

FILED
September 2, 2016
Court of Appeals
Division I
State of Washington

NO. 73864-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CELSO ORBE-ABARCA,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE JEFFREY RAMSDELL

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ANN SUMMERS
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
C. <u>ARGUMENT</u>	9
1. HINOJOSA DID NOT IMPROPERLY TESTIFY TO THE GOOD CHARACTER OF HER CHILDREN BY STATING THAT SHE WAS "PROUD" OF THEM	9
2. HINOJOSA DID NOT IMPROPERLY TESTIFY TO THE BAD CHARACTER OF THE DEFENDANT	13
3. HINOJOSA DID NOT IMPROPERLY OFFER AN OPINION ON GUILT BY TESTIFYING THAT THE DEFENDANT SMILES WHEN HE IS NERVOUS	16
4. ORBE-ABARCA HAS FAILED TO ESTABLISH THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL	19
5. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ALLOWING THE DETECTIVE TO OFFER EXPERT TESTIMONY REGARDING SEXUAL ASSAULT INVESTIGATIONS	22
D. <u>CONCLUSION</u>	27

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) 19

United States v. Abel, 469 U.S. 45,
105 S. Ct. 465, 83 L. Ed. 2d 450 (1984) 14, 15

United States v. deSoto, 885 F.2d 354
(7th Cir. 1989) 25

Washington State:

Seattle v. Heatley, 70 Wn. App. 573,
854 P.2d 658 (1992)..... 10, 17

State v. Black, 109 Wn.2d 336,
745 P.2d 12 (1987)..... 17

State v. Bourgeois, 133 Wn.2d 389,
945 P.2d 1120 (1997)..... 11, 12

State v. Campbell, 78 Wn. App. 813,
901 P.2d 1050 (1995)..... 25

State v. Crowder, 119 Wash. 450,
205 P. 850 (1922)..... 21

State v. Day, 51 Wn. App. 544,
754 P.2d 1021 (1988)..... 18

State v. Garcia, 57 Wn. App. 927,
791 P.2d 244 (1990)..... 20

State v. Groth, 163 Wn. App. 548,
261 P.3d 183 (2011)..... 23, 25

<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	20
<u>State v. Ortiz</u> , 119 Wn.2d 294, 831 P.2d 1060 (1992).....	24
<u>State v. Ray</u> , 116 Wn.2d 531, 806 P.2d 1220 (1991).....	20
<u>State v. Sanders</u> , 66 Wn. App. 380, 832 P.2d 1326 (1992).....	24
<u>State v. Smith</u> , 106 Wn.2d 772, 725 P.2d 951 (1986).....	25
<u>State v. Tharp</u> , 96 Wn.2d 591, 637 P.2d 961 (1981).....	12
<u>State v. Thomas</u> , 150 Wn.2d 821, 83 P.3d 970 (2004).....	12
<u>State v. Yates</u> , 161 Wn.2d 714, 168 P.3d 359 (2007).....	23, 24, 25

Rules and Regulations

Washington State:

ER 401	14
ER 404	2, 11, 16, 19, 20
ER 702	23
RAP 1.1.....	10
RAP 2.4.....	10
RAP 2.5.....	10, 17

A. ISSUES PRESENTED

1. The Rules on Appeal allow parties to challenge trial court decisions. A defendant may not raise non-constitutional issues for the first time on appeal. Can the defendant raise non-constitutional evidentiary issues for the first time on appeal, where the trial court sustained the defense objections, and defense counsel did not move to strike the testimony, request a mistrial, or ask the trial court to take any other curative action?

2. Evidence of a character trait is generally inadmissible to prove a person's action in conformity therewith. However, evidence regarding a witness's feelings toward other witnesses or toward the defendant is not character evidence. Similarly, evidence of a person's demeanor is not character evidence. Should this Court reject the defendant's claim that evidence of the victims' mother's pride in her children, the victims' dislike of the defendant and the defendant's ability to be "pleasant" was inadmissible character evidence?

3. A witness's opinion on the defendant's guilt is improper. Testimony of the defendant's demeanor based on personal observation is not an improper opinion on guilt. Should this Court reject the defendant's claim that evidence that the

defendant smiled nervously when faced with an accusation of wrongdoing was an inadmissible opinion on guilt?

4. Evidence of sexual misconduct toward the victim is admissible under ER 404(b) to show lustful disposition regardless of whether the misconduct occurred before or after the charged crime. Has the defendant failed to show that defense counsel was ineffective in failing to object to evidence that was clearly admissible under existing case law as evidence of lustful disposition?

5. Law enforcement officers may testify as to specialized knowledge gained through training or experience when that knowledge is helpful to the jury. Detective Smith had training and experience that gave her specialized knowledge that is outside the province of the average layperson as to the type of evidence gathered in sexual assault investigations. Did the trial court properly exercise its discretion in allowing her to testify based on this knowledge?

B. STATEMENT OF THE CASE

Celso Orbe-Abarca was charged with five crimes: three counts of rape of a child in the first degree (counts 1 through 3),

one count of child molestation in the second degree (count 4) and one count of child molestation in the third degree (count 5). CP 1-2. A jury found him guilty as charged on all counts. CP 29-33. Counts 1 through 3 involved victim J.C. and counts 4 and 5 involved victim D.G. CP 29-33. The court imposed an indeterminate sentence of 318 months to life on counts 1 and 2, with lesser concurrent sentences on the other three counts. CP 62-74.

In 2003, Orbe-Abarca met and became romantically involved with Maria Hinojosa, the mother of then eight-year-old D.G. and her younger half-brother, four-year-old J.C. RP 712, 716.¹ Hinojosa's two children lived with her, and only periodically visited their respective fathers. RP 697, 706, 709.

Orbe-Abarca and Hinojosa never lived together, but Hinojosa moved from Bellevue to Bothell in order to live near Orbe-Abarca. RP 712-14, 717. Hinojosa and her children lived in an apartment near Orbe-Abarca's mobile home, and then moved into a nearby mobile home. RP 695-96, 717. Orbe-Abarca had free access to Hinojosa's home. RP 718.

¹ The Verbatim Report of Proceedings are consecutively paginated, and will be referred to as simply "RP," except for the proceedings on July 14, 2015, and August 19, 2015, which will be referred to as "7/14/15 RP" and "8/19/15 RP."

Hinojosa noticed that her two children did not like Orbe-Abarca. RP 721. One evening, when D.G. was in 6th or 7th grade, she told her mother that Orbe-Abarca had touched her inappropriately while she was asleep on the couch. RP 722-24, 817. D.G. told her that Orbe-Abarca had rubbed his hands on her thighs. RP 724. At trial, D.G. testified that he touched her crotch area. RP 820.² D.G., frightened, pretended to be asleep and shifted her legs, and he went away. RP 823-24. Hinojosa confronted Orbe-Abarca with D.G.'s accusation, and he claimed to have been searching for the television remote. RP 725. Hinojosa accepted his explanation, believing her children were jealous of her relationship with Orbe-Abarca. RP 727.

D.G. testified that Orbe-Abarca had touched her crotch area a previous time as she was asleep on the couch, but she did not tell her mother about the first incident. RP 816-22, 825. D.G. was hurt and sad that her mother believed Orbe-Abarca's excuse. RP 828-39.

Eventually, Hinojosa and Orbe-Abarca planned to have a child together and Hinojosa became pregnant. RP 728, 779. In the summer of 2009, shortly before that baby was born, D.G. reported

² This conduct formed the basis for count 4. RP 927.

to Hinojosa that Orbe-Abarca had slipped into her bedroom at night. RP 729-31. As she reported this, D.G., who was 14 years old, sounded very nervous and afraid. RP 731. Hinojosa confronted Orbe-Abarca about D.G.'s new accusation. RP 733. He claimed that he was very drunk, and mistakenly entered the wrong bedroom. RP 734-35. Although Hinojosa suspected that Orbe-Abarca was attracted to her young daughter, she decided to remain in the relationship with him. RP 739-41.

At trial, D.G. testified that Orbe-Abarca had previously come into her room and had laid on top of her in bed, touching her upper thigh and breasts. RP 839-44.³ Startled awake, she asked "what are you doing?" RP 839. He apologized and said he thought he was in Hinojosa's bedroom. RP 846.

In February of 2011, when D.G. was 16 years old, she was showering and was startled to find the defendant trying to photograph her with his cell phone over the shower door. RP 744, 754, 854-58. D.G. told her mother, who again confronted Orbe-Abarca. RP 745-47, 861. He claimed that he thought Hinojosa was in the shower. RP 746, 859. This time, Hinojosa did not believe him because she had told Orbe-Abarca that she was

³ This conduct formed the basis for count 5. RP 927.

leaving for work, and thus he knew she was not home. RP 746. Hinojosa ended her relationship with Orbe-Abarca, but he continued to see his 2-year-old daughter, X.O.H., on weekends until 2014. RP 761.

In late 2014, Hinojosa and Orbe-Abarca began to quarrel about his refusal to follow dietary restrictions for X.O.H., and his refusal to pay for a bedroom set for the child. RP 763, 785-88. Hinojosa stopped allowing Orbe-Abarca to have visits with X.O.H. RP 766-67. She told him that she wanted him to obtain a court order because she wanted a judge to settle their disputes. RP 766-67.

In February of 2015, Orbe-Abarca served court papers on Hinojosa regarding X.O.H. RP 768. Hinojosa decided that the court should "know everything" and asked D.G. to report what had happened to her to the police. RP 769-70. D.G., now 20 years old and attending college, reluctantly agreed. RP 769-71, 790, 801.

Hinojosa told J.C. that D.G. was going to make a police report. RP 772. She asked J.C., now 16 years old, whether Orbe-Abarca had ever done anything to him. RP 772. J.C. disclosed that Orbe-Abarca had raped him on multiple occasions from the time he was seven years old until he was twelve years old.

RP 773.⁴ Hinojosa never suspected that Orbe-Abarca was abusing J.C. RP 761.

J.C. testified at trial that he was often bullied and threatened in elementary school and did not have a close relationship with his half-sister or his father. 7/14/15 RP 69, 72, 77. J.C. never liked Orbe-Abarca. 7/14/15 RP 82. The first sexual assault occurred when J.C. was seven years old. 7/14/15 RP 85. He was taking a shower when Orbe-Abarca opened the shower curtains and forced J.C. to put Orbe-Abarca's penis in J.C.'s mouth. 7/14/15 RP 85. Orbe-Abarca told J.C. that if he told anyone what happened they would both be arrested, so J.C. was afraid to tell anyone. 7/14/15 RP 92. After they moved into the mobile home, Orbe-Abarca came into J.C.'s bedroom and forced him to perform oral sex. 7/14/15 RP 94-97. When J.C. was eight or nine years old, Orbe-Abarca anally raped him in the mobile home. 7/14/15 RP 101-05. He recalled other incidents that occurred in a grocery store parking lot, in the defendant's bedroom during a party at his home, in the shower, and in Hinojosa's bedroom. 7/14/15 RP 109-16, 117-18, 124-32,

⁴ This conduct formed the basis for counts 1 through 3. RP 918-23.

134-35. Orbe-Abarca stopped when J.C. was twelve years old. 7/14/15 RP 134-35. J.C. wondered if he was to blame for the abuse. 7/14/15 RP 139. Years later, when his mother asked him if anything had happened, he was no longer afraid and felt that he needed to protect his little sister. 7/14/15 RP 146-47. He realized she was nearing the age he had been when the abuse started. 7/14/15 RP 174.

Both D.G. and J.C. provided statements to the police on February 16, 2015. RP 669, 671, 775. D.G. revealed that she had recorded a "voice note" on her cell phone when she awoke to find Orbe-Abarca hovering over her in the middle of the night, to prove to herself that the incident was real. RP 848. A detective extracted the recording from her phone, and the recording was presented to the jury. RP 7/14/15 RP 184-89.⁵ The recording had been saved in a text message sent at 3:14 a.m. on July 20, 2009. 7/14/15 RP 187.

The defense presented no evidence at trial. RP 911.

⁵ In closing, the State argued that when listening to the recording, "[D.G.]'s fear, her distress, that is unmistakable." RP 939. Indeed, she sounds very afraid. Ex. 2. At sentencing, the court noted that the recording "spoke volumes." 8/19/15 RP 14. The transcript of the recording can be found at CP 129.

C. ARGUMENT

1. HINOJOSA DID NOT IMPROPERLY TESTIFY TO THE GOOD CHARACTER OF HER CHILDREN BY STATING THAT SHE WAS "PROUD" OF THEM.

Orbe-Abarca claims that Hinojosa's testimony improperly included character evidence of the victims when she briefly testified that she was proud of her two children. This claim is without merit. First, this claim is based on no trial court errors and cannot be reviewed. Second, Hinojosa's testimony was not evidence of the victims' good character. Finally, even if the testimony was improper, it was not prejudicial.

As the prosecutor began her direct examination of Hinojosa, the following exchange occurred:

- Q: Let's go through all of your children.
A: Okay. My oldest daughter is [D.G.]. She is going to be 21. Very proud of her. And then there is [J.C.]. He is 16 years old. He is also a very proud of kid.
Ms. Lopez De Arriaga: Objection, Your Honor.
The Court: Grounds?
Ms. Lopez De Arriaga: Pretrial motion.⁶
The Court: I will sustain the objection. Why don't you rephrase the question, counsel.

⁶ In the Defendant's Trial Brief, the defense moved to exclude evidence of prior bad acts, evidence of other convictions, infractions or bad acts, and comments on the guilt or veracity of the defendant, and the veracity of the victims. CP 14-21. The State also sought to exclude character evidence of the defendant and the victims, except for the shower incident, which was offered to prove lustful disposition and motive. CP 108-21.

RP 697. Defense counsel did not move to strike the testimony or move for a mistrial. RP 697.

There is no claim that the prosecutor asked an improper question, or that the trial court erred. Hinojosa's statement that she was proud of her children was not responsive to the prosecutor's question, the court sustained defense counsel's objection and counsel chose not to move to strike the testimony. The prosecutor properly moved on to ask specific questions about the children. RP 697-98.

The Rules on Appeal allow a party to seek review of a trial court order, decision or ruling. RAP 1.1(a), 2.4(b). A claim of error may be raised for the first time on appeal only if it constitutes a manifest error affecting a constitutional right. RAP 2.5(a). Many evidentiary issues do not meet the standard of a manifest error affecting a constitutional right. Seattle v. Heatley, 70 Wn. App. 573, 583-86, 854 P.2d 658 (1992). Orbe-Abarca's attempt to assign error to a witness's unresponsive testimony, where defense counsel's objection was sustained by the trial court, and where the trial court was not asked to take any further action, should be rejected as an attempt to raise a non-constitutional issue for the first time on appeal.

Even if this issue was properly before this Court, the testimony was not improper character evidence. ER 404(a) provides that “evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion.” Hinojosa’s testimony does not fit within the parameters of this rule. Hinojosa’s feelings about her children were not evidence of any particular character trait. Hinojosa did not testify as to why she was proud of D.G. or J.C. She did not name any particular character trait that caused her to be proud. Perhaps it was because they did well in school, or were respectful and obedient toward her. Perhaps it was because they both had plans for the future, which each testified to without objection.⁷ Orbe-Abarca cites to no case where similar testimony has been found to constitute inadmissible character evidence.

Moreover, Hinojosa’s testimony was not prejudicial. An error in admission of evidence does not require reversal unless there is prejudice to the defendant. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Where the error is based on an evidentiary rule and not a constitutional mandate, courts apply the

⁷ D.G. was studying to become a surgeon. RP 802. J.C. was interested in fashion design. 7/14/15 RP 68-69.

nonconstitutional harmless error standard: “the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). An error in admitting evidence is harmless if the evidence is of minor significance in reference to the overall evidence. Bourgeois, 133 Wn.2d at 403. In State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004), a witness was allowed to testify that the murder victim was “a really good boss” and “a nice guy.” On review, the appellate court held that the evidence was arguably irrelevant, but harmless. Id.

The fact that defense counsel did not move to strike the testimony demonstrates that it was not particularly prejudicial. In addition, in closing argument, defense counsel made the following statements, essentially agreeing with Hinojosa’s assessment of her children:

[J.C.] and [D.G.] are good kids. They are good kids. They work hard. They have goals. They love their family. They honor and respect their mother.

RP 945. Defense counsel argued that the victims were testifying to please their mother and support her in her custody dispute with Orbe-Abarca. RP 962. There is no reasonable probability that

Hinojosa's statement that she was proud of her two oldest children materially affected the result of the trial.

2. HINOJOSA DID NOT IMPROPERLY TESTIFY TO THE BAD CHARACTER OF THE DEFENDANT.

Next, Orbe-Abarca asserts that Hinojosa's testimony improperly included character evidence of the defendant when she testified that D.G. and J.C. did not like Orbe-Abarca. This claim is also without merit. The victims' dislike of the defendant was not evidence of a character trait of the defendant. Similarly, Hinojosa's testimony that Orbe-Abarca was "very good at being very pleasant" was not evidence of a character trait offered to prove action in conformity therewith. Moreover, the challenged testimony was insignificant and not prejudicial.

During direct examination of Hinojosa, the following exchange occurred:

- Q: . . . describe for us Celso's relationship with [J.C].
- A: He didn't have relationship with my kids. . . .
- Q: Did they seem to get along?
- A: No. The kids never like him. Never like him, yeah. They didn't necessarily fight - -
- Ms. Lopez De Arriaga: Objection.
- The Court: I will sustain. Ask another question. Thank you.

RP 721. Defense counsel did not move to strike the testimony. RP 721. Like Hinojosa's testimony about being proud of her children, there is no trial court error to review. Counsel did not move to strike the testimony or request a mistrial. RP 721. This Court should reject Orbe-Abarca's attempt to raise this non-constitutional issue for the first time on appeal.

In discussing the relationship between Hinojosa and Orbe-Abarca immediately prior to X.O.H.'s birth, the following exchange occurred:

Q: He was coming back over?
A: Yeah. He started to working himself. He is very good at being very - -
Ms. Lopez De Arriaga: Objection.
A. Pleasant.
The Court: Same objection, counsel?⁸
Ms. Lopez De Arriaga: Yes.
The Court: I'll overrule the objection. The answer stands. Ask another question, counsel.

RP 741.

Hinojosa's testimony that her children did not like Orbe-Abarca was not improper character evidence, but relevant evidence that went to their bias and credibility. The bias of a witness is relevant under ER 401. United States v. Abel, 469 U.S. 45, 52, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984). "Bias is ... the relationship

⁸ The previous objection made by counsel was based on "speculation." RP 736. On appeal, Orbe-Abarca does not argue that the evidence was speculative.

between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest." Id.

Significantly, both victims testified about their dislike of Orbe-Abarca without any objection. D.G. testified that "I did try to get along with him, but it kind of got difficult after a while." RP 812. D.G. testified that J.C. did not like Orbe-Abarca. RP 814. J.C. testified, "I didn't like him. I mean I never did" 7/14/15 RP 82. None of this testimony drew an objection, and for good reason. Given the fact that the victims were accusing the defendant of sexually assaulting them as children, it is not surprising that they did not "like" him. Indeed, this was useful evidence for the defense, allowing Orbe-Abarca to argue that the children were biased against him. Orbe-Abarca has failed to present any authority that a witness's dislike of a party is improper character evidence, rather than relevant evidence of bias and interest. Moreover, the challenged testimony was cumulative to the unchallenged testimony of the victims regarding their dislike of Orbe-Abarca, and helpful to the defense, thus any supposed error was not prejudicial.

Similarly, Hinojosa's testimony that Orbe-Abarca was good at "being pleasant" was not improper character evidence. On appeal, Orbe-Abarca cites no authority that this type of evidence, which essentially described his demeanor, is character evidence. He has failed to explain how "being pleasant" on occasion is a character trait, or how it was offered in this instance to prove "action in conformity therewith." ER 404(a). Nor is it clear that defense counsel's objection was on the basis of ER 404(a), as the grounds stated were "same objection" and the previous objection was based on speculation. RP 736, 741. Finally, Orbe-Abarca fails to explain how testimony that he could be very pleasant materially affected the outcome of the trial. Hinojosa's testimony was not improper or prejudicial.

3. HINOJOSA DID NOT IMPROPERLY OFFER AN OPINION ON GUILT BY TESTIFYING THAT THE DEFENDANT SMILES WHEN HE IS NERVOUS.

Orbe-Abarca contends that Hinojosa improperly testified as to her opinion of his guilt when she testified that he smiles when he is nervous. This claim is without merit. Hinojosa's testimony about the defendant's demeanor, based on personal observation, was not an opinion on guilt.

During direct examination of Hinojosa, when discussing the first time that she confronted Orbe-Abarca with D.G.'s accusation that he had touched her inappropriately, the following exchange occurred:

Q: And what did Celso say?

A: He said – he started kind of – when Celso gets nervous, he started smiling.

Ms. Lopez De Arriaga: Objection.

The Court: I will sustain. Ask another question, counsel.

Q: Just listen to my questions, okay? What did Celso say?

RP 725. Defense counsel did not move to strike the testimony. RP 725. Again, there is no claimed error by the trial court here. Orbe-Abarca's attempt to raise this issue on appeal, in the absence of any claim that the trial court failed to act as requested by the defense, should be rejected pursuant to RAP 2.5(a).

Moreover, this was not improper opinion testimony. Generally, no witness, lay or expert, may testify as to their opinion of the defendant's guilt. Heatley, 70 Wn. App. at 577. Such testimony invades the province of the jury as the finders of fact. Id. In State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987), an expert's testimony that the victim suffered from "rape trauma

syndrome” was an improper opinion that the defendant was guilty of rape when the defense was that the victim consented.

Testimony about the appearance and demeanor of the defendant, from which an inference of guilt can be drawn, is not improper opinion testimony on the guilt of the defendant. Id. at 760. Testimony regarding a defendant’s demeanor is proper if a proper foundation is laid: personal observations of the defendant’s conduct, factually recounted by the witness. State v. Day, 51 Wn. App. 544, 552, 754 P.2d 1021 (1988). For example, in Day, testimony that a murder defendant showed very little emotion when told of his wife’s death was not an improper opinion on guilt. Id.

In this case, the testimony that Orbe-Abarca smiles when nervous was not an opinion on guilt. According to the testimony, Orbe-Abarca had just been accused of inappropriately touching D.G. As such, he had reason to be nervous whether he was guilty or not. Thus, the inference that he was nervous does not necessarily lead to the conclusion that he was guilty. The testimony was well within the proper bounds of demeanor testimony, as in Day. Hinojosa’s testimony about Orbe-Abarca’s demeanor, based on her personal observations of the defendant’s conduct, was not an improper opinion on guilt.

4. ORBE-ABARCA HAS FAILED TO ESTABLISH THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

Orbe-Abarca argues that his trial counsel rendered constitutionally ineffective assistance of counsel by conceding that evidence that he attempted to photograph D.G. while showering was admissible pursuant to ER 404(b). His claim should be rejected. Because the evidence was admissible, counsel was not deficient in conceding its admissibility, and counsel's actions were not prejudicial.

The State sought to admit evidence of the shower incident to prove lustful disposition and motive pursuant to ER 404(b). CP 108-13; RP 17-18. The trial court asked defense counsel for her response. RP 18. Defense counsel stated, "I think the argument is well founded on that one specific incident." RP 19. The trial court granted the State's motion to admit evidence of the shower incident. RP 21-22.

A criminal defendant has a constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's conduct "so undermined the proper functioning of the

adversarial process that the trial cannot be relied on as having produced a just result.” Id. at 686.

The defendant has the burden of establishing ineffective assistance of counsel. Id. at 687. To prevail, the defendant must show that: (1) counsel’s representation was deficient, meaning it fell below an objective standard of reasonableness based on consideration of all the circumstances (the performance prong); and (2) the defendant was prejudiced, meaning there is a reasonable probability that the result of the proceeding would have been different (the prejudice prong). Id.; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If the court decides that either prong has not been met, it need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244 (1990).

The trial court correctly concluded that the evidence was admissible to show lustful disposition, and thus defense counsel’s concession was not unreasonable or deficient. Pursuant to ER 404(b), collateral sexual misconduct may be admitted when it shows the defendant’s lustful disposition toward the victim. State v. Ray, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991). A lustful disposition toward the victim makes it more probable that the defendant committed the offense charged because it “evidences a

sexual desire for the particular female.” Id. The question of whether the misconduct is sufficiently close in time to the charged crime to be probative lies within the discretion of the trial court. Id. (allowing misconduct that occurred 10 years before the crime charged to be admitted to show lustful disposition).

Orbe-Abarca argues that collateral sexual misconduct that occurs after the charged crime cannot show lustful disposition. He is incorrect. There is no logic to this argument. Whether the other acts of sexual misconduct occur before or after the charged crime, they are still probative of a sexual desire for that victim. Moreover, this argument was long ago rejected in State v. Crowder, 119 Wash. 450, 205 P. 850 (1922). In that case, the defendant was charged with carnally knowing a female child. Id. at 450. The court noted that in such cases, the victim may testify as to other acts of intercourse with the defendant. Id. at 451. The defendant argued that acts of intercourse subsequent to the charged crime were inadmissible. Id. In explaining lustful disposition, the court stated “evidence of acts prior to the one charged is quite generally held admissible, and except in a few jurisdictions, evidence of subsequent acts is also admissible.” Id. (quoting 16 C.J. 608). The court concluded, “We hold therefore that, under the conditions

shown here, the evidence of the details of what later proved to be prior and subsequent acts was properly admitted.” Id. at 452.

Evidence of the shower incident was admissible to show lustful disposition toward D.G. under existing case law. Defense counsel did not act unreasonably in conceding this point. Orbe-Abarca has failed to show either deficient performance or prejudice.

5. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ALLOWING THE DETECTIVE TO OFFER EXPERT TESTIMONY REGARDING SEXUAL ASSAULT INVESTIGATIONS.

Orbe-Abarca contends that the trial court abused its discretion in allowing Detective Smith, the case detective, to testify that cases involving sexual abuse often have little physical evidence. Detective Smith had specialized knowledge based on her training and experience, and this testimony was relevant and helpful to the jury. Thus, the trial court reasonably concluded that this testimony was proper.

In direct examination of Detective Smith, the prosecutor asked, “Based on your training and experience in cases involving sexual abuse, is there often evidence to collect in those cases?” 7/14/15 RP 197. Defense counsel objected, stating that Detective

Smith was “not qualified.” 7/14/15 RP 197. The objection was overruled. 7/14/15 RP 198. Detective Smith answered as follows:

When I attended a week-long training for the CSI team that I’m on at our department, I was trained on how to gather different types of evidence, anywhere from skin, dandruff, hairs, clothing fibers, anything of that nature, any type of bodily fluid, so I do know that those types of evidence are available, but I also know that sometimes when time elapses, there’s weather, there’s traffic, people move, people – there’s all types of different reasons why sometimes evidence just will not be there any longer.

7/14/15 RP 198. On cross examination, defense counsel asked Detective Smith, “Is it fair to say that in a burglary you may be looking for a little bit more physical evidence, but in this type of case it may be more testimonial?” RP 892-93. Detective Smith answered, “Possible, uh-huh.” RP 893.

ER 702 governs expert testimony and states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Application of ER 702 requires a case-by-case analysis. State v. Groth, 163 Wn. App. 548, 561, 261 P.3d 183 (2011). The two key criteria for the admission of expert testimony are a qualified witness and helpful testimony. State v. Yates, 161 Wn.2d 714, 761, 168

P.3d 359 (2007). Where expert testimony does not concern technical matters, “it need not meet the rigors of a scientific theory.” State v. Sanders, 66 Wn. App. 380, 385-86, 832 P.2d 1326 (1992). An appellate court reviews the trial court’s admission of expert testimony for an abuse of discretion. Id.

The objection below was that Detective Smith was not qualified to testify about the type of evidence usually found in sexual assault cases. The trial court did not abuse its discretion in finding Detective Smith qualified. Training or practical experience is sufficient to qualify a witness as an expert. State v. Ortiz, 119 Wn.2d 294, 310, 831 P.2d 1060 (1992). Detective Smith testified that she had been a patrol officer for five years before advancing to the position of detective. 7/14/15 RP 193. She had been a detective for over a year, and worked in both the general crime and sexual assault units. 7/14/15 RP 194-95. She had received specialized training in interviewing witnesses and evidence collection. 7/14/15 RP 195, 198. Based on her training and practical experience, Detective Smith had specialized knowledge as to the type of evidence typically available in a sexual assault case, and the trial court properly exercised its discretion in allowing her to testify based on that knowledge.

The trial court also properly exercised its discretion in concluding that this testimony would be helpful to the jury. Expert testimony is helpful to the jury and admissible if it concerns matters beyond the common knowledge of the average layperson. Groth, 163 Wn. App. at 564. For example, law enforcement experts may testify as to criminal practices that are beyond the common knowledge of the average juror. United States v. deSoto, 885 F.2d 354 (7th Cir. 1989) (finding law enforcement testimony admissible to help the jury understand particular drug transactions); State v. Campbell, 78 Wn. App. 813, 823, 901 P.2d 1050 (1995) (police officers allowed to testify to gang terminology, symbols and codes of conduct). In Yates, supra, 161 Wn.2d at 765-66, a social worker was properly allowed to testify regarding the practices of women who work in prostitution. Just as the average layperson is not exposed to drug transactions, gang practices, or prostitution, the average layperson is not exposed to sexual assault investigations. Detective Smith's testimony was helpful to the jury.

Even if the testimony was improperly admitted, any error was harmless. The nonconstitutional harmless error standard applies to evidentiary errors. State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). Under that standard, an error is not

prejudicial and does not require reversal unless, “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” Id. Orbe-Abarca cannot meet that standard. The challenged testimony by Detective Smith was of little significance. Because the crimes charged in this case occurred more than five years before they were reported to police, the lack of physical evidence was not surprising or probative. Indeed, defense counsel revisited this point in cross-examination, which demonstrates that it was not a matter of dispute. The State’s case hinged on the credibility of D.G. and J.C. There is no reasonable probability that Detective Smith’s testimony, which was essentially that the passage of time has an effect on the ability to collect physical evidence, affected the outcome of this trial.

Because there is no merit to Orbe-Abarca’s claims of error, his claim of cumulative error must be rejected. The case involved two articulate victims who testified in detail to the acts that formed the basis of the crimes. D.G.’s testimony was corroborated by the chilling July 2009 “voice-note” that was obtained from her phone. The defense presented no evidence. The jury returned its verdicts in less than a day, indicating that they easily came to a consensus

that D.G. and J.C. were credible. RP 981. This Court should conclude that Orbe-Abarca was afforded a fair trial.

D. CONCLUSION

The trial court properly exercised its discretion in ruling on the admission of evidence in this case. Orbe-Abarca's convictions should be affirmed.

DATED this 1st day of September, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

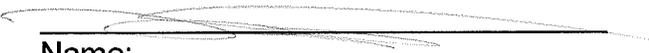
ANN SUMMERS, WSBA #21509
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Oliver Davis, the attorney for the appellant, at Oliver@washapp.org, containing a copy of the Brief of Respondent in State v. Celso Orbe-Abarca, Cause No. 73864-0, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 2 day of September, 2016.


Name:
Done in Seattle, Washington