

66826-9

66826-9

NO. 66826-9-I

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

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STATE OF WASHINGTON,

Respondent,

v.

GERALD WILSON,

Appellant.

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

The Honorable Jay White, Judge

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2012 JAN 19 AM 11:02

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REPLY BRIEF OF APPELLANT

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A. STATEMENT OF CASE IN REPLY

1. THE STATE AGREES THIS CASE REQUIRED THE JURY TO RELY ON A DIFFERENT ACT FROM A DIFFERENT TIME PERIOD TO SUPPORT EACH CHARGE.

The State acknowledges that this case presents a different factual and legal scenario than many "multiple acts" cases. There were multiple counts charged, but each had a different charging period defined by the age of the child at the time of the alleged act. The charge was defined by that time and age as an essential element of the crime. "Thus, the jury was required to rely on a different act from a different time period to support each charge." Resp. Br. at 28.

However, the State is not entirely accurate in its description of the charging periods. Resp. Br. at 15. Count III, on which the jury acquitted, spanned June 3, 2005-October 31, 2006. During this time, Lexi was 14 and 15, not 13 years old. CP 1-2; App. Br. at 18; RP7 70 (Lexi born 6/3/91).

2. THE STATE CONCEDES THE PROSECUTOR ARGUED EVIDENCE THAT WAS NOT ON THE RECORD.

The State concedes that the prosecutor argued in closing that "the defendant was on top of her, naked" when they heard the door open. The State

equally concedes Lexi never testified that the defendant was on top of her. Resp. Br. at 25-26; App. Br. at 35-36.

3. THE STATE CLAIMS IT DID NOT RELY ON THE THREE INCIDENTS THE PROSECUTOR SPECIFIED DURING CLOSING ARGUMENTS TO SUPPORT THE CHARGES.

The State argues here that the prosecutor at trial did not intend in her argument to suggest the State relied on the three incidents she specified to support the charges. Resp. Br. at 20. The record does not reveal her intent; yet it clearly conveyed that the jury should believe Lexi was raped because of these three incidents.

Counsel first reviewed the elements in the "to convict" instruction. She "checked off" King County, they weren't married, and the dates, "because that's when she was living there." She continued reviewing the required elements:

So the issue then becomes whether or not she was raped. **Lexi talked to you about some very specific incidents.** She remembers graphically about throwing up popcorn after the defendant came in her mouth. She remembers the defendant drawing a dog on her boob. She remembers when her Aunt Cecile came home and she was shaking because **the defendant was on top of her, naked,** and they heard the door. He ran into the shower and Lexi got dressed.

RP8 199 (emphases added).

These were the only "specific incidents" to which Lexi testified. The State concedes the second and third incidents were legally insufficient to support a finding of sexual intercourse. Resp. Br. at 26.

Appellant concedes the first incident would be sufficient to support a finding of sexual intercourse, but not sufficient to be rape of a child in the first or second degree because no age or time was established.

4. THE STATE DOES NOT ATTEMPT TO CLAIM THE PROSECUTOR'S CLOSING ARGUMENT WAS AN ACCURATE STATEMENT OF THE LAW.

The State acknowledges the prosecutor argued:

You don't have to be unanimous that, "Yes, this defendant raped her before she was twelve." "This defendant raped her before she was thirteen." And, "This defendant raped her between thirteen and fourteen." You have to unanimously agree that, yes, that rape occurred. That's what you have to agree on.

RP8 198-99. The State makes no attempt to claim this argument was an accurate statement of the law. Resp. Br. at 27-28. In fact, in this Court it restates the proper legal standard: the jury had to be unanimous on which act or incident it relied on for each count, and it had to rely on a

different act from a different time period to support each charge. Resp. Br. at 28.

5. THE EVIDENCE DID NOT PLACE OTHER ACTS IN TIME.

The State relates that Lexi testified she had her first period on the first day of 6th grade. "The defendant **then** discussed the possibility of pregnancy and bought AD a pregnancy test." Resp. Br. at 21 (emphasis added). The evidence does not support any temporal connection between these two events except that the discussion occurred sometime after, not before, the first period.

The prosecutor asked Lexi whether she and her uncle "ever" discussed any concerns about becoming pregnant. Lexi said yes.

A. I don't remember what time, if it was -- I can't put a date on anything I'm saying. I mean, I know the times between it happened, but anything specific, I don't know if it was before or after anything. Um, I remember it was after I started my period, and I my periods have never, ever been regular. Even to this day, they are never consistent.

RP7 127. After this testimony, Lexi said her first period was September 3 of her first day of 6th

grade,<sup>1</sup> but true to her characterization, she provided no guidance whatsoever as to when in relation to that date she discussed concerns about being pregnant.<sup>2</sup> There is no evidence to connect this discussion to the charging periods of Counts I or II, as opposed, for example, to Count III, on which the jury acquitted.

6. THE MOLE ON THE PENIS IS SIGNIFICANT.

Despite her claimed intimate familiarity with Gerry Wilson's penis over many years, Lexi repeatedly said she had not noticed anything unusual or unique about it. RP5 156, RP6 35, RP7 200-01. Yet Cecile testified to the unique mole or blood vessel that is obvious on his penis, especially when it is engorged. RP6 211; Ex. 12.

The State attempts to minimize this gap in Lexi's familiarity, stating that "No evidence was

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<sup>1</sup> Even the State has difficulty reconciling the complainant's testimony. Lexi seemed certain that her first period was the first day of 6th grade, on September 3, which she said was in 2000. The State notes she would have been 9 in 2000, and 11 in 2002-2003, which she later testified was her 6th grade year. Resp. Br. at 21.

<sup>2</sup> Compare this general timing with Lexi's testimony of the incident when she claimed Cecile nearly "caught" them in her bedroom; she was unable even to say whether this was before or after her first period. RP7 119-21; App. Br. at 14-15.

introduced that AD had ever seen a man's penis other than the defendant's." Resp. Br. at 12-13.

However, the issue was not whether Lexi could distinguish Gerry's penis from others. In response to police questioning on the point, this 18-year-old responded she wished there was a mole on Gerry's penis -- but there wasn't. RP8 33-34.

B. ARGUMENT IN REPLY

1. THE EVIDENCE WAS INSUFFICIENTLY SPECIFIC TO PERMIT A UNANIMOUS JURY VERDICT ON THE SAME ACT, AS THE CONSTITUTION REQUIRES.

The State concedes that Lexi (AD) testified in this case about four specific events that she recalled. It also concedes that only one of those events constituted an act of sexual intercourse. Although at trial the prosecutor specifically relied on three of these four events, the State now argues in this Court that "these four events were not the evidence used to support the crimes charged." Resp. Br. at 18-20.

- a. The Law Requires Evidence of Specific and Distinct Incidents of Sexual Acts Even if the State Does Not Elect an Act on Which it Bases the Charges.

The State claims that appellant's argument is based on the State having made an "election" that

these incidents were the evidence to support the charges. Resp. Br. at 18-20. But the legal requirement of sufficiently specific evidence to assure a unanimous jury on one specific act does not require the State to elect the specific acts.

In sexual abuse cases where multiple counts are alleged to have occurred within the same charging period, **the State need not elect particular acts associated with each count so long as the evidence "clearly delineate[s] specific and distinct incidents of sexual abuse" during the charging periods.**

State v. Hayes, 81 Wn. App. 425, 431, 914 P.2d 788, review denied, 130 Wn.2d 1013 (1996) (emphases added). See also State v. Jensen, 125 Wn. App. 319, 325-26, 104 P.3d 717, review denied, 154 Wn.2d 1011 (2005); State v. Brown, 55 Wn. App. 738, 780 P.2d 880 (1989), review denied, 114 Wn.2d 1014 (1990); State v. Corbett, 158 Wn. App. 576, 242 P.3d 52 (2010); App. Br. at 21-33. The State does not distinguish these cases.

In State v. Newman, 63 Wn. App. 841, 822 P.2d 308, review denied, 119 Wn.2d 1002 (1992), the court held that even substantial evidence of crimes cannot support a conviction without sufficient evidence as to at least one individual, specific crime for each count.

In this case, however, the testimony clearly delineated specific and distinct incidents of sexual abuse to each girl and during the specified charging periods. A reasonable trier of fact could single out specific incidents of sexual abuse as to each count charged. **Thus, the fact that the State did not elect particular acts for each count did not deny Newman a fair trial.**

63 Wn. App. at 851-52. The contrast between the evidence in this case and the children's testimony in Newman demonstrates the problem.

M testified that during the time Raone baby-sat the two girls, her grandfather [the defendant] approached her on four different occasions on the playground near Raone's apartment and took her to his apartment. M **differentiated each occasion by what happened to her in the grandfather's home:** on three occasions M's grandfather put his penis or some object inside her vagina and once he made her pose nude while he photographed her.

63 Wn. App. at 844-45 (emphasis added). For charges with a separate charging period:

M testified that while her grandfather and she were in the upstairs bathroom, he "stuck his private" into her. Marcus and R were in the downstairs bathroom. When M later went downstairs, Marcus then "did the same thing" to her that her grandfather had done.

63 Wn. App. at 845. The other child testified separately that the same day her brothers fought with Marcus, her grandfather touched her "[i]n my bottom ... the bottom part, the back one," and she

felt something go inside her. During the other charging period, her grandfather "put his hands down her pants and put his finger inside of her" while she had been outside in the playground. Id.

This testimony from two young children is far more specific than what the 19-year-old complainant offered in this case. She responded "yes" to general leading questions of whether she had "sexual intercourse" "prior to or around" 5th grade, 6th grade, and 7th and 8th grades. RP7 128. Despite the prosecutor's best efforts to elicit something specific, Lexi described only one distinct incident of intercourse -- the incident with oral sex and the popcorn. Yet she failed to provide any age or date for that event.<sup>3</sup> Thus the jury was utterly unable to place it in any of the charging periods.

It does not matter if the State did not "elect" the specific acts on which it based its charges. The law still requires the evidence be sufficiently specific for the jury to be able to discern a specific incident for each count on which

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<sup>3</sup> The State concedes she did not provide any date. Resp. Br. at 20.

it can be unanimous. U.S. Const., amends. 6, 14; Const., art. I, §§ 3, 21, 22.

b. A Generic Statement that Sexual Intercourse Occurred is Not Sufficient to be a "Specific Act" on Which a Jury Can Be Unanimous.

The State argues that despite evidence of multiple acts, Lexi's "yes" to the prosecutor's leading and generic questions of whether "sexual intercourse" occurred during each charging period was sufficient to support the verdicts. It claims "what act was committed" was "sexual intercourse." Resp. Br. at 22. It cites no authority to support this assertion.

For a jury to be unanimous as to a specific act, as the law requires, there must be evidence describing a specific act -- a factual incident, not merely a legal conclusion. This record contains at best a legal conclusion, but no specific factual event within the charging periods that the jury could unanimously agree actually occurred. See App. Br. at 21-33 and authority there cited.

c. The State Elected, By Its Argument, Instructions, and the Evidence Presented, Three Insufficient Incidents.

The State cites State v. Kier, 164 Wn.2d 798, 813, 194 P.3d 212 (2008), to support its claim that it did not elect specific incidents to support the charges in this case. As discussed above, due process does not require election. Nonetheless, from the jury's perspective, the State in effect did make such an election in this case.

Furthermore, Kier does not support the State's position. Kier was not a case of child sexual abuse, but charges of robbery 1° and assault 2°, both arising from a single incident of carjacking when two people were in the car. After a conviction on both counts, the issue on appeal was whether the two convictions violated double jeopardy. The Court held it did and vacated the assault conviction.

The Kier Court considered the evidence, instructions, and the State's argument. In Kier, the State argued that its closing argument clearly limited the State's intent to charge the robbery as against victim Hudson and the assault against victim Ellison. However, the jury instructions did not so limit the jury's decision. The Court held the instructions prevailed over the State's

argument. The instructions failed to restrict the jury to considering the robbery as against only one of the victims.

[W]here the jury heard evidence describing both Hudson and Ellison as victims of the robbery and the instruction did not specify a victim, the basis for Kier's conviction is ambiguous.

Kier, 164 Wn.2d at 812. This ambiguity required the rule of lenity to vacate the assault as violating double jeopardy.

In Kier, the issue was whether the State's "election" was sufficient to restrict the jury's verdict to one victim. The Court held that mere argument was not sufficient to restrict the verdict; the restriction had to appear in the instructions.

This Court need not rely on the State's closing argument to determine whether it "elected" the three specific incidents to support its charges. The State's argument demonstrates that even the prosecutor could find specific evidence only of these three incidents to support even an argument.

The instructions, nonetheless, required the State to prove the essential element of the

charging period, of Lexi's age, for each count. The State provided evidence legally sufficient to permit a jury to be unanimous of only one incident within the definition of "sexual intercourse." Yet there was no evidence whatsoever of when that incident occurred. Thus it was insufficient as a matter of law to support either conviction.

This Court therefore should reverse and dismiss both convictions in this case. U.S. Const., amends. 6, 14; Const., art. I, §§ 3, 21, 22.

d. State v. Cozza Does Not Support the State's Case.

The State also cites State v. Cozza, 71 Wn. App. 252, 257, 858 P.2d 270 (1993), to support its claim that a child's inability to recall the exact time of sexual contact should not result in the defendant escaping prosecution. Resp. Br. at 23.

In Cozza, the State charged a single count of indecent liberties with a charging period spanning nearly three years -- the entire time the child lived with the defendant, when she was ages 2-6.

The issue in Cozza, however, was whether the charge was sufficiently specific to give adequate notice to the defendant -- not whether the evidence

was sufficiently specific to permit a jury to be unanimous. The court held "a defendant has no due process right to a reasonable opportunity to raise an alibi defense." Cozza, 71 Wn. App. at 259.

Within Cozza's charging period, time was not of the essence. The crime was defined the same regardless of when it occurred. In this case in contrast, the State charged two different crimes. Time, defined by the complainant's age, was an essential element of each charge. And it was different for each charge.

The issue here is not sufficient notice to prepare a defense, but sufficiently specific evidence to permit a unanimous jury verdict. The record shows the evidence here was insufficiently specific.

The controlling authority here is Hayes:

The challenge is to fairly balance the **due process rights of the accused** against the inability of the young accuser to give extensive details regarding multiple alleged assaults. We believe **the proper balance is struck by requiring, at a minimum, three things**. First the alleged victim must describe the kind of act or acts with **sufficient specificity** to allow the trier of fact to determine what offense, if any, has been committed. Second, the alleged victim must describe the number of acts committed with sufficient certainty to support each of

the counts alleged by the prosecution. Third, the alleged victim must be able to describe the general time period in which the acts occurred.

Hayes, 81 Wn. App. at 438 (emphases added). The court struck this balance in consideration of young children as witnesses. When, as here the State's witness is an adult, the balance should weigh at least as much or more for due process.

e. The State's Inability to Elect Demonstrates the Insufficiency of the Evidence.

The State candidly observes: "The State did not, **nor could it based on the evidence**, elect [what incidents to charge] in this case." Resp. Br. at 16 (emphasis added).

The State is correct. But if the evidence was insufficient for it to elect, it was equally insufficient for a jury to choose one incident on which to be unanimous that it occurred.

When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error.

Griffin v. United States, 502 U.S. 46, 59, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991).

For this reason, this Court should reverse and dismiss both counts.

2. THE STATE CONCEDES THE COURT ABUSED ITS DISCRETION BY ADMITTING EVIDENCE UNDER THE "HUE & CRY" DOCTRINE.

The State concedes the trial court abused its discretion by admitting as "hue and cry" evidence that this complainant told her boyfriend she had been abused four years<sup>4</sup> after the last alleged incident. Resp. Br. at 45.

It argues instead that this court should eliminate the "fact of complaint" doctrine as "incorrect, harmful and based [on] an antiquated sexist belief that a rape victim's disclosure is only relevant--i.e., only credible, if the rape victim discloses immediately after being raped." Resp. Br. at 44-45.

a. This Court Has No Authority to Overturn Holdings of the Washington Supreme Court.

A decision by the Washington Supreme Court is binding on all lower courts in the state, including

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<sup>4</sup> Initially, the State again confuses dates. It refers to Lexi dating Patrick Jackson "during her junior year of high school," and that Lexi told him about the abuse "sometime that summer." Resp. Br. at 9 & n.2. Patrick testified he met Lexi the end of her junior year in 2008; they started dating that fall, Lexi's senior year in high school. It was during the summer of 2009, after she graduated, that she told him she'd been sexually abused. RP7 31-36.

the Court of Appeals. 1000 Virginia Ltd. Partnership v. Vertecs, 158 Wn.2d 566, 578, 146 P.3d 423 (2006); State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

With all due respect, this Court has no lawful authority to overturn more than a century of Supreme Court precedent. State v. Griffin, 43 Wash. 591, 86 P. 951 (1906); State v. Ferguson, 100 Wn.2d 131, 135-36, 667 P.2d 68 (1983).

b. Abolishing the "Hue and Cry" or "Fact of Complaint" Doctrine Still Requires Excluding the Evidence.

The State misconstrues how the "fact of complaint" doctrine is an exception to the normal rules of evidence, and so the consequences of abolishing it. Resp. Br. at 44-50.

Normally, a witness's prior out-of-court statements that are consistent with her in-court testimony are admissible only to rebut a charge of recent fabrication, and only when the statements were made prior to the time that the motive to fabricate arose. State v. Brown, 127 Wn.2d 749, 758 n.2, 903 P.2d 459 (1995).

The fact of complaint doctrine was created by the court to permit the State to admit, in its case

in chief, evidence that the victim of a sex offense made a timely complaint. It is introduced for the purpose of bolstering the victim's credibility.

The rule is grounded in the time-honored assumption that in forcible rape cases the absence of evidence of seasonable complaint creates an inference that the victim's testimony has been fabricated. ... Allowing the State to present the fact of complaint in its case in chief dispels this inference.

State v. Bray, 23 Wn. App. 117, 121-22, 594 P.2d 1363 (1979).<sup>5</sup>

Although Washington courts may in some cases admit expert testimony regarding the fact that child sexual abuse victims often delay reporting abuse, Resp. Br. at 47-48, the State offered no such expert testimony in this case. Admitting such evidence is not the same as holding as a matter of law that evidence of delayed reporting is admissible to buttress the complaint. The State cites no authority to support such a position.

Similarly, the State cites no authority for the proposition that "the timing of a disclosure,

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<sup>5</sup> Contrary to the State's assertion, the rule is not "sexist." Resp. Br. at 44-45, 50. It is applied equally to both male and female victims of sexual assault. State v. Ragan, 22 Wn. App. 591, 593 P.2d 815 (1979) (male rape victim).

where immediate or at a later date, is *always* relevant." Resp. Br. at 48. Again, the rules of evidence are to the contrary. Prior consistent statements are not admissible to reinforce or bolster testimony because "repetition generally is not a valid test of veracity." The evidence therefore is not relevant. State v. Purdom, 106 Wn.2d 745, 750, 725 P.2d 622 (1986); Thomas v. French, 99 Wn.2d 95, 103, 659 P.2d 1097 (1983); State v. Harper, 35 Wn App. 855, 670 P.2d 296 (1983).

In this case, the State began its evidence with Patrick Jackson's testimony that Lexi told him, in the summer of 2009, that she had been sexually abused. RP5 31-45. It was error to admit this evidence under the hue and cry doctrine. If the courts were to abolish the hue and cry doctrine, it would have been equally erroneous to admit the evidence.

Because this case turned solely on the credibility of witnesses, the additional evidence to buttress Lexi's credibility was necessarily prejudicial. This Court should reverse.

3. INEFFECTIVE ASSISTANCE OF COUNSEL CAN OCCUR IF THERE IS NO REASONABLE TACTICAL PURPOSE FOR COUNSEL'S CONDUCT.

Under Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984), where there can be no reasonable tactical purpose for counsel's conduct, failure to object is deficient performance. State v. Boehning, 127 Wn. App. 511, 111 P.3d 899 (2005).

[W]e emphasize that where, as here, the prosecutorial misconduct is so flagrant that it denies the defendant a fair trial, defense counsel should have recognized such an egregious breach.

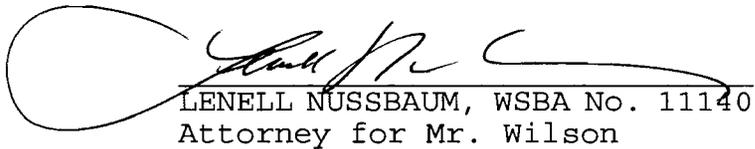
Boehning, 127 Wn. App. at 525.

C. CONCLUSION

For the reasons stated above and in the Brief of Appellant, this Court should reverse and dismiss these convictions. In the alternative, it should grant a new trial.

DATED this 17<sup>th</sup> day of January, 2012.

Respectfully submitted,

  
LENELL NUSSBAUM, WSBA No. 11140  
Attorney for Mr. Wilson

**DECLARATION OF SERVICE**

I declare that on this date I filed an original and one copy of the Reply Brief of Appellant in the Court of Appeals and served a copy of the same on the prosecutor by depositing those documents in the United States Postal Service, postage prepaid, addressed as follows:

Mr. Richard D. Johnson  
Court Administrator/Clerk  
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Dennis J. McCurdy  
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I declare under penalty of perjury under the laws of the state of Washington that the above statement is, are true and correct to the best of my knowledge.

Jan. 17, 2012 Seattle, WA  
Date and Place

  
\_\_\_\_\_  
KIRSTEN RUE

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2012 JAN 19 AM 11:03