IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BERTRAN D. CALCOTE, Appellant.	)	No. 64605-2-I DIVISION ONE UNPUBLISHED OPINION FILED: August 8, 2011

Appelwick, J. — Calcote appeals his convictions for attempted rape of a child in the first degree, attempted rape in the second degree, and three counts of indecent liberties. He argues that his convictions were not supported by sufficient evidence and that trial counsel was ineffective for not objecting to fact of complaint testimony. The State concedes that there is a scrivener's error in the judgment and sentence. Finding no error in the convictions, we affirm and remand for correction of the scrivener's error.

FACTS

Three female victims, J.S., J.H., and M.P., reported several different

incidents of awaking in the night to feel a hand on or in their vagina. All three reported that Bertran Calcote had done the touching. Calcote was convicted at a bench trial of attempted rape of a child in the first degree, attempted rape in the second degree, and three counts of indecent liberties.

Calcote timely appeals.

DISCUSSION

I. Ineffective Assistance

Calcote first argues that trial counsel was ineffective on the grounds counsel failed to object to the admission of two types of evidence: "fact of complaint" evidence and "prior bad acts" evidence.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances and that the deficient performance prejudiced the trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). To show prejudice, the defendant must prove that, but for the deficient performance, there is a reasonable probability that the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). If one of the two prongs of the test is absent, we need not inquire further. Strickland, 466 U.S. at 697; State v. Foster,

140 Wn. App. 266, 273, 166 P.3d 726 (2007). A claim of ineffective assistance of counsel presents a mixed question of fact and law, reviewed de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

A. Fact of Complaint Evidence

Calcote argues that his counsel was ineffective for failing to object to testimony relating to the victim's reports of Calcote's behavior. Testimony at trial included the following:

M.P. testified she was molested once when she was under the age of 12 years old (between approximately February 1999 and February 2002) and again in June 2007 when she was 17 years old. M.P. testified that she told J.H., J.S., J.S.'s sister, and her mother the day after the second incident. She testified that she also told her father days later. J.S. testified that M.P. told her about the incidents the day after the June 2007 incident and described her demeanor at the time of the report. J.H. testified that M.P. told her about the earlier incident the day before the June 2007 incident while they were riding on a bus. J.H. also testified that the day after the June 2007 incident, M.P. told her that "it happened again." J.H. described M.P.'s demeanor at the time of the report. M.P.'s mother testified that M.P. reported the incident to her the morning after the June 2007 incident. M.P.'s father also testified that M.P. reported the incident to him. While the timing of that report was unclear, it was possibly up to one month after the date of the incident.

J.H. testified that she was abused two times when she was about 14 years old (approximately December 2003 to December 2005). J.H. said she told

J.S. about the sexual contact, and J.S. revealed she was also touched inappropriately. The time of that report was unclear in J.H.'s testimony. J.H. also testified that she told M.P. about the abuse on the school bus in June 2007. J.H. finally testified that she participated in the police investigation.

J.S. testified that she was abused several times (approximately July 2003 to July 2005), with her testimony focusing on the one charged incident that occurred when she was in the eleventh grade. J.S. testified that after that incident she immediately told her sister. J.S. told her boyfriend the next morning, some other friends shortly after, and, at their insistence, her mother a few weeks later. She also testified that she told J.H.

Finally, J.H., J.S., and M.P. all reported the incidents to the police. Detective Susana Ditusa testified to those reports. M.P. and J.H. offered reports and were interviewed between July 3 and July 11, 2007. The detective interviewed J.S. on November 6, 2009 (immediately before trial).

The general rule is that in criminal trials for sex offenses, the prosecution may present evidence that the victim complained to someone after the assault. State v. Ferguson, 100 Wn.2d 131, 135, 667 P.2d 68 (1983); State v. Goebel, 40 Wn.2d 18, 25, 240 P.2d 251 (1952), overruled on other grounds by State v. Lough, 125 Wn.2d 847, 860 n.19, 889 P.2d 487 (1995). The rule admits only such evidence as will establish that the complaint was timely made. Ferguson, 100 Wn.2d at 135-36. Evidence of the details of the complaint, including the identity of the offender and the nature of the act is excluded. Id. at 136; State v. Murley, 35 Wn.2d 233, 237, 212 P.2d 801 (1949).

The rule is grounded in the feudal assumption that, in forcible rape cases, the absence of evidence of a seasonable complaint creates an inference that the victim's testimony has been fabricated. See State v. Bray, 23 Wn. App. 117, 121-22, 594 P.2d 1363 (1979) (citing State v. Griffin, 43 Wash. 591, 86 P. 951 (1906)). Allowing the State to present the fact of complaint in its case-in-chief dispelled this inference. See Murley, 35 Wn.2d at 237. But, the early doctrine required that the complaint be timely in order for the State to be permitted to introduce evidence of the victim's complaint. For example, in Griffin, the Supreme Court held that "evidence of the complaint should be excluded whenever from delay or otherwise it ceases to have corroborative force." 43 Wash. at 598. The Griffin court went on to hold that a complaint made six months after the alleged incident was not sufficiently timely to qualify for the hearsay exception. Id. at 599.

But, our Supreme Court explained in Murley: "Modernly the inference affects the woman's credibility generally, and the truth of her present complaint specifically, and consequently, we permit the state to show in its case-in-chief when the woman first made a complaint consistent with the charge." 35 Wn.2d at 237 (emphasis omitted). As articulated in Murley, evidence as to the timeliness of the complaint was admissible. Id. The Court stated, "Presently, however, our rule excludes evidence of the details of the complaint, including the identity of the offender and the nature of the act, and admits only such evidence as will establish whether or not a complaint was made timely." Id.; see also Ferguson, 100 Wn.2d at 135-36 ("The rule admits only such evidence as will

establish that the complaint was timely made."). Under this articulation of the rule, the timeliness of the complaint by the victim is no longer a predicate fact that must be proved before admission of the evidence of a victim's complaint; rather, either side may use timeliness or lack thereof to argue inferences as to the victim's credibility.

Courts have treated fact of complaint evidence as hearsay[1] and the doctrine as an exception to the prohibition against hearsay. See, e.g., State v. Ackerman, 90 Wn. App. 477, 481, 953 P.2d 816 (1998) ("The fact of complaint or 'hue and cry' doctrine is a case law exception to the hearsay rule."); State v. DeBolt, 61 Wn. App. 58, 63, 808 P.2d 794 (1991). This is because under the ancient hue and cry doctrine, the details of the prior out-of-court statement were admissible to prove consistency with her present complaint. Murley, 35 Wn.2d at 237. But, the modern doctrine limits the testimony to the fact of complaint, Murley, 35 Wn.2d at 237, which is something that is within the specific knowledge of the witness. It is not hearsay. See State v. Pugh, 167 Wn.2d 825, 842, 225 P.3d 892 (2009) ("The fact that a complaint was made was considered to be original evidence, not hearsay."). Fact of complaint testimony is not offered to prove the truth of the complaint. Rather, it is admitted to prove only that a complaint was actually made. See Bray, 23 Wn. App. at 121 ("The evidence is not hearsay because it is introduced for the purpose of bolstering the victim's credibility and is not substantive evidence of the crime."). Under the

[1] "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c).

modern rule, other details of the complaint may only come in if provided for by other rules of evidence.

In sum, either party can introduce fact of complaint evidence. Testimony must be limited to the fact of complaint. After admission, either party can use evidence of timeliness to argue credibility.

Here, the State produced testimony relating to the victims' reports of their allegations regarding Calcote. The State is entitled to do so. To the extent that the testimony did not provide details of the complaint, the fact of complaint does not trigger the hearsay prohibition and either party can argue credibility inferences from that evidence.

Calcote argued at oral argument that the fact of complaint evidence was not relevant because Calcote did not directly challenge the credibility of the victims. First, a direct challenge to the victim's credibility is not required for fact of complaint evidence to be admitted. Murley, 35 Wn.2d at 236-37 ("[I]n criminal trials for sex offenses, the credibility of the complaining witness, irrespective of whether it is assailed or unassailed, may be supported by evidence of her timely prior out-of-court complaint.") (emphasis added)). Second, here the victim's credibility was under attack by Calcote's general denial of the allegations. Without eyewitnesses, the allegations, as is typical in these types of cases, became a "he said, she said" dispute, and the credibility of the victims versus the defendant became the critical question.

The evidence of the fact of complaints by the victims was admissible and trial counsel was not deficient for electing not to object to that testimony.

Trial counsel may have had grounds to object to portions of the testimony that went beyond the fact of complaint and revealed the identity of the perpetrator, Calcote. For example, in response to the State's question "Who was the first person that you told about Bertran and the touching?" J.H. responded that she had told J.S. But, even if it was deficient for counsel not to object to this line of questioning, Calcote cannot show prejudice because the identity of the alleged perpetrator was not in question, only whether the offenses occurred. Even Calcote admitted that he had been present in the victims' rooms, claiming he was there to check on the girls because they had asthma. No prejudice resulted from any failure to object.

Calcote fails to show ineffective assistance of counsel on these grounds.

B. Prior Acts Evidence

Calcote next argues he received ineffective assistance of counsel when counsel failed to object to J.S.'s testimony relating to uncharged incidents of a similar nature to the acts alleged. He argues that the testimony did not go to any element of the charged offense and was therefore prohibited propensity evidence.

ER 404(b)[2] prohibits using evidence of other acts to prove the character of a person in order to show that he acted in conformity with that character. State v. Smith, 106 Wn.2d 772, 775, 725 P.2d 951 (1986). But, other acts

[2] ER 404(b) states: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

evidence may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b).

In this case, J.S. testified to several uncharged incidents. The prosecutor sought to enter this evidence to show Calcote's "lustful" disposition toward the victims.

Evidence of sexual misconduct directed at the same victim is admissible under ER 404(b) to show lustful disposition. Ferguson, 100 Wn.2d at 134. Calcote acknowledges this case law, but argues that evidence of a lustful disposition was not relevant to the charged offense, indecent liberties. But, in Ferguson the defendant was charged with indecent liberties. 100 Wn.2d at 132; see also 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice § 404.26, at 579-80 (5th ed. 2007) ("By long-standing tradition, the defendant's previous sexual contacts with the victim are admissible in prosecutions for rape, statutory rape, incest, seduction, sodomy, and indecent liberties.") (footnotes omitted)). The evidence prior conduct was clearly relevant here.

Even if counsel was deficient in not objecting to the evidence of other incidents, no prejudice resulted from that deficiency. We presume that the trial court did not rely on inadmissible evidence in making its decision. State v. Read, 147 Wn.2d 238, 244, 53 P.3d 26 (2002). The court did not discuss that evidence in the oral ruling. The trial court stated in its findings of fact that "[t]his was not the first time that the defendant had paid a late night visit to [J.S.] while she was sleeping. This incident, however, is the one night that [J.S.] remembers

with the most clarity." This brief mention does not indicate any undue reliance on the prior acts evidence for the trial court's findings of credibility or guilt. The remaining evidence supports the conviction. No prejudice is established.

Calcote fails to show ineffective assistance of counsel on these grounds.

II. Sufficiency of the Evidence

Calcote next argues that there was insufficient evidence to support his convictions for indecent liberties (counts III, IV, and V).

Evidence is sufficient if, when viewed in the light most favorable to the State, any reasonable trier of fact could find guilt beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). When a criminal defendant challenges the sufficiency of the evidence, he admits the truth of the State's evidence, and all reasonable inferences therefrom are drawn in favor of the State. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). "The relevant question is 'whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt.'" State v. Drum, 168 Wn.2d 23, at 34-35, 225 P.3d 237 (2010) (quoting State v. Wentz, 149 Wn.2d 342, 347, 68 P.3d 282 (2003)). Criminal intent may be inferred from conduct, and circumstantial evidence is as reliable as direct evidence. State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004).

Calcote was charged and convicted of three counts of indecent liberties under RCW 9A.44.100(1)(b). 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.

RCW 9A.44.100. The issue here is whether J.H. and J.S. were physically incapacitated and incapable of consent.

It is established that one who is asleep is physically helpless. State v. Puapuaga, 54 Wn. App. 857, 861, 776 P.2d 170 (1989). Calcote does not actually challenge that a person who is asleep is unconscious and therefore incapable of consent. Rather, he argues that because the victims testified that they were "in the state between sleep and wakefulness," the State failed to prove that the victims were physically helpless and incapable of consent.

A. Sufficient Evidence Supported Count III

The trial court found the following regarding count III:

> On one such occasion, [J.H.] lay sleeping in the same big bed with [J.S.] [J.H.] awakened to the feeling of the defendant's hand on the bare skin of her vagina. [J.H.] feigned sleep and watched as the defendant left the bedroom. [J.H.] did not report the sexual touching by the defendant.

The trial court then concluded the following:

> The court finds that during the time period of December 13, 2003 through December 13, 2005, the defendant . . . knowingly touched the bare skin of [J.H.'s] vagina while [J.H.] was asleep. As a result of [J.H.] being asleep, [J.H.] 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.

J.H. testified that the following occurred while she was sleeping at night with her niece:

> Q. Okay. What is the first thing that you can tell us happened that night?
>
> A. I was asleep, and I felt something, I felt a hand in my private area . . . .

Shortly after, the following exchange occurred:

> 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 the middle period.
>
> Q. Okay, between sleep and fully awake?

J.H. then said she was still not fully awake when she heard the bedroom door open and saw Calcote leave the room.

Sufficient evidence supports the trial court's finding that J.H. was asleep when Calcote touched her vagina. She awoke to the feel of his hand. She was asleep when the touching began. Because J.H.'s testimony shows she was physically incapacitated and incapable of consent at the time of the touching, count III is supported by sufficient evidence.

B. Sufficient Evidence Supported Count IV

The trial court found the following regarding count IV:

> [J.H.] lay sleeping in the same big bed with [J.S.] [J.H.] awakened to the feeling of the defendant's hand touching her vagina over her underpants. [J.H] feigned sleep and watched as the defendant left the bedroom. [J.H.] did not report the sexual touching by the

defendant.

The trial court concluded the following:

> The court finds that during the time period of December 13, 2003 through December 13, 2005, the defendant . . . knowingly touched [J.H.'s] vagina over her underpants while [J.H.] was asleep. As a result of [J.H.] being asleep, [J.H.] 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.

J.H. testified that Calcote had again entered the room in which she was sleeping:

> Q. Okay. And when you felt the hand on your vaginal area, remember we talked about earlier, there's asleep, there's that moment between sleep and waking, and then there's alert and awake.
>
> A. Um-hum.
>
> Q. Where were you? Were you asleep, were you in that middle period, were you alert and awake when the touching occurred?
>
> A. Well, I was more so alert than last time, but I wasn't like woke like up, you know, like.
>
> Q. Okay. So when you say you were more so alert than the last time, did you see him when he adjusted and put his hand between --
>
> A. No.
>
> Q. -- your--
>
> A. No, I mean, like this time, I seen -- like I wasn't -- like my eyes wasn't wide awoke, but I seen him like move, and then I -- when I woke up, he was standing by the radio, Jamila's radio that was on the right side of the bed.
>
> Q. Okay. Okay, because I wasn't there, I need to ask you a couple questions, all right?
>
> A. Okay.

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

A. After.

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

A. Yeah.

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

A. Um-hum.

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

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

Q. Okay, okay.

A. Like I knew what was going on.

Q. Okay.

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

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

A. Um-hum.

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

A. Yeah.

J.H. then testified to the following:

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

A. Sleepy.

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

Sufficient evidence supports the trial court's finding that J.H. was again asleep when Calcote touched her vagina. J.H. testified that she was asleep and awoke to Calcote's touch. Because J.H.'s testimony shows she was physically incapacitated and incapable of consent at the time of the touching, count four is supported by sufficient evidence.

C. Sufficient Evidence Supported Count V

The trial court found the following regarding count V:

> One night when she lay in bed, she awakened to the feeling of the defendant touching her vagina. [J.S.] was asleep in her bed, when she felt the defendant's hand softly tapping on the outside of her vagina. [T]he defendant's hand was on the bare skin of her vagina. [J.S.'s] body had been moved so that her legs were hanging off the end of the bed. As [J.S.] awakened, she watched as the defendant left the bedroom.

The trial court concluded the following regarding count V:

> The court finds that during the time period of July 25, 2003 through July 24, 2004, the defendant . . . knowingly touched the bare skin of [J.S.'s] vagina while [J.S.] was asleep. As a result of being asleep, [J.S.] 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.

J.S. testified to the following:

> Q. Can you tell me where you were when this something happened to you?
>
> A. In my room.
>
> Q. And when you were in your room, was it daytime, nighttime,

something different?

A. Nighttime.

Q. Were you alone asleep in your room?

A. Yes.

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

A. I remember feeling a breeze.

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

A. My legs.

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

A. I felt a tapping.

Q. And tapping on what part of your body?

A. On my vagina.

The testimony continued:

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

A. I was waking up.

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

A. Yes.

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

A. Yes.

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

A. That’s correct.

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

A. Yes.

Q. Tell me about that.

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

Q. Okay.

A. -- the edge.

. . . .

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

A. Yes.

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

A. Yes.

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

A. No.

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

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

Q. Okay.

A. Laying on my pillow.

Q. The way one would normally fall asleep?

> A. Yes.
>
> Q. What was -- once the tapping that you said -- the pressing the gentle push was going on, tell me what the next thing was that you felt.
>
> A. I moved.
>
> Q. Okay.
>
> A. And I felt the elastic from my underwear snap against my pelvic area.

J.S. also stated the following:

> Q. At what point, [J.S.], are you fully awake and alert, just as you are today?
>
> A. After he left out [of] the room.
>
> Q. Okay. So during this entire time period that you've described thus far, you're still in that state of sleep, or not fully awake and alert?
>
> A. No, my eyes just weren't open all the way.
>
> Q. They weren't open all the way, okay. So let me ask my question a little better: At the point when you're awake, and yet your eyes are still closed, what point in the sequence of events are you awake, yet your eyes are closed?
>
> A. When the elastic snapped back on my waist.
>
> Q. Okay, so after the touching on the vagina, okay. And why did you keep your eyes closed? Tell me -- tell me why.
>
> A. I was scared.

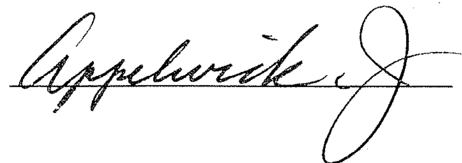
Sufficient evidence supports the trial court's finding that J.S. was also asleep when Calcote touched her vagina. J.S. testified that she had fallen asleep at the head of the bed and awoke with her legs hanging off the end of the bed. She testified that she awoke to the feel of a breeze on her legs and next

felt a tapping on her vagina. The inference from this testimony is that Calcote's touch woke her and that she had been asleep when the touching began. Because J.S.'s testimony shows she was physically incapacitated and incapable of consent at the time of the touching, count V is supported by sufficient evidence.

III. Error in Judgment and Sentence

Calcote notes that the trial court found that the crime of indecent liberties as charged in count five occurred between July 25, 2003 and July 24, 2004. This charging period is consistent with the State's second amended information. The judgment and sentence, however, indicates that this crime occurred between July 25, 2005 and July 25, 2007. The State concedes the error. We remand to the sentencing court to correct the error on the judgment and sentence.

We affirm the convictions. We remand for correction of the judgment and sentence.



WE CONCUR: