of Error 11-14).

8. A trial court's finding of fact will be upheld if there is substantial evidence to support it. Where JS testified the incident

occurred after she awoke but was not fully alert, was there substantial evidence to support the trial court's finding that JS was asleep when she felt the defendant touching her? (Assignments of Error 13-14).

9. The trial court found that Count 5 occurred between July 25, 2003, and July 24, 2004, but the Judgment and Sentence reflects a different date. Must Mr. Calcote's case be remanded to correct the Judgment and Sentence? (Assignment of Error 15).

C. STATEMENT OF THE CASE

Bertran Calcote is a respected member of his wife's close-knit family, and he had good relationship with his step-daughter JS (dob 7/25/87), his sister-in law JH (dob 2/13/90), and his niece MP (dob 4/10/90). 11/10/09RP 19-20, 47-48, 90; 11/12/09RP 57, 62, 70; 11/16/09RP 7-16. The King County Prosecutor charged Mr. Calcote with sexual abuse of each of the three occurring when they were minors. CP 6-8; 11/9/09RP 1-3; 11/16/09RP 1.

Mr. Calcote waived his right to a jury trial and was convicted by the Honorable Michael Hayden of (Count 1) attempted rape of a child in the first degree (MP, between 2/13/99 and 2/12/2002); (Count 2) attempted rape in the second degree (MP, June 10-11, 2007); (Count 3) indecent liberties (JH, between 12/13/03 and

12/13/05); (Count 4) indecent liberties (JH, same time period); and (Count 5) indecent liberties (JS, between 7/25/03 and 7/24/04). CP 29 (Conclusions of Law 9-14).¹

For Count 2, Mr. Calcote was sentenced to a maximum term of life in prison with a minimum term of 157.5 months. CP 16. He received a standard range sentence of 180 months for Count 1 and concurrent sentences of 87 months for Counts 3-5. CP 15. He appeals. CP 24-25.

1. Counts 1 and 2. 19-year-old MP testified that when she was probably 9 or 10 years old, she spent the weekend at her grandparents' home and fell asleep on a couch in the living room.² 11/10/09RP 99, 108-09, 111-12. While she was asleep, MP felt a still hand in her vaginal area. 11/10/09RP 113-15, 116. When she woke up, she saw Mr. Calcote next to the couch with his hands by his sides. 11/10/09RP 115-16. MP went back to sleep and did not tell her grandparents what happened. 11/10/09RP 117-18. She continued to have a good relationship with Mr. Calcote and was not hesitant to spend the night with his family; MP's parents did not

¹ A redacted copy of the Findings of Fact and Conclusions of Law, CP 26-30, is attached as an appendix to this brief.

² MP frequently spent the night at the home of her grandparents, the Allens, and Mr. Calcote and his family occasionally lived with the Allens. 11/10/09RP 21-23; 11/12/09RP 8-10. MP also occasionally spent the night at Mr. Calcote's home. 11/10/09RP 48.

observe anything unusual in her relationship with him. 11/10/09RP 33, 37-38, 79, 118.

On June 9-10, 2007, MP was at Mr. Calcote's home because she was helping as a backup dancer for JS who was singing in a competition the next day at the community center. 11/10/09RP 49-53, 122-24; 11/12/09 RP 42-43. MP fell asleep in her clothing on the bed in JS's downstairs bedroom. 11/10/09RP 129. MP described rising up, being guided into JS's sister's nearby bedroom, and placed on a mattress. She then felt her pants being removed and felt Mr. Calcote's finger inside the lips of her vagina. 11/10/09RP 131-36. MP said she was never fully awake and simply went back to sleep. 11/10/09RP 137. The next morning MP told JH, JS, and JS's sister Kanisha. 11/10/09RP 139-41; 11/12/09RP 104-05.

Mr. Calcote's family had other relatives visiting at that time, and the house was filled with people. 11/12/09RP 42-43; 11/16/09RP 24. MP wanted Mr. Calcote to let a friend spend the night also, but he refused because the friend was a runaway. 11/16/09RP 20-21. MP was angry about his decision. 11/16/09RP 20-21.

Mr. Calcote explained that he found MP asleep in a chair that night and guided her downstairs, but was distracted because he found JH vomiting in the basement and he had to assist her and clean the bathroom.³ 11/16/09RP 24-25. Mr. Calcote placed a mattress on the floor of his daughter Kanisha's bedroom, woke up MP, who had fallen back asleep in JS's room, and told MP to sleep on the mattress. 11/16/09RP 25-26. He then returned with covers for MP and left the room without having any sexual contact with MP. 11/16/09RP 26.

Mr. Calcote was charged with first degree rape of a child and rape in the second degree. CP 6-7. Because MP was not awake during the incidents and was therefore unlikely to know if she was penetrated, the trial court did not find Mr. Calcote guilty of either offense beyond a reasonable doubt. RP 11/16/09RP 86-87. The court therefore found Mr. Calcote guilty of the lesser-included offenses of attempted rape of a child in the first degree and attempted rape in the second degree. 12/11/09RP 5-7; Conclusions of Law 10-11.

2. Counts 3 and 4. JH was close to both her sister and her brother-in-law Mr. Calcote. 11/12/09RP 70, 73, 78-79. Mr. Calcote

³ JH was also spending the night at Mr. Calcote's home. 11/12/09RP 44, 102.

and his family lived with JH's parents for a period of time when JH was in elementary school. 11/12/09RP 77-78. JH also lived with the Calcote family for awhile when she was in middle school and her parents were unable to provide the necessary structure and discipline. 11/12/09RP 79-82; 11/16/09RP 7-9, 10-11.

JH was 19 years old at the time of trial and related two incidents that she believed happened when she was 14 years old. 11/12/09RP 68, 81, 89. Both times JH was sleeping in JH's bedroom in Mr. Calcote's house. 11/12/09RP 81-83, 92. While she was between being asleep and being awake, JH felt a hand cupping her genital and vaginal area. 11/12/09RP 83-86, 92, 94-95. The first time the hand was under her underpants, but she could not remember if it was over or under her clothing during the second incident. 11/12/09RP 85, 93. Both times JH saw Mr. Calcote. 11/12/09RP 86-87, 95-96. Both times JH went back to sleep. 11/12/09RP 89, 96-97, 99. JH continued to spend time at Mr. Calcote's home without worry. 11/12/09RP 97-98.

3. Count 5. Mr. Calcote's stepdaughter JS was 22 years old at the time of the trial. 11/12/09RP 23. JH related that one evening while she was 16 years old, she was sleeping in her bedroom and felt a breeze on her legs and then a tapping on her vagina

underneath her clothing. 11/12/09RP 14-15, 58. She noticed she was at the bottom of her bed with her legs hanging off the edge and was uncovered. 11/12/09RP 17-18, 20-21. JS then felt her nightgown pulled back into place and her covers replaced.

11/12/09RP 20. She said she was awake and saw Mr. Calcote leave the room and shut the door. 11/12/09RP 21-22. JS woke up her sister Kanisha and told her what happened. 11/12/09RP 23.

JS added that Mr. Calcote had touched or tapped her vaginal area from outside her underwear several times when she was in the 7th and 8th grades but she had not told anyone. 11/12/09RP 25-28.

Defense counsel did not object.

JS told her boyfriend and other friends about the high school incident, and she eventually told her mother. 11/12/09 30-33.

According to JS, she and her mother later confronted Mr. Calcote; Mr. Calcote responded that he was trying to determine if JS was still a virgin and apologized for his tactics. 11/12/09RP 35-37. The touching then stopped. 11/12/09RP 39.

At trial, Mr. Calcote denied sexually abusing any of the three girls. 11/16/09RP 27. He explained that he and his wife always checked on the children while they were sleeping, as his children suffered from asthma. 11/16/09RP 46-47.

D. ARGUMENT

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

Defense counsel did not pose any objections to the testimony elicited by the State during Mr. Calcote's trial. Counsel did not object when the State elicited testimony that MP, JH and JS each told people that they were sexually abused, and counsel did not object when the State elicited testimony that Mr. Calcote touched JS's vaginal area on several occasions before and once occasion after the charged crime. Competent defense counsel would have objected to this evidence, which was used by the trial court to convict Mr. Calcote. His convictions must be reversed and remanded for a new trial where he will receive effective assistance of counsel.

a. Mr. Calcote had the right to effective assistance of counsel. The accused enjoys the constitutional right to the assistance of counsel.⁴ U.S. Const. amends. VI, XIV; Const. art. I,

⁴ The Sixth Amendment provides in part, "In all prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Fourteenth Amendment states in part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

§§ 3, 22. The right to counsel includes the right to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 n.14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); State v. A.N.J., 168 Wn.2d 91, 96, 225 P.3d 956 (2010). Counsel plays a critical role in the adversarial system by putting the prosecutor's case to the test and making sure the adversarial process is fair. Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); United States v. Cronin, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); A.N.J. 168 Wn.2d 96-97. "[T]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Herring v. New York, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975).

When reviewing a claim that trial counsel was not effective, appellate courts utilize the two-part test announced in Strickland v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). The appellate court must determine (1) was the attorney's

Article I, Section 22 provides in pertinent part, "In all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . ."

Article I Section 3 of the Washington Constitution states, "No person shall be deprived of life, liberty, or property, without due process of law."

performance below objective standards of reasonable representation, and, if so, (2) did counsel's deficient performance prejudice the defendant. Strickland, 466 U.S. at 687-88; Thomas, 109 Wn.2d at 226. In reviewing the first prong, courts presume counsel's representation was effective. Strickland, 466 U.S. at 689; Thomas, 109 Wn.2d at 226. To show prejudice under the second prong, the defendant must demonstrate that "counsel's errors were so serious as to deprive the defendant of a fair trial." Strickland, 466 U.S. at 687.

Ineffective assistance of counsel is a mixed question of law and fact reviewed de novo. Strickland, 466 U.S. at 698; A.N.J., 168 Wn.2d at 109. While the appellate courts presume that defense counsel was not deficient, the tactic must be reasonable; the presumption is rebutted if there is no tactical explanation for counsel's performance. Wiggins v. Smith, 539 U.S. 510, 523-24, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Here, Mr. Calcote's counsel did not object to (1) irrelevant testimony admitted under the "hue and cry" doctrine or (2) inadmissible evidence of other misconduct to show the defendant's "lustful disposition." To prevail on a claim of ineffective assistance

of counsel based upon a failure to object, the defendant must show (1) the absence of a legitimate strategic or tactical reason for not objecting, (2) the trial court would have sustained the objection if made, and (3) the result of the trial would have been different if the evidence had not been admitted. State v. Saunders, 91 Wn.App. 575, 578, 958 P.2d 364 (1998).

b. Defense counsel's performance was deficient when he failed to object to the admission of prejudicial testimony admitted under the "hue and cry" doctrine. Prior to trial, the State indicated a desire to admit evidence that MP, JH, and JS told people about the sexual abuse under the "hue and cry" doctrine. RP 11/9/09RP 28. Seven specific disclosures were listed in the State's trial memorandum. SuppCP __ (State's Trial Memorandum, sub. no. 125, filed 11/12/09) (hereafter Trial Memorandum) at 9-10. Defense counsel did not object. 11/9/09RP 28-29. During the course of the trial, the State elicited additional times that the three girls told people they were sexually abused. Again, defense counsel did not object.

MP testified she was molested once when she was under the age of 12 and again when she was 17. Without objection, the State elicited testimony that MP told her mother, JH, JS, and JS's

sister the day after the second incident. MP also told her father the next month; some witnesses described MP's demeanor.

11/10/09RP 24-28, 53-56, 139-41, 143, 144-45; 11/12/09RP 46-47, 104-09. JH added that MP had told her about the earlier incident and then said "it happened again" when she told her about the second time. 11/12/09RP 105-06.

JH testified that she was abused two times when she was about 14 years old. 11/12/09RP 81-96. JH said she told JS about the sexual contact, and JS revealed she was also touched inappropriately. 11/12/09RP 99. The court also learned that JH told MP on the school bus and also told MP's mother. 11/10/09RP 64-64, 107-08.

Concerning JS, the court learned that she immediately told her sister Kanisha, 11/12/09RP 23. Later, JS told her boyfriend and some other friends and, at their insistence, her mother. 11/12/09RP 28, 30-33. She also told JH and MP's mother. 11/10/09RP 68-69; 11/12/09RP 48-49.

Finally, the court learned that Detective Susana DiTusa took a telephone statement from JH and later interviewed her at her mother's home. 11/10/09RP 87-88. The detective also interviewed JS. 11/10/09RP 88-89. MP went to the police station to report the

incident, and she later gave a statement to Detective DiTusa.

11/10/09RP 31-32, 76-77, 85.

A witness's prior out-of-court statements consistent with her trial testimony are not admissible simply to bolster the witness's credibility; repetition is not a valid test for veracity. State v. Alexander, 64 Wn.App. 147, 152-53, 822 P.2d 1250 (1992).

Nonetheless, Washington courts have admitted evidence that a rape victim complained to someone after the assault under the "hue and cry" or fact of the complaint doctrine. State v. Ferguson, 100 Wn.2d 131, 135, 667 P.2d 68 (1983) (citing State v. Goebel, 40 Wn.2d 18, 25, 240 P.2d 251 (1952), overruled on other grounds, State v. Lough, 125 Wn.2d 847 (1995)); Alexander, 64 Wn.App. at 151-52.

Washington's evidence rules generally govern the admission of evidence in a criminal trial, and they supersede prior common law evidentiary doctrines. ER 101, 1101; State v. Brush, 32 Wn.App. 445, 450, 648 P.2d 897 (1982). The "hue and cry" or "fact of the complaint" doctrine is not an exception to Washington's hearsay rules. Karl B. Tegland, 5C Washington Practice: Evidence Law and Practice, § 803.7 at 28 (5th ed. 2007) Thus, reliance on this common law exception to the hearsay rule is "questionable."

Id. Nonetheless, Mr. Calcote's attorney made no objection to the admission of any evidence under this theory that MP, JS and JH told other people they were sexually assaulted.

Nor did defense counsel seek to limit any of the testimony to that permitted under this common law rule. To comply with the "hue and cry" doctrine, the disclosure must be close in time to the purported abuse. Alexander, 100 Wn.2d at 135-36. Moreover, the admissible evidence is strictly limited to the timeliness and fact of the complaint – the details of the complaint and identity of the assailant -- are not admissible. Ferguson, 100 Wn.2d at 135-36; Alexander, 64 Wn.App. 147.

Here, some of the disclosures of sexual abuse, however, revealed Mr. Calcote's identity. JH, for example, said JS was the first person she told "about Bertran and the touching." 11/12/09RP 99. JH also testified that MP said on the bus that "she had been touched by Bertran." 11/12/09RP 105. Other disclosures happened long after the alleged incident, as when JH told the girls on the bus what had happened when she was much younger. 11/12/09RP 107-08.

The repetition of a witness's story does not make it more reliable or credible. Mr. Calcote did not attack the credibility of MP,

JH, and JS. Moreover, the introduction of the evidence under the “hue and cry” doctrine does not comport with Washington evidence rules. Under these circumstances, diligent defense counsel would object to the admission of repetitive evidence that the alleged victims told other people they were sexually assaulted.

c. Defense counsel’s performance was deficient when he failed to object to evidence of uncharged misconduct. Mr. Calcote was charged with indecent liberties against JS on one occasion, and Mr. Calcote’s lawyer did not object when the State elicited testimony of several prior similar incidents and another incident that occurred after the charged crime. 11/09/09RP 30-32; 11/12/09RP 25-29, 33. The trial court’s findings reflect JS’s testimony that she remembered more than just the charged incident. Finding of Fact 2, paragraph 2.

Prior to trial the prosecutor asserted this evidence as admissible to show Mr. Calcote’s “lustful disposition” towards the girls. Supp CP __ (Prosecutor’s Trial Memorandum at 14); 11/9/09RP 30. Defense counsel stated he was not aware of any evidence of acts other than those charged and that he would address it later if other misconduct was elicited by the State.

11/09/09RP 31. Defense counsel, however, posed no objection to JS's testimony.

Evidence is admissible if it is relevant and if the probative value of the evidence outweighs its prejudicial effect.⁵ ER 402, 403; Ferguson, 100 Wn.2d at 133 (citing State v. Saltarelli, 98 Wn.2d 358, 655 P.2d 697 (1982)). Washington's evidence rules prohibit the introduction of evidence of a defendant's character or character traits, and a defendant's other misconduct is not admissible to prove the defendant's character or show that he acted in conformity with that character. ER 404; State v. Everybodytalksabout, 145 Wn.2d 456, 464, 39 P.3d 294 (2002); State v. Smith, 106 Wn.2d 772, 775, 725 P.2d 951 (1986). Evidence of prior misconduct may not be used to demonstrate the defendant is the type of person who would commit the charged offense. Everybodytalksabout, 145 Wn.2d at 466. The rule, however, permits evidence of other misconduct when relevant to prove an ingredient of the offense charged. The rule reads:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of the person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of

⁵ Evidence is relevant if it tends to "make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." ER 401.

motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b).

In determining if evidence of prior misconduct is admissible under ER 404(b), the trial court must

(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purposes for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, (4) weigh the probative value against the prejudicial effect.

State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002) (citing State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995)). In doubtful cases, the evidence should be excluded. Id. (citing Smith, 106 Wn.2d at 776). Because Mr. Calcote's attorney did not object to the evidence, however, the trial court did not make a determination that the evidence fit the criteria for admissibility under ER 404(b).

Washington cases have upheld the introduction of evidence of collateral sexual misconduct under ER 404(b) "when it shows a lustful disposition directed toward the offended female." Ferguson, 100 Wn.2d at 133-34. The theory is that the defendant's lustful inclination towards a specific person makes it more probable the defendant committed the charged offense. Id. (quoting State v.

Thorne, 43 Wn.2d 47, 60-61, 260 P.2d 331 (1953)). The conduct must be of a kind that would naturally be interpreted “as the expression of sexual desire.” Id.

In Mr. Calcote’s case, however, evidence that he sexually abused JS on occasions other than the charged offense was not relevant to prove any element of the charged offense or to disprove any defense. It was thus tantamount to the propensity evidence prohibited by ER 404. See Tegland, 5 Wash. Pract: Evidence, § 404.26 at 581.

The State was not required to prove Mr. Calcote’s motive or even his intent. All the indecent liberties statute requires is that the defendant “knowingly” causes another person to have sexual contact with him. RCW 9A.44.100(1). Thus, this evidence was not necessary to prove any ingredient of the charged offense. Had defense counsel objected to the prior misconduct against JS, the court would have granted the motion and the other misconduct would not have been relied upon by the court to convict Mr. Calcote of Count 5.

d. Defense counsel’s deficient performance prejudiced Mr. Calcote, and this Court should reverse his convictions. The appellate court will not find a trial attorney’s performance defective

if the decisions in question constitute legitimate trial tactics.

Reichenbach, 153 Wn.2d at 130. Here, for example, the State asked MP, JH and JS why they did not report the incidents and why they thought no one would believe them. These questions were objectionable and elicited irrelevant information that simply garnered sympathy for the victims. 11/10/09RP 43-44, 138, 146; 11/12/09RP 20-21, 28, 101-02. JS, however, testified she suspected she would not be believed because of Mr. Calcote's good character and reputation in their family. 11/12/09RP 60-62. Thus, defense counsel's failure to object to these questions demonstrates a legitimate trial tactic, as this information was helpful to the defense and difficult for the defense to produce. See State v. Jackson, 46 Wn.App. 360, 365, 730 P.2d 1361 (1987) (defendant's reputation for moral decency is irrelevant in prosecution for indecent liberties and incest); State v. Harper, 35 Wn.App. 855, 859-60, 670 P.2d 296 (1983) (reputation for truthfulness irrelevant in prosecution for indecent liberties), rev. denied, 100 Wn.2d 1035 (1984).

In contrast, the evidence that the three young women told others that they were sexually molested and evidence that JS was molested several times other than the charged offense did nothing

to help Mr. Calcote's defense. This information was used by the court in convicting Mr. Calcote. Findings of Fact 2 (paragraphs 2-3), 5-6. Defense counsel's failure to object thus permitted the State 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 did not receive effective assistance of counsel, and his convictions must be reversed and remanded for a new trial. Thomas, 109 Wn.2d at 232.

2. THE STATE DID NOT PROVE BEYOND A
REASONABLE DOUBT THAT MR. CALCOTE
COMMITTED THREE COUNTS OF INDECENT
LIBERTIES

The trial court found Mr. Calcote guilty of three counts of indecent liberties based upon the conclusion that JH and JS were physically helpless and incapable of consent because they were asleep. The testimony, however, does not support the court's finding that the young women were asleep because each testified she was not asleep and waking up when the abuse occurred. Mr. Calcote's convictions for indecent liberties must therefore be

reversed because the State did not prove every element of the crimes beyond a reasonable doubt.

a. The State was required to prove every element of indecent liberties beyond a reasonable doubt. The due process clauses of the federal and state constitutions require the government prove every element of a crime beyond a reasonable doubt.⁶ Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. The inquiry on appellate review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 334, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Ortega-Martinez, 124 Wn.2d 702, 708, 881 P.2d 213 (1994).

Mr. Calcote was charged and convicted of three counts of indecent liberties under RCW 9A.44.100(1)(b). CP 7-8; 29

⁶ The Sixth Amendment provides in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

Article I, Section 22 provides specific rights in criminal cases. "In all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . . to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury . . ."

(Conclusions of Law 12-14). The relevant section of the statute reads:

(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; . . .

(2)(a) Except as provided in (b) of this subsection, indecent liberties is a class B felony.

RCW 9A.44.100. "Sexual contact" is defined by statute as "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).

The elements of indecent liberties as charged in Mr. Calcote's case thus are: (1) the defendant knowingly (2) caused another person to have sexual contact with him, (3) the other person was not the defendant's spouse, and (4) the other person was incapable of consent by reason of being mentally defective, mentally incapacitated or physically helpless. RCW 9A.44.100(1)(b). The defendant must know the victim lacked capacity to consent due to a physical or mental disability. State v. Lough, 70 Wn.App. 302, 326, 853 P.2d 920 (1993), aff'd, 125

Wn.2d 847, 889 P.2d 487 (1995). The issue here is whether JH and JS were physically incapacitated and incapable of consent.

b. The State did not prove beyond a reasonable doubt that either JH or JS was physically and mentally incapacitated. For each of the three indecent liberties convictions, the trial court found the victim was “physically helpless and incapable of consent” because she was asleep. Findings of Fact 12-14.

RCW 9A.44.010(4) defines “mental capacity” as “that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause.” While “mental defect” is not defined in the statute, as used in the statute “a ‘mental defect’ is an irregularity in the emotional and intellectual response of a person to his environment which renders the person incapable of consent to sexual contact.” State v. VanVlack, 53 Wn.App. 86, 90, 765 P.2d 349 (1988). The mental incapacity “can be the result of an illness, defect, substance, or some other cause.” Id. A developmentally disabled person, for example, may be mentally incapable of consent. Ortega-Martinez, 124 Wn.2d at 705, 709, 711-12 (victim with IQ in 40’s did not

meaningfully understand nature or consequences of sexual intercourse). In addition, “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 (5). See State v. Bucknell, 144 Wn.App. 524, 183 P.3d 1078 (2008) (bedridden victim with ALS not physically helpless for purposes of second degree rape).

This Court has concluded that a victim was “physically helpless” and therefore incapable of consent because he was asleep when the sexual contact was initiated. State v. Puapuaga, 54 Wn.App. 857, 776 P.2d 170 (1989). Reviewing cases from other jurisdictions, this Court concluded “the state of sleep appears to be universally understood as unconsciousness or physical inability to communicate unwillingness.” Puapuaga, 54 Wn.App. at 861.

On appeal, this Court determines if the trial court’s findings of fact are supported by substantial evidence and whether the findings support the conclusions of law beyond a reasonable doubt. State v. Halstien, 122 Wn.2d 109, 128, 857 P.2d 270 (1993); State v. Luther, 157 Wn.2d 63, 78, 134 P.2d 205 (2006). Substantial evidence exists where there is evidence in the record “to persuade

a fair-minded, rational person of the truth of the allegation.

Halstien, 122 Wn.2d at 129. A finding of fact denominated as a conclusion of law is treated as a finding of fact. Luther, 157 Wn.2d at 78.

JS and JH did not say they were asleep. The prosecutor posited that there were three possible states – asleep, awake, or between the two; JH and JS each said they were in the state between sleep and wakefulness. Thus, the trial court's factual findings that JH and JS were asleep must be stricken.

i. Count 3. J.H. believed she was about 14 years old and sleeping in JS's room in Mr. Calcote's home when she felt a hand cupping her genital area. 11/12/09RP 81-85. JH said she was waking up and only partially asleep:

Q: When you felt the hand on the skin of your vagina, I want to ask you about that. Were you asleep – there's asleep, there's the moment, if you follow me, between that kind of time period where you're asleep and you're just starting to wake up, and then you're fully awake and alert.

When you felt the hand on your vagina, were you asleep, in that middle period, still asleep and on the start of waking up, or were you fully alert?

A: I was in the middle period.

Q: Okay, between sleep and fully awake? . . .

11/12/09RP 85-86. JH said she was still not fully awake when she heard the bedroom door open and saw Mr. Calcote leave the room. 11/12/09RP 86-87.

JS's testimony establishes that she was not asleep, and the trial court's factual finding, Finding of Fact 3, paragraph 1, and the finding that JS was asleep that is included in Conclusion of Law 12 must be stricken.

ii. Count 4. Concerning the second incident, Count 4, the prosecutor reminded JH of the three possible stages of consciousness she could have been in – asleep, awake or in between – and asked where she fit on this scale. 11/12/09RP 93. JH explained, "I was more so alert than last time, but I wasn't like woke like up, you know . . . like my eyes wasn't wide awake but I seen him like move." 11/12/09RP 94-95. JH added that she was awake, but another person would not be able to tell she was awake; "I knew what was going on." 11/12/09RP 94-95. After Mr. Calcote left the room JH went back to sleep. 11/12/09RP 96-97. Again, JH's testimony does not establish that she was asleep, and this portion of Finding of Fact 3, paragraph 2, and the finding that JH was asleep that is included in Conclusion of Law 13 must be stricken.

iii. Count 5. JS described feeling a breeze on her body and a slight push on her vaginal area. 11/12/09RP 14-17.

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 asleep 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. It is 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.

JS said she kept her eyes closed because she was scared, not because she was asleep, but she saw Mr. Calcote leaving her bedroom. 11/12/09RP 21-22.

Although JS testified she was not asleep when the touching occurred, the trial court found she was. Finding of Fact 2. The trial court first found that JS "was awakened to the feeling of the

defendant touching her vagina.” The court then found JS “was asleep in her bed, when she felt the defendant’s hand softly tapping on the outside of her vagina.” Here, a fair-minded person would not conclude JS was asleep when she said she was not. The finding that JS was asleep that is included in Finding of Fact 2, paragraph 1, and Conclusion of Law 13 must be stricken.

c. Mr. Calcote’s three convictions for indecent liberties must be reversed and dismissed. Based upon its findings, the trial court concluded that JS and JH were physically helpless and incapable of consent because they were asleep. Conclusions of Law 12-14. The trial court’s conclusion, however, are not supported by the testimony. JH said she was in the “middle period,” neither asleep nor fully awake for Count 3 and “more alert” but not fully awake for Count 4. JS also agreed with the prosecutor that she was in an “interim period” between sleep and wakefulness and thus not asleep for Count 5.

Because physical and mental helplessness are an essential element of indent liberties as charged, but it was not proven by the State beyond a reasonable doubt. Mr. Calcote’s conviction must be reversed and dismissed. State v. R.P., 122 Wn.2d 735, 862 P.2d 127 (1993) (per curium).

3. THE JUDGMENT AND SENTENCE REFLECTS A
DIFFERENT DATE FROM THE COURT'S FINDINGS
OF FACT REGARDING COUNT 5

The trial court found that the crime of indecent liberties, Count 5, occurred between July 25, 2003, and July 24, 2004. Conclusion of Law 14. This finding was consistent with JS's testimony that the incident occurred when she was in 11th grade. 11/12/09RP 14. The State had amended the information to reflect this date, but the second amended information is not in the court file. 11/12/09RP 113; 11/16/09RP 1.

The Judgment and Sentence, however, reflects the first amended information and not second amended information or the court's factual findings. Conclusion of Law 14; CP 7-8, 18. This Court should remand Mr. Calcote's case to correct the Judgment and Sentence to conform to the court's findings of fact and the second amended information.

E. CONCLUSION

Mr. Calcote's three convictions for indecent liberties must be dismissed because the State did not prove beyond a reasonable doubt that JH and JS were physically and mentally incapacitated. In addition and in the alternative, all five convictions must be reversed and remanded for a new trial because Mr. Calcote's

attorney did not provide the effective assistance of counsel guaranteed by the federal and state constitutions. Finally, this Court should remand the case for correction of the dates for Count 5 on the Judgment and Sentence.

DATED this 30th day of July 2010.

Respectfully submitted,



Elaine L. Winters – WSBA # 7780
Washington Appellate Project
Attorneys for Appellant

APPENDIX

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Redacted)

December 17, 2009

FILED
KING COUNTY, WASHINGTON

DEC 17 2009

SUPERIOR COURT CLERK
JUVA GHANAIE
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

No. 07-1-05176-3 SEA

vs.

BERTRAN CALCOTE,

Defendant.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter came before the Honorable Michael Hayden for trial in November 2009. The defendant, Bertran Calcote, was present and represented by his attorney Gary Davis. The State of Washington was represented by Senior Deputy Prosecutor Julie Kays. The defendant waived his right to a trial by jury, and requested that the matter be tried to the bench.

The court, having listened to the testimony of witnesses, exhibits admitted into evidence, and the argument of counsel, hereby enters the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

1. The defendant is married to Sophia Calcote. Sophia's biological daughter is, J [REDACTED] S [REDACTED] J [REDACTED] was born on: July 25, 1987. The defendant is not the biological father of Jamila, but the defendant is the only father that J [REDACTED] has ever known. The defendant and Sophia have two children together: Adriana and Kanisha.

J [REDACTED] H [REDACTED] is the sister of Sophia Calcote. J [REDACTED] was born on: February 13, 1990. J [REDACTED] is significantly younger than Sophia, and, as a result, Sophia was more like a mother to J [REDACTED]. As a result of their relationship, J [REDACTED] spent a considerable amount of time at the defendant and Sophia's residence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

- 1

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1 Jewell P [redacted] is the sister of both J [redacted] H [redacted] and Sophia Calcote. Jewell P [redacted] was
2 married to Thaddeus Powell. The two have a daughter named M [redacted] P [redacted]. M [redacted] P [redacted] was
3 born on: April 10, 1990. J [redacted] H [redacted] and M [redacted] P [redacted] are close in age and spent a considerable
amount of time together growing up. As a result J [redacted] H [redacted] and M [redacted] P [redacted] have a close relationship.

4 2. During the time period of July 25, 2003 through July 24, 2004, J [redacted] S [redacted] resided
5 in the home of her mother, Sophia, and the defendant. One night when she lay in bed, she
6 awakened to the feeling of the defendant touching her vagina. J [redacted] was asleep in her bed,
7 when she felt the defendant's hand softly tapping on the outside of her vagina. the defendant's
hand was on the bare skin of her vagina. J [redacted]'s body had been moved so that her legs were
hanging off the end of the bed. As J [redacted] awakened, she watched as the defendant left the
bedroom. J [redacted] was upset and walked across the hall to her sister's bedroom. She told her
sister Kanisha what had happened.

8 This was not the first time that the defendant had paid a late night visit to J [redacted] S [redacted] while she was
9 sleeping. This incident, however, is the one night that Jamila remembers with the most clarity.

10 At some point J [redacted] S [redacted] told her mother, Sophia, what had occurred. There was tension in the
11 home, and a short time later the defendant confronted Sophia and J [redacted]. The defendant
12 demanded to know what was wrong. J [redacted] confronted the defendant, in the presence of her
13 mother, about the late night touching of her vagina. The defendant admitted that he had touched
14 her vagina, and explained that he was checking to see if Jamila was still a "virgin." The
defendant told J [redacted] and his wife that he needed a few weeks to get his affairs in order, and that
he would leave the home. A few weeks passed, and the defendant never left the home. The
subject of the defendant's late night touching of Jamila was never raised again, and the defendant
stopped sexually touching J [redacted].

15 3. During the time period of December 13, 2003 to December 13, 2005, when J [redacted]
16 H [redacted] in middle school, it was common for her to spend the night at her sister Sophia's home.
17 On one such occasion, J [redacted] lay sleeping in the same big bed with J [redacted]. J [redacted] awakened to
the feeling of the defendant's hand on the bare skin of her vagina. J [redacted] feigned sleep and
watched as the defendant left the bedroom. J [redacted] did not report the sexual touching by the
defendant.

18 On another occasion, during that same time period of December 13, 2003 to December 13, 2005,
19 she again spent the night at her sister Sophia's home. J [redacted] lay sleeping in the same big bed
20 with J [redacted]. J [redacted] awakened to the feeling of the defendant's hand touching her vagina over
her underpants. J [redacted] feigned sleep and watched as the defendant left the bedroom. J [redacted] did
not report the sexual touching by the defendant.

21 4. When M [redacted] P [redacted] was a young girl, under the age of twelve, it was common for her to
22 spend the night at her maternal grandparent's home. During the time period of February 13,
23 1999 through February 12, 2002, M [redacted] spent the night at her grandparents home. During this
24 time period, the defendant and Sophia were also living at the home of M [redacted]'s grandparents. On
one occasion, M [redacted] fell asleep on the couch in the front room. M [redacted] awakened to the feeling of

1 the defendant's finger inside of her vagina, penetrating her vagina. M did not report the
2 defendant's sexual touching of her.

3 On June 10-11, 2007, M was over at the defendant's home in South Seattle. M was at the
4 residence to help J prepare for an upcoming singing performance. M did not intend to
5 spend the night at the defendant's home, but as the evening approached, M ended up spending
6 the night. M initially fell asleep in one bedroom, with J and J and M all
7 sleeping in the same bed. In the middle of the night, the defendant took M from the bed and
8 guided her to the bedroom across the hall. The defendant placed a mattress down on the floor,
9 and lay M down on the mattress. M fell asleep, and awakened to the feeling of the
10 defendant's finger inside of her vagina, penetrating her vagina. The defendant the left the
11 bedroom.

12 5. H The next morning M told J H what the defendant had done the night before.
13 J H instructed Mary to tell J what had occurred. J advised M to tell her mother
14 (Jewell). M telephoned her mother at some point that day and told her what had occurred.
15 Once M arrived home, Jewell attempted several times to reach her sister, Sophia, but was
16 unable to contact her. Jewell spoke with J H, and J H disclosed to Jewell that she had
17 been sexually assaulted. Jewell also spoke with J H, who also disclosed that she too had been
18 sexually assaulted. M's father was informed of what the defendant had done to his daughter.
19 A police report was made by M, with the support of her mother and father, on July 3, 2007.

20 6. Detective Susan DiTusa with the Seattle Police Department was assigned to investigate
21 the case. DiTusa took statements from M, Jewell and J H. DiTusa attempted to speak
22 with J about the defendant's sexual abuse, but J at that time was not willing to
23 participate in the police investigation. (Later, in November 2009, J spoke with DiTusa and
24 agreed to participate in the police investigation of her father, the defendant). DiTusa made
arrangements to have the defendant arrested on July 13, 2007, and the defendant was arrested.
DiTusa obtained a search warrant to photograph the defendant's residence. Those photos were
admitted into evidence.

7. Each of the events described by M P, J S and J H
occurred at the defendant's various residences located in King County, Washington. The
defendant has never been married to M P, J S or J H.

19 II. DISPUTED FACTS

20 8. The defendant testified at trial. The defendant stated that he never sexually touched
21 M, J or J H. The defendant denied admitting to J that he sexually touched her.

21 III. CONCLUSIONS OF LAW

22 The court, having considered the testimony of witnesses, exhibits admitted into evidence,
23 relevant law, and the arguments of counsel, hereby enters the following conclusions of law:

24 FINDINGS OF FACT AND CONCLUSIONS OF LAW

- 3

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1 9. The court finds that each of the acts alleged in Counts I-V occurred in King County,
2 Washington. The court further finds that the defendant was never married, nor has he ever been
3 married to M P, J H or J S. The court finds credible: M,
4 J H and J S.

5 10. Count I -- The court finds that when M was under the age of twelve, that the defendant
6 touched the bare skin of M's vagina, while M was asleep. As a result of M being asleep,
7 M was physically helpless and incapable of consent. The court finds that penetration did not
8 occur, and further finds that the defendant took an intentional and deliberate step toward
9 committing the act of penetrating M's vagina. In so doing, the court finds that the defendant
10 took a substantial step toward the commission of the crime of Rape of a Child in the First
11 Degree. The court finds that the defendant is guilty beyond a reasonable doubt of the crime of
12 Attempted Rape of a Child in the First Degree. The court finds that this crime was committed
13 during the time period intervening between February 13, 1999 through February 12, 2002.

14 11. Count II -- The court finds that on June 10-11, 2007, the defendant touched the bare skin
15 of M P's vagina while M was asleep. As a result of M being asleep, M was
16 physically helpless and incapable of consent. The court finds that penetration did not occur, and
17 further finds that the defendant took an intentional and deliberate step toward committing the act
18 of penetrating M's vagina. In so doing, the court finds that the defendant took a substantial
19 step toward the commission of the crime of Rape in the Second Degree. The court finds that the
20 defendant is guilty beyond a reasonable doubt of the crime of Attempted Rape in the Second
21 Degree.

22 12. Count III -- The court finds that during the time period of December 13, 2003 through
23 December 13, 2005, the defendant the defendant knowingly touched the bare skin of J H
24 H's vagina while J was asleep. As a result of J being asleep, J was
physically helpless and incapable of consent. The court finds the defendant guilty beyond a
reasonable doubt of the crime of Indecent Liberties without forcible compulsion.

13 13. Count IV -- The court finds that during the time period of December 13, 2003 through
14 December 13, 2005, the defendant the defendant knowingly touched J H's vagina
15 over her underpants while J was asleep. As a result of J being asleep, J was
16 physically helpless and incapable of consent. The court finds the defendant guilty beyond a
17 reasonable doubt of the crime of Indecent Liberties without forcible compulsion.

18 14. Count V -- The court finds that during the time period of July 25, 2003 through July 24,
19 2004, the defendant the defendant knowingly touched the bare skin of J S's vagina
20 while J was asleep. As a result of J being asleep, J was physically helpless and
21 incapable of consent. The court finds the defendant guilty beyond a reasonable doubt of the
22 crime of Indecent Liberties without forcible compulsion.

23 15. The court hereby incorporates by reference and without limitation the court's oral
24 findings as set forth on the record.

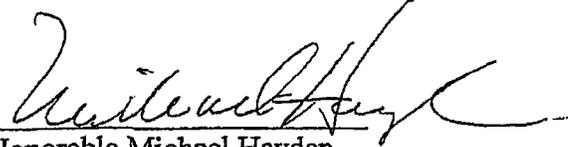
FINDINGS OF FACT AND CONCLUSIONS OF LAW

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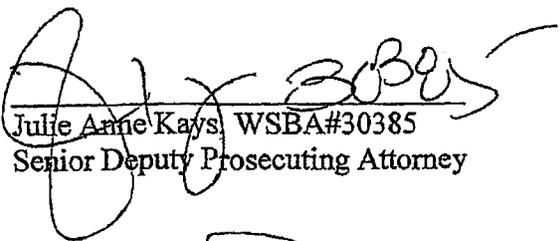
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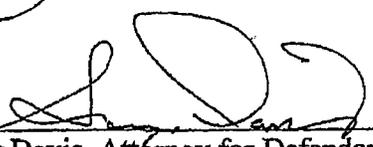
Signed this 17 day of December, 2009.



The Honorable Michael Hayden



Julie Anne Kays, WSBA#30385
Senior Deputy Prosecuting Attorney



Gary Davis, Attorney for Defendant
WSBA # 19019

FINDINGS OF FACT AND CONCLUSIONS OF LAW

- 5

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 BERTRAN CALCOTE,)
)
 Appellant.)

NO. 64605-2-I

2010 JUL 30 01:14:15

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF JULY, 2010, I CAUSED THE ORIGINAL **OPENING 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:

[X] KING COUNTY PROSECUTING ATTORNEY	(X)	U.S. MAIL
APPELLATE UNIT	()	HAND DELIVERY
KING COUNTY COURTHOUSE	()	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		
[X] BERTRAN CALCOTE	(X)	U.S. MAIL
336040	()	HAND DELIVERY
MCC-WSR	()	_____
PO BOX 777		
MONROE, WA 98272		

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF JULY, 2010.

X _____ 

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