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NO. 69508-8-I

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

REC'D
MAY 31 2013
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

JON DEL DUCA,

Appellant.

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

The Honorable Mary Roberts, Judge
The Honorable Lori K. Smith, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant was denied effective assistance of counsel when his attorney failed to lay proper foundation necessary to allow extrinsic evidence of a complaining witness's prior inconsistent statements.

Issue Pertaining to Assignment of Error

Appellant sought to impeach a complaining witness with extrinsic evidence of her prior inconsistent statements regarding the number of times alleged sexual incidents happened and appellant's actions prior to the alleged incident. The trial court denied appellant's request to present impeachment evidence finding that proper foundation had not be laid on cross-examination. Defense counsel did not request the witness be recalled so proper foundation could be laid for impeachment purposes. Was defense counsel ineffective for failing to properly question the complaining witness so as to allow the introduction of extrinsic impeachment evidence?

B. STATEMENT OF THE CASE

1. Trial Testimony

In the summer of 2010 appellant Jon Del Duca was living in his motor home on the shore of Trout Lake in Auburn, Washington. Del Duca parked his motor home at the home of Jeff Wentz and worked

construction jobs at nearby lake houses. 10RP¹ 114, 117, 121. In August, Del Duca began working with Daniel Andrews to repair a concrete dock on Andrews' property. 9RP 141-42, 176-77; 10RP 106-111, 117.

Andrews' property was separated from his neighbors' property by a "waist-high" fence. 9RP 138-39; 10RP 106, 109, 135. Del Duca knew Andrews' neighbors, Cheryl and John Strojan, from prior work around the lake. 9RP 142, 177-78; 10RP 118, 124. The Strojans had a 7-year-old daughter, K.S., and a 4-year-old son, C.S. 9RP 140. Cheryl worked during the day while John stayed home with the children. 9RP 140, 175. K.S. and C.S. would occasionally come to the fence and watch Del Duca and Andrews work. 9RP 143-44, 179; 10RP 109-10, 118. Del Duca once handed C.S. a hose after he asked to spray the concrete. 10RP 119, 127-29.

One evening, K.S. told Cheryl that Del Duca had touched her over her clothing. 9RP 145; 10RP 43. K.S. demonstrated by moving her hand from her chin, down her body over her breast, and ending between her legs. 9RP 145, 155. K.S. told Cheryl the incident happened once. 9RP

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – November 16, 2011; 2RP – April 27, 2012; 3RP – May 4, 2012; 4RP – June 21, 2012; 5RP – August 16, 2012; 6RP – August 20, 2012; 7RP – August 21, 2012; 8RP – August 22, 2012; 9RP – August 23, 2012; 10RP – August 28, 2012; 11RP – August 29, 2012; 12RP – August 30, 2012; 13RP – September 11, 2012; 14RP – September 20, 2012; 15RP – October 9, 2012; 16RP – October 19, 2012.

155. Cheryl told K.S. she needed tell her father about the alleged incident. K.S. was reluctant. 9RP 146; 10RP 43. Cheryl did not tell John about her conversation with K.S. 9RP 146-47. Cheryl did not confront Del Duca about the allegations. 9RP 148. She did not ask C.S. whether anything happened to him. 9RP 147, 156.

The next day, K.S. told her father Del Duca touched her “potty” over her clothing. 9RP 159, 181, 184; 10RP 43-45. K.S. did not demonstrate the alleged touching. 9RP 182. John than asked C.S. whether “Jon touched your body.” 9RP 184, 195-96. C.S. responded that Del Duca had tried to touch his “potty.” 9RP 184, 196. John spoke with his neighbors about the alleged incident before confronting Del Duca. 9RP 187-89, 197. Del Duca denied the allegations before leaving in his motor home. 9RP 149-50, 158.

About two months later, John encountered Del Duca at grocery store. 9RP 151, 189-90, 199; 10RP 78, 122-23. John told Del Duca he was on the “way to being dead.” 10RP 122-23. Del Duca left the store in his motor home. John followed Del Duca in his car and called 911. 9RP 151, 189-90; 10RP 123. Del Duca decided to try and “out drive” John in order to avoid a confrontation. 10RP 123. After turning down a dead end street, Del Duca backed up his motor home and accidentally hit John’s car.

9RP 190; 10RP 123-24. John returned to his house with a broken car windshield. 9RP 152-53.

Detective Mary Lisa Preibe-Olson interviewed John two days after the grocery store encounter. 10RP 63, 65. John identified Del Duca in a photo montage. 10RP 69, 73. Preibe-Olson also spoke with Andrews. 10RP 76, 78. Andrews never saw Del Duca touch K.S. or C.S. 10RP 110, 112. Andrews did not hear any yelling and never saw any confrontations between Del Duca and John. 10RP 110. Andrews told Del Duca to leave his property after the dock project was finished. 10RP 111, 121-22.

Child interview specialist Carolyn Webster separately spoke with K.S. and C.S. several days later. 9RP 7, 37, 42, 74. Webster showed both K.S. and C.S. cards and asked questions to determine whether they knew the difference between a truth and a lie. 9RP 23-26. C.S.'s answer on one card was incorrect. 9RP 70-71.

C.S. told Webster Del Duca had touched his "potty" twice on the same day. 9RP 52-53, 57, 60. Both incidents were outside C.S.'s clothing. 9RP 57, 62. C.S. was by the gate at Andrews' house when the alleged incidents happened. 9RP 54, 66. C.S. saw Del Duca touch K.S.'s "potty" outside of her clothing. 9RP 53, 59-60. Del Duca told K.S. not to tell anyone about the incidents. 9RP 62.

C.S. first told Webster only he and K.S. were present when the incidents happened. 9RP 56. However, C.S. then told Webster John also saw Del Duca touch him and K.S. 9RP 59, 118. Webster explained C.S. may have said John witnessed the incidents because children C.S.'s age have a "tendency to be very egocentric." 9RP 121-22.

K.S. told Webster Del Duca touched her in the "wrong spot." 9RP 85. She alleged Del Duca touched her two or three times outside of her clothing on the same day. 9RP 86-87, 90-91, 94. The incidents happened at the fence separating her yard from Andrews. 9RP 87, 90.

K.S. explained the touching started on her chin, moved downward over her breast, and ended at her "potty." 9RP 87, 90. K.S. denied to Webster that anyone, including C.S., had seen Del Duca touch her. 9RP 100. Del Duca did not ask K.S. to touch him. 9RP 96. Del Duca told K.S. not to tell her parents about the incidents. 9RP 94. K.S. acknowledged to Webster that she had not seen Del Duca touch C.S. 9RP 100-01, 114. Rather, C.S. told K.S. Del Duca touched him. 9RP 100-01.

Based on this evidence, the state charged Del Duca with two counts of first-degree child molestation. CP 1-6.

At trial, C.S. did not recognize Del Duca. 10RP 14. Initially, C.S. said he did not remember speaking with Webster or anything about Del Duca touching his "potty." 10RP 18-20. However, C.S. later testified Del

Duca touched him once after he said hello to Del Duca in Andrews' yard. 10RP 22-24, 26-27. C.S. did not remember telling his father about the alleged incident. 10RP 25. C.S. testified K.S. was present during the incident. C.S. explained Del Duca did the "same thing" to K.S. 10RP 28.

K.S. testified Del Duca asked her if she wanted to write her name in the concrete. K.S. declined. 10RP 54. K.S. testified Del Duca then "started touching me and I didn't really like it." 10RP 41. K.S. said the incident happened while Del Duca was helping Andrews' repair the dock. 10RP 40-41. K.S. said she told her parents about the incident after it happened. 10RP 43-45. K.S. explained, "and that was the first time he [Del Duca] did it and that was the last time." 10RP 41.

K.S. testified Del Duca touched her "vagina and my boobs" outside of her clothing. 10RP 42-43. Del Duca did not say anything during the alleged incident. 10RP 42. Del Duca kept touching K.S. after she asked him to stop. 10RP 42.

K.S. said C.S. was playing in the sandbox when Del Duca touched her. 10RP 42. C.S. did not see Del Duca touch K.S. 10RP 42, 51, 54. However, K.S. testified she saw Del Duca touch C.S.'s "private spot" on the same day Del Duca touched her. 10RP 54-55.

Del Duca denied ever touching K.S. or C.S. 10RP 119. He explained he was working at Andrews' dock for about a week and half.

10RP 132. A few days before the allegations, Del Duca asked John what type of rocks could be used during construction since John was mason. 10RP 133.

Prior to the allegations Del Duca had three short conversations with K.S. and C.S. 10RP 129. The first time, C.S. and K.S. came to the fence while he was cutting and grinding concrete. He answered their questions about what he was doing. 10RP 126. The second conversation happened when K.S. came to the fence while he was pouring concrete. Del Duca jokingly asked K.S. if she wanted to draw her name in the concrete. C.S. came to the fence after he finished hitting golf balls. Del Duca told C.S. he was good. 10RP 127. The last conversation happened when C.S. asked if he could spray the concrete with a hose. Del Duca passed him the hose but was not close enough to touch C.S. 10RP 119, 127-28. On other occasions, C.S. and K.S. would come to the fence to watch without saying anything to Del Duca or Andrews. 9RP 143-44, 179; 10RP 109-10, 129.

At some point during the project with Andrews, Del Duca heard that John told people Del Duca was on his property. 10RP 120. Del Duca went to John's house to speak with him about it. While there, John accused Del Duca of touching K.S. Del Duca decided to leave when John became "belligerent." 10RP 120.

Del Duca headed toward his motor home but was blocked by John. John left when Del Duca asked him to. 10RP 120-21. Del Duca then left Wentz's property to "cool off." 10RP 121. Andrews' told Del Duca the project was finished when Del Duca returned to the property the next day. Del Duca packed up his tools and left. 10RP 111, 121-22. Del Duca eventually returned to Wentz's property and stayed there until encountering John at the store two months later. 10RP 121.

After hearing the above, a King County jury found Del Duca not guilty of first degree child molestation as to C.S. and guilty of first degree child molestation as to K.S. CP 161-62; 12RP 5-7. The trial court imposed a standard range indeterminate sentence of 68 months to life. CP 192-202; 16RP 15-16. Del Duca timely appeals. CP 190-91.

2. Impeachment Evidence

Before trial, defense investigator Jana Richards interviewed C.S. and K.S. regarding the alleged incidents with Del Duca. CP 84-134; 10RP 101-03. K.S. made several statements during the interview that were inconsistent with her trial testimony and interview with Webster. In particular, K.S. told Richards Del Duca had touched her several times on different days. CP 117-18, 131. K.S. told Richards, "[T]he first time it happened I told my parents and, my mom didn't quite get it so I told my

dad and my dad kinda went crazy, but not that crazy.” CP 117. The interview continued with the following exchange:

Richards: [H]ow many times did, did uh, Jon [Del Duca] touch you?

K.S.: Um...Well I can't remember the exact number, but I can just say he touched me a lot.

Richards: Okay. All that same day?

K.S.: Um, not all that same day. But a few days into, it turned into a day and then a week and then a daily basis.

CP 131.

During one incident, K.S. alleged Del Duca touched her after jumping out of a bush near her yard: “[T]hen Jon [Del Duca] pops out of the bush and then he started like touching me and [C.S.], and I just about screamed for my dad, and then he almost covered my mouth so where the point I couldn't breathe.” CP 125. K.S. also told Richards when she went swimming in the lake, Del Duca would “jump in too” and “follow us wherever we went.” CP 123.

During cross-examination at trial, defense counsel probed K.S.'s version of events:

Counsel: Um, and do you know how long Jon [Del Duca] was working there?

K.S.: Um, I don't know. Like, three days.

Counsel: And, um – so, you said that you – did you go over there and watch him multiple times work or just that one time?

K.S. Just that one time.

10RP 51-52. Counsel's cross-examination of K.S. continued as follows:

Counsel: Um, you remember when we met a – a while ago to talk about this?

K.S.: Yeah.

Counsel: And, um, did – did Jon [Del Duca] ever – you said sometimes you jump in the lake. Would he ever follow you, jump in the lake – follow you?

K.S.: No. He would never – he wouldn't jump in the lake, but he would get at the end of the dock and just watch me.

Counsel: Um, what about the bush? Did he ever jump out of a bush and put his hand over your mouth? Did – do you remember telling us that?

K.S.: No. I don't.

10RP 55-56.

The trial court excused K.S. after defense counsel finished his cross-examination. 10RP 57. After hearing testimony from Detective Preibe-Olson, the court took its lunch recess. When the parties returned from recess, defense counsel noted he intended to call Richards as a witness for purposes of impeaching portions of K.S.'s trial testimony with

prior inconsistent statements she made to Richards. The prosecutor objected, arguing certain testimony from K.S. was not inconsistent, and “other portions the appropriate foundation has not been laid under ER 613(b).” 10RP 81-82.

Specifically, defense counsel wanted to introduce K.S.’s comments to Richards about “[T]he first time it happened,” arguing it differed both from K.S.’s trial testimony where she alleged Del Duca touched her once, and from the interview with Webster where she alleged Del Duca touched her two or three times on the same day. 10RP 82-84. Defense counsel sought to introduce K.S.’s comments to Richards about the incidents happening on “a daily basis,” for the same reasons. 10RP 89.

The State and trial court agreed K.S.’s statements to Richards “about the first time,” were inconsistent with her trial testimony and statements to Webster. 10RP 84-85. However, the prosecutor objected to the introduction of both K.S.’s statements to Richards about the frequency of the incidents, arguing defense counsel had not laid appropriate foundation on cross-examination for Richards to testify as to those statements. 10RP 89-90.

Defense counsel also sought to introduce K.S.’s statements to Richards about Del Duca jumping into the lake and “follow[ing] us wherever we went,” as inconsistent with K.S.’s trial testimony. 10RP 85-

86. The prosecutor objected, arguing the statements were not inconsistent and that K.S. was never “actually confronted, um, with having made that statement in her defense interview.” 10RP 85-87.

Lastly, defense counsel sought to introduce K.S.’s statements to Richards about Del Duca appearing from a bush and covering her mouth with his hand as inconsistent with K.S.’s trial testimony. 10RP 88-89. The prosecutor acknowledged impeachment on this point was proper because defense counsel had specifically confronted K.S. on cross-examination with her prior statement about “jumping out of the bush and putting, uh, his hand over her mouth.” 10RP 89. The trial court likewise agreed that defense counsel had properly laid foundation to impeach K.S. through Richards’ testimony about the alleged bush incident. 10RP 89, 97.

In response to the prosecutor’s objections, defense counsel maintained he was permitted to impeach K.S.’s trial testimony with her inconsistent statements to Richards. 10RP 87. Counsel noted K.S. was a child a witness, he was not certain as to K.S.’s reading level for purposes of showing her the prior statements she made to Richards, and risked alienating the jury if he was too harsh with K.S. on cross-examination. 10RP 87. The prosecutor responded that ER 613(b) did not have a child witness exception. 10RP 87. The prosecutor further argued neither K.S.’s

age, nor reading level, hampered defense counsel from asking her whether she remembered making specific statements to Richards as opposed to showing K.S. specific statements. 10RP 88.

Counsel asked that K.S.'s cross-examination testimony be replayed in open court. 10RP 90. After playback, defense counsel maintained he laid proper foundation during cross-examination to impeach K.S. with her prior inconsistent statements to Richards. 10RP 92-93.

The trial court noted there was no dispute K.S.'s statements were inconsistent. 10RP 93. Rather, the issue was, "whether under 613 you are required to ask the witness about the statement in order to be able to use the impeachment." 10RP 93. The court concluded proper foundation had not been established to allow in K.S.'s prior statements about the jumping in the lake and the touching having occurred on "a daily basis." 10RP 99-100. The court explained its ruling as follows:

You didn't say to her [K.S.] 'do you remember telling me that he jumped in the lake?' That's confronting her [K.S.] with her prior inconsistent statement. Like you did whenever you asked her [K.S.] about him [Del Duca] hiding in the bush and covering her mouth. You asked her specifically, 'do you remember telling me that Jon hid in the bush and covered your mouth?' And she [K.S.] said 'no.' That's confronting her with the fact that she said that statement, which is different than asking her if it happened.

10RP 97. The court likewise noted there not proper foundation to allow K.S.'s prior inconsistent statements in "simply as child hearsay." 10RP 96.

Summarizing its ruling, the trial court concluded Richards could only testify as to K.S.'s prior inconsistent statements about Del Duca appearing from the bush, and her statement about "[T]he first time it happened." 10RP 99. Defense counsel said, "the jumping out the bush statement I plan on going into. But, uh, the other one it's just, uh, um – I don't plan on asking." 10RP 100.

Richards subsequently testified as to K.S.'s interview statement about Del Duca appearing from the bush and grabbing her. 10RP 103-04. Defense counsel never requested that K.S. be recalled as a witness so that proper foundation could be established for impeachment purposes as to the remainder of her inconsistent statements.

C. ARGUMENT

DEL DUCA WAS DENIED EFFECTIVE ASSISTANCE OF
COUNSEL WHEN HIS ATTORNEY FAILED TO LAY
PROPER FOUNDATION FOR ADMISSION OF EXTRINSIC
IMPEACHMENT EVIDENCE

The federal and Washington constitutions guarantee the right to effective assistance of counsel. U.S. Const. amend 6; Const. art. 1 § 22. A defendant is denied the right and is entitled to reversal of his

convictions when his attorney's conduct (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a reasonable probability that the outcome would be different but for the attorney's conduct. State v. Doogan, 82 Wn. App. 185, 188-89, 917 P.2d 155 (1996) (citing Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Strickland, 466 U.S. at 693. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. Strickland, 466 U.S. at 694.

The credibility of a witness may be attacked by any party. ER 607. Evidence offered to impeach a witness is relevant if "(1) it tends to cast doubt on the credibility of the person being impeached, and (2) the credibility of the person being impeached is a fact of consequence to the action." State v. Allen S., 98 Wn. App. 452, 459-460, 989 P.2d 1222 (1999), rev. denied sub nom. State v. Swagerty, 140 Wn.2d 1022, 10 P.3d 405 (2000).

ER 613 permits impeachment of a witness with extrinsic evidence of a prior inconsistent statement. State v. Curtis, 110 Wn. App. 6, 9, 37 P.3d 1274 (2002). ER 613(b) states:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

Under ER 613, the proper procedure to impeach a witness with a prior inconsistent statement is to ask the witness whether she made the prior statement. State v. Babich, 68 Wn. App. 438, 443, 842 P.2d 1053, rev. denied, 121 Wn.2d 1015 (1993). If the witness admits the prior statement, extrinsic evidence of the statement is not allowed because such evidence “would waste time and would be of little additional value.” Babich, 68 Wn. App. at 443 (quoting 5A K. Tegland, Washington Practice: Evidence § 258(2), at 315 (1989)). If the witness denies the prior statement, extrinsic evidence of the statement is admissible unless it concerns a collateral matter. Babich, 68 Wn. App. at 443.

It is also sufficient under ER 613 for the examiner to give the declarant an opportunity to explain or deny the statement after the introduction of extrinsic evidence. State v. Horton, 116 Wn. App. 909, 916, 68 P.3d 1145 (2003) (citing State v. Johnson, 90 Wn. App. 54, 70, 950 P.2d 981 (1998)). In order for counsel to admit extrinsic evidence of a prior inconsistent statement without first affording the witness a chance to explain or deny, counsel must arrange for the witness to remain in attendance after testifying. Horton, 116 Wn. App. at 916.

Here, defense counsel wanted to impeach K.S.'s trial testimony regarding the number of times Del Duca allegedly touched her and whether Del Duca followed her into the lake. Counsel intended to have his investigator testify that before trial K.S. alleged Del Duca touched her multiple times and would jump in the lake to follow K.S. wherever she went. Before counsel could do that, he had to give K.S. an opportunity to explain or deny those pretrial statements by calling them to K.S.'s attention while she was on the stand, or by arranging for K.S. to remain in attendance after testifying. Counsel did neither. Nor did he request that K.S. be recalled as a witness after the trial court concluded he had not established proper foundation for impeachment on cross-examination.

Counsel's failure to lay proper foundation to impeach K.S. with prior inconsistent statements fell below the standard expected for effective representation. Horton is instructive in this regard. Horton was charged with child rape and molestation for incidents that occurred with S.S. over a three year period. Horton, 116 Wn. App. at 911. Before trial, S.S. disclosed to a child protective services investigator that she had been having intercourse with a boy. A defense investigator then interviewed S.S.'s friend who acknowledged S.S. had bragged about being sexually active with a former boyfriend two years earlier. S.S. described in detail

to the friend, the sexual activity she engaged in with the former boyfriend. Horton, 116 Wn. App. at 913.

A medical examination of S.S. revealed penetrating trauma to her hymen, which a doctor concluded was consistent with sexual abuse. S.S. told the doctor she had not been sexually active with anyone except Horton. Horton, 116 Wn. App. at 911.

During direct examination at trial, S.S. denied she engaged in intercourse with anyone other than Horton. Defense counsel then asked S.S.: “You told the prosecutor this morning that you had not engaged in sexual intercourse with anyone other than Mr. Horton; correct?” After an intervening objection, S.S. answered: “No.” Defense counsel did not ask S.S. to explain or deny her pretrial statements to the investigators, nor did she ask the court to have S.S. remain in attendance after testifying. Horton, 116 Wn. App. at 913.

Later, defense counsel attempted to call both investigators to relate S.S.’s pretrial statements about sexual activity with the former boyfriend. The State moved to exclude such testimony. The trial court denied defense counsel’s request finding she had not complied with ER 613(b). Horton, 116 Wn. App. at 914. Although Horton denied any sexual activity with S.S., a jury found him guilty as charged. Horton, 116 Wn. App. at 911-12.

On appeal, Horton argued his attorney was ineffective in failing to comply with ER 613(b). Horton, 116 Wn. App. at 910. The Court of Appeals noted that before counsel could impeach S.S. with her pretrial statements, counsel had to give S.S. an opportunity to explain or deny them by calling the statements to her attention while S.S. was testifying, or by arranging for S.S. to remain in attendance after testifying. Horton, 116 Wn. App. at 916.

The Court found non-compliance with ER 613(b) was entirely to Horton's detriment; that compliance with ER 613(b) would have been only to his benefit; and that counsel's non-compliance could not have been a strategy or tactic designed to further his interests. Concluding an objectively reasonable attorney would have complied with ER 613(b) under the circumstances, the Court found defense counsel's performance fell below an objective standard of reasonableness. Horton, 116 Wn. App. at 916-17.

Like Horton, here counsel's failure to lay proper impeachment foundation as required by ER 613(b) denied Del Duca effective representation. There was no legitimate reason for defense counsel not to properly question K.S. so as to allow introduction of her prior inconsistent statements. Counsel was aware of K.S.'s prior inconsistent statements and what was required to introduce those statements as evidenced by his

ability to effectively impeach her with other inconsistent statements she made before trial. Moreover, as evidenced by his original motion, counsel recognized the importance of impeaching K.S. with her prior inconsistent statements. Counsel simply neglected to lay the proper foundation as required by ER 613(b). See State v. Kyлло, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law); State v. Carter, 56 Wn. App. 217, 224, 783 P.2d 589 (1989) (counsel is presumed to know court rules). Such neglect constitutes deficient performance. Horton, 116 Wn. App. at 917.

Counsel's failure to lay proper impeachment foundation was prejudicial. The opportunity to challenge a witness's credibility is particularly critical in two circumstances: (1) where a case rests essentially on the trier of fact believing or disbelieving that one witness or (2) where the offense at issue is a sex offense. State v. Smith, 130 Wn.2d 215, 227, 922 P.2d 811 (1996); State v. Whyde, 30 Wn. App. 162, 166, 632 P.2d 913 (1981); State v. Roberts, 25 Wn. App. 830, 834-35, 611 P.2d 1297 (1980). The first circumstance needs no explanation. The reasoning behind the second was discussed in, State v. Peterson, 2 Wn. App. 464, 469 P.2d 980 (1970). For sex crimes, the opportunity to challenge credibility is particularly important because "owing to natural instincts and laudable sentiments on the part of the [trier of fact], the usual

circumstances of isolation of the parties involved . . . and the understandable lack of objective corroborative evidence the defendant is often disproportionately at the mercy of the complaining witness' testimony." Peterson, 2 Wn. App. at 466-467.

The credibility of K.S. and C.S. was the central issue in the case. K.S. and C.S. were the only witnesses to the alleged incidents. There was no physical evidence of sexual contact. Del Duca denied any sexual contact with either child. Because of "natural instincts and laudable sentiments," the isolation of the parties, and the absence of determinative physical evidence, Del Duca was "at the mercy of the complaining witness' testimony." Peterson, 2 Wn. App. at 467. Therefore, it was particularly critical that Del Duca be provided an opportunity to challenge K.S.'s credibility and her version of events.

In Horton, the court concluded there was a "reasonable probability" that the outcome would have been different absent defense counsel's errors. Horton, 116 Wn. App. at 922. The court noted S.S.'s denial of intercourse with anyone other than Horton necessarily implied Horton was the source of the "penetrating trauma" to her hymen. The Court noted defense counsel could have defused the implication by presenting evidence that S.S. had earlier made inconsistent statements to two people. When counsel failed to comply with ER 613(b), Horton lost

that opportunity which was “extremely detrimental” to Horton’s position at trial. Horton, 116 Wn. App. at 922-23 (citing Wright v. State, 581 N.E.2d 978, Ind. App. 3 Dist. (1991); Ellyson v. State, 603 N.E.2d 1369, Ind. App. 4 Dist. (1992)). Concluding Horton demonstrated both deficient performance and resulting prejudice, the Court found Horton was entitled to a new trial. Horton, 116 Wn. App. at 924.

Like Horton, the lost opportunity to impeach K.S. with her inconsistent statements was “extremely detrimental” to Del Duca’s trial defense. The jury questioned the credibility of C.S.’s testimony, as well as, K.S.’s testimony that she saw Del Duca touch C.S., as evidenced by its not guilty verdict on the charge where C.S. was the complaining witness. Thus, any evidence capable of impeaching K.S.’s credibility and contradicting her version of events surrounding the alleged incident between her and Del Duca was of crucial importance. Had defense counsel laid proper foundation, the trial court would have permitted extrinsic evidence of K.S.’s prior inconsistent statements as it did with respect to other portions of her prior statements.

There is a reasonable probability the outcome would be different but for defense counsel’s conduct. Del Duca’s constitutional right to effective assistance counsel was violated.

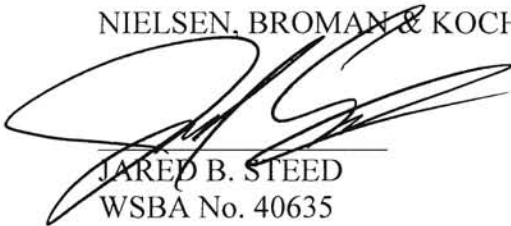
D. CONCLUSION

For the reasons discussed above, this Court should reverse Del
Duca's conviction and remand for a new trial.

DATED this 31st day of July, 2013.

Respectfully submitted,

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