

Court of Appeals No. 49103-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON

Plaintiff/Respondent,

v.

ROBERT DENGLER, JR.,

Defendant/Appellant.

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BRIEF OF APPELLANT

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Appeal from the Superior Court of Pierce County,  
Cause No. 15-1-01759-6  
The Honorable Kathryn J. Nelson, Presiding Judge

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**I. ASSIGNMENT OF ERROR**

Mr. Dengler was denied his right to effective assistance of counsel.

**II. ISSUE PRESENTED**

Was it ineffective assistance of counsel for Mr. Dengler's trial counsel to fail to argue that evidence that T.M. had previously lied about prior sexual assaults was admissible under ER 613?

**III. STATEMENT OF THE CASE**

*Factual and Procedural Background*

In October of 2014, Rhianna Wilson was living with her friend Brian Miller, and his son, C.M.<sup>1</sup> Ms. Wilson knew T.M. because T.M. was in the same grade as her son and T.M.<sup>2</sup>

One Sunday evening in October of 2014, C.M. told Ms. Wilson that something was wrong and he needed her help.<sup>3</sup> C.M. was in a video chat with T.M. and C.M. told Ms. Wilson that he needed an adult to help.<sup>4</sup> Ms. Wilson spoke to T.M. and she, T.M., and C.M. decided that Child Protective Services (CPS) should become involved.<sup>5</sup> T.M. told Ms. Wilson that her uncle, Robert Dengler, Jr., had abused her while she was living with him and that he had touched her inappropriately.<sup>6</sup>

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<sup>1</sup> RP 194-195. Pursuant to General Order 2011-1, juveniles involved in this case will be referred to by their initials.

<sup>2</sup> RP 196.

<sup>3</sup> RP 199.

<sup>4</sup> RP 199.

<sup>5</sup> RP 199.

<sup>6</sup> RP 200.

Ms. Wilson sent C.M. out of the room, called CPS, and asked T.M. to provide specific details about the claimed abuse.<sup>7</sup> CPS wanted additional details so Ms. Wilson remained on the phone with CPS while she spoke to T.M. via video chat.<sup>8</sup> T.M. seemed uncertain, but described between three and four separate incidents including one incident where T.M. had just gotten out of a shower and a second incident that took place on a couch while T.M. and Mr. Dengler were watching a movie.<sup>9</sup> T.M. claimed that when she got out of the shower Mr. Dengler rubbed himself against her until he “finished” but that there was no penetration.<sup>10</sup>

On October 27, 2014, Pierce County Sheriff’s Deputy Ray Readwin was working as a school resource officer at Peninsula High School when a school counselor called him and asked him to speak with T.M. regarding disclosures that T.M. had made to the counselor.<sup>11</sup> Officer Readwin contacted T.M. in the counselor’s office.<sup>12</sup> T.M. gave general statements about things that had been done to her but was not very comfortable speaking to Officer Readwin.<sup>13</sup> T.M. claimed that she was living with her uncle, Robert Dengler, Jr., who had cuddled and snuggled

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<sup>7</sup> RP 200.

<sup>8</sup> RP 202-203.

<sup>9</sup> RP 200-201.

<sup>10</sup> RP 201-202.

<sup>11</sup> RP 179-180.

<sup>12</sup> RP 180.

<sup>13</sup> RP 181.

with her in an uncomfortable way.<sup>14</sup> T.M. was very uncomfortable giving details and told Officer Readwin that there would be no evidence because she had taken a shower and washed all of her clothes.<sup>15</sup>

Officer Readwin called CPS and CPS put Officer Readwin in contact with T.M.'s caseworker and a social worker.<sup>16</sup> The social worker responded to the school, picked T.M. up, and placed T.M. in a home.<sup>17</sup>

On October 29, 2014, Michelle Breland at the Mary Bridge Children's Hospital Child Abuse Intervention Department examined T.M.<sup>18</sup> The physical examination did not reveal any injuries to T.M.<sup>19</sup>

On May 6, 2016, Mr. Dengler was charged with four counts of child molestation in the third degree, all counts alleged to be acts of domestic violence.<sup>20</sup>

On March 9, 2016, the charges against Mr. Dengler were amended to change one of the child molestation charges to a charge of rape of a child in the third degree.<sup>21</sup>

On March 17, 2016, the charges against Mr. Dengler were again

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<sup>14</sup> RP 181-182.

<sup>15</sup> RP 183.

<sup>16</sup> RP 182-183.

<sup>17</sup> RP 184.

<sup>18</sup> RP 221-225.

<sup>19</sup> RP 229.

<sup>20</sup> CP 1-3.

<sup>21</sup> CP 14-16.

amended to make the rape charge the first count.<sup>22</sup>

Pretrial, citing RCW 9A.44.020, the rape shield statute, the State moved to exclude any reference to the sexual activity of T.M. or that T.M. had been previously sexually abused and evidence that T.M. had made 29 prior allegations of molestation.<sup>23</sup> The State sought to exclude evidence of T.M.'s claims that she had previously been sexually abused on the basis that it was irrelevant and excluded under the rape shield law.<sup>24</sup>

Trial counsel for Mr. Dengler objected and informed the court that Mr. Dengler intended to call T.M.'s father, Mr. Dengler's ex-wife, and a Dengler family friend, all of whom would testify that T.M. has made false accusations of sexual abuse over the years including testimony T.M. herself had admitted she had made up the allegations.<sup>25</sup> The State responded by arguing that evidence that T.M. had previously lied about being sexually abused was irrelevant and that RCW 9A.44.020(2) excluded such evidence.<sup>26</sup>

The trial court held that Mr. Dengler might be able introduce evidence that T.M. had previously lied about being sexually abused for purposes of establishing T.M.'s reputation for truth if Mr. Dengler made a

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<sup>22</sup> CP 28-29; RP 366-368.

<sup>23</sup> CP 19-21.

<sup>24</sup> CP 19-21.

<sup>25</sup> RP 73-74.

<sup>26</sup> RP 75-76.

sufficient offer of proof.<sup>27</sup>

Mr. Dengler's trial began on March 15, 2016.<sup>28</sup>

T.M. was born in May of 2015 to Joseph Dengler and Tina Marquise.<sup>29</sup> T.M. was removed from her parents' custody when she was about 3.5 years old when they were arrested for crimes related to methamphetamine.<sup>30</sup> T.M. was placed in foster care for a short time but from the age of 4 to the age of 6 she lived with Mr. Dengler, who was her uncle, and Corrie Dengler.<sup>31</sup> T.M. testified that living with them was "really nice" and that while she lived with them she felt like she "had a family, someone-- a mother and father that cared, loved."<sup>32</sup> T.M. was eventually returned to Tina Marquis' custody and lived with Ms. Marquis, with T.M.'s grandmother, and various different places until June of 2014 when she was returned to Mr. Dengler's custody by CPS.<sup>33</sup>

T.M. alleged four specific instances where Mr. Dengler sexually molested her in some way. She claimed that the first incident occurred a week or two after she moved in with Mr. Dengler.<sup>34</sup> T.M. alleged that she and Mr. Dengler were watching movies while on a couch in the living

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<sup>27</sup> RP 77-79, 81-82.

<sup>28</sup> RP 97.

<sup>29</sup> RP 97-98.

<sup>30</sup> RP 98-99.

<sup>31</sup> RP 99.

<sup>32</sup> RP 99.

<sup>33</sup> RP 100-101.

room and Mr. Dengler was laying on the couch with his head in T.M.'s lap when Mr. Dengler turned of the movie and lay down parallel with T.M. facing her back and began rubbing her thighs.<sup>35</sup> T.M. claimed that Mr. Dengler moved his hand toward her vagina and began rubbing her vagina over her clothes while grinding his body against hers while he had an erection and the erection made contact with T.M.'s body.<sup>36</sup> T.M. claimed that Mr. Dengler put his finger inside of her vagina at some point while he was rubbing her.<sup>37</sup> T.M. alleged that Mr. Dengler tried to touch her breast on top of her clothes but she pushed his hand away.<sup>38</sup> T.M. said she got up and went to bed but a few minutes later Mr. Dengler came in and laid down towards the foot of her bed and said, "I don't want to be that creepy uncle."<sup>39</sup> T.M. testified that she went to sleep and Mr. Dengler left the room.<sup>40</sup>

T.M. claimed that while she lived with him, every third night Mr. Dengler would rub her on the couch until he ejaculated.<sup>41</sup>

T.M. claimed that the second incident of molestation occurred 2-3 nights after the first incident when Mr. Dengler came to her bedroom after

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<sup>34</sup> RP 107.

<sup>35</sup> RP 107-109.

<sup>36</sup> RP 110-112.

<sup>37</sup> RP 113-114.

<sup>38</sup> RP 113-114.

<sup>39</sup> RP 113-114.

<sup>40</sup> RP 115.

she had taken a shower and asked if he could cuddle and she said, “yeah, sure.”<sup>42</sup> T.M. alleged that she was wearing a sweatshirt and pants and got under the covers and Mr. Dengler got under the covers with her with no sheets or blankets between them.<sup>43</sup> T.M. asserted that Mr. Dengler rubbed his torso against her bottom and she felt his genitalia on her butt and felt Mr. Dengler ejaculate and then leave to go to bed.<sup>44</sup> T.M. claimed that Mr. Dengler rubbed her under her clothes and that this happened until she told someone.<sup>45</sup>

T.M. testified that at one point she asked to go to Great Wolf Lodge and Mr. Dengler agreed and booked the rooms but told T.M., “I want you as a daughter outside and I want you as a girlfriend in the room.”<sup>46</sup> T.M. alleged that she did not respond when Mr. Dengler told her this and that he did not like her response so he cancelled the rooms at Great Wolf Lodge.<sup>47</sup>

The next incident T.M. described allegedly occurred on October 19, 2014, when she was waiting to be picked up for homecoming by her boyfriend, C.M., and Mr. Dengler came up behind her, grabbed her

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<sup>41</sup> RP 116-117.

<sup>42</sup> RP 117-118.

<sup>43</sup> RP 119-120.

<sup>44</sup> RP 120-121.

<sup>45</sup> RP 122.

<sup>46</sup> RP 152-153.

<sup>47</sup> RP 153.

bottom, and said that T.M. made him horny when she wore that dress.<sup>48</sup>

T.M. also claimed that in October of 2014 she was laying on the couch when Mr. Dengler began rubbing her thigh and bottom then picked her up and put her on his bed, removed her jeans and rubbed his genitalia against hers first over the clothes and then directly against her genitalia until he ejaculated.<sup>49</sup> T.M. testified that she contacted C.M. for help the day after this incident.<sup>50</sup>

After the State rested, the court conducted voir dire examination of Corrie Dengler (Mr. Dengler's ex-wife),<sup>51</sup> Harry Tachell (Corrie Dengler's father),<sup>52</sup> and Joseph Dengler (Mr. Dengler's brother and T.M.'s father)<sup>53</sup> to determine if Mr. Dengler could offer their testimony under ER 608 with regards to T.M.'s reputation for truthfulness.

Corrie Dengler testified that 2-3 times per year T.M. would allege that she had been sexually abused but that in June of 2014 T.M. told Corrie Dengler that the accusations were lies and that T.M.'s mother had made her make the false accusations.<sup>54</sup> Corrie Dengler also revealed that T.M. had told her that T.M. had faked her suicide attempt in June of 2014

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<sup>48</sup> RP 123-125.

<sup>49</sup> RP 127-130.

<sup>50</sup> RP131-136.

<sup>51</sup> RP 247-301.

<sup>52</sup> RP 301-316.

<sup>53</sup> RP 320-352.

<sup>54</sup> RP 265-267.

just to get out of her mother's home.<sup>55</sup> Corrie Dengler testified that she believed T.M. was a liar.<sup>56</sup>

Harry Tachell testified that T.M. has a reputation of not being truthful in the community.<sup>57</sup>

Joseph Dengler testified that T.M. would lie to get out of going to school, lie about having no clothes so Joseph Dengler had to buy clothes for her, and lied about going to bible study.<sup>58</sup> Joseph Dengler testified that T.M. began lying and manipulating around 8 years old and that T.M. was not honest in his opinion.<sup>59</sup>

The trial court held that Mr. Dengler could question T.M. about whether she had made false claims but Mr. Dengler could not introduce extrinsic evidence that T.M. made any false claims.<sup>60</sup> The trial court also held that Mr. Dengler could not introduce any testimony regarding T.M.'s reputation for truthfulness and excluded Corrie Dengler, Joseph Dengler, and Harry Tachell as witnesses.<sup>61</sup> The trial court based its ruling on ER 608, *State v. Harris*, 97 Wn.App. 865 (1999), and *Nevada v. Jackson*, 133

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<sup>55</sup> RP 265.

<sup>56</sup> RP 267.

<sup>57</sup> RP 312.

<sup>58</sup> RP329-330.

<sup>59</sup> RP 332-333.

<sup>60</sup> RP 358-359, 392-402.

<sup>61</sup> RP 360.

S.Ct. 1990, 186 L.Ed.2d 62 (2013).<sup>62</sup>

Mr. Dengler called T.M. in his case-in-chief but T.M. testified that she did not remember speaking to Corrie Dengler about the suicide attempt, did not tell Corrie Dengler that she had faked the suicide attempt, and did not speak to Corrie Dengler regarding the prior alleged assaults.<sup>63</sup> T.M. testified that her claims about Mr. Dengler were true and that her suicide attempt was not a fake attempt.<sup>64</sup>

Mr. Dengler testified and denied committing any sexual misconduct on T.M. and denied all of her allegations against him<sup>65</sup>

Mr. Dengler testified that the day before T.M. reported that Mr. Dengler had abused her to the school counselor he had grounded T.M. for a week because she had gone to a pumpkin patch with C.M. and lied about when she would come home and Mr. Dengler ended up having to pick T.M. up from C.M.'s house.<sup>66</sup>

The jury found Mr. Dengler guilty of all charges.<sup>67</sup>

Notice of Appeal was filed on June 21, 2016.<sup>68</sup>

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<sup>62</sup> RP 359-362, 368-372.

<sup>63</sup> RP 408.

<sup>64</sup> RP 412.

<sup>65</sup> RP 426-430, 443.

<sup>66</sup> RP 430-433, 440-441.

<sup>67</sup> CP 100-103; RP 563.

<sup>68</sup> CP 132-147.

#### IV. ARGUMENT

**It was ineffective assistance of counsel for Mr. Dengler’s trial attorney to fail to attempt to introduce T.M.’s admissions to Corrie Dengler under ER 613.**

*a. Standard of Review*

Article 1, §22 of the Washington State Constitution guarantees a criminal defendant the right to effective assistance of counsel. The Sixth Amendment, as applicable to the states through the Fourteenth Amendment, entitles an accused to the effective assistance of counsel at trial.<sup>69</sup>

To prevail on a claim of ineffective assistance of counsel, a defendant must establish both ineffective representation and resulting prejudice.<sup>70</sup>

To establish ineffective representation, the defendant must show that counsel’s performance fell below an objective standard of reasonableness.<sup>71</sup>

To establish that counsel's performance was deficient, a defendant must show “that counsel made errors so serious

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<sup>69</sup> *Dows v. Wood*, 211 F.3d 480, *cert. denied* 121 S.Ct. 254, 531 U.S. 908, 148 L.Ed.2d 183 (2000), *citing McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) (“[T]he right to counsel is the right to the effective assistance of counsel.”).

<sup>70</sup> *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002), *cert. denied*, 126 S.Ct. 2294, 164 L.Ed. 820 (2006) (*citing State v. Rosborough*, 62 Wn.App. 341, 348, 814 P.2d 679 (1991)).

<sup>71</sup> *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (*citing Strickland v. Washington*, 466 U.S. 668, 693, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *State v. King*, 130 Wn.2d 517, 531, 925 P.2d 606 (1996) (quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064). To establish that the deficient performance prejudiced the defense, the defendant must show “that counsel’s errors were so serious as to deprive the defendant of a fair trial.” *King*, 130 Wn.2d at 531, 925 P.2d 606 (quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064). **A defendant is denied his right to a fair trial when the result has been rendered unreliable by a breakdown in the adversary process.** *King*, 130 Wn.2d at 531, 925 P.2d 606.<sup>72</sup>

There is a strong presumption that trial counsel’s performance was adequate, and exceptional deference must be given when evaluating counsel’s strategic decisions.<sup>73</sup> If trial counsel’s conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel.<sup>74</sup>

The remedy for ineffective assistance of counsel is remand for a new trial.<sup>75</sup>

b. *Mr. Dengler’s constitutional right to present a defense included the right to introduce evidence that would impeach T.M.*

A criminal defendant has a constitutional right to present a

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<sup>72</sup> *State v. Glenn*, 86 Wn.App. 40, 45, 935 P.2d 679 (1997), review denied 134 Wn.2d 1003 (1998) (emphasis added).

<sup>73</sup> *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (citing *Strickland*, 466 U.S. at 689).

<sup>74</sup> *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (citing *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)).

<sup>75</sup> See *In re Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

defense.<sup>76</sup> Both the United States and Washington Constitutions guarantee an accused the right to confront prosecution witnesses.<sup>77</sup>

The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.' The right of confrontation, which is secured for defendants in state as well as federal criminal proceedings...means more than being allowed to confront the witness physically. Indeed, the main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.<sup>78</sup>

"Cross-examination of a witness is a matter of right...Its permissible purposes, among others, are...that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased."<sup>79</sup> The central concern of the Sixth Amendment's Confrontation Clause is "to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."<sup>80</sup>

The primary and most important component is the right to conduct a meaningful cross-examination of adverse witnesses.<sup>81</sup> The denial of a criminal defendant's right to adequately cross-examine an essential state

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<sup>76</sup> *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

<sup>77</sup> U.S. Const. amend. VI; Washington Const. art. I, § 22.

<sup>78</sup> *Delaware v. Van Arsdall*, 475 U.S. 673, 678, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

<sup>79</sup> *Alford v. United States*, 282 U.S. 687, 691-692, 51 S.Ct. 218, 219, 75 L.Ed.624 (1931). (Citations omitted).

<sup>80</sup> *Maryland v. Craig*, 497 U.S. 836, 845, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990).

<sup>81</sup> *State v. Foster*, 135 Wn.2d 441, 456, 957 P.2d 712 (1998).

witness as to relevant matters tending to establish bias or motive will violate the Sixth Amendment's right of confrontation, made applicable to the states by the Fourteenth Amendment.<sup>82</sup>

*c. T.M.'s admissions to Corrie Dengler that she had lied about the prior claims of sexual abuse and the suicide attempt was false would have been admissible under ER 613, had Mr. Dengler's trial counsel attempted to offer them under that rule.*

Under ER 607, "the credibility of a witness may be attacked by any party." Thus, a party has a right to cross-examine a witness to reveal bias as well as prejudice.<sup>83</sup>

ER 608(b) provides, in pertinent part:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility . . . may not be proved by extrinsic evidence. They may, however, in the discretion of the court, **if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness . . . .**

Emphasis added.

Following the voir dire/offer of proof of Corrie Dengler's testimony, the trial court held that Mr. Dengler could call T.M. in his case-

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<sup>82</sup> *State v. Roberts*, 25 Wn.App. 830, 834, 611 P.2d 1297 (1980), citing *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

<sup>83</sup> *In re Detention of Law*, 146 Wn.App. 28, 37, 204 P.3d 230 (2008), cert. denied 165 Wash.2d 1028 (2009), citing *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); See also *Davis v. Alaska*, 415 U.S. 308, 316-317, 94 S.Ct. 1105 (1974) ("The partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony. We have

in-chief and ask her if she had admitted to Corrie Dengler that she had lied about the prior sexual assault allegations and told Corrie Dengler that the suicide attempt was fake, but that Corrie Dengler could not testify because ER 608 prohibited Mr. Dengler from introducing extrinsic evidence of those statements. Trial counsel for Mr. Dengler apparently adopted the trial court's analysis and did not attempt to introduce Corrie Dengler's testimony under any other evidence rule. This was ineffective assistance of counsel because T.M.'s statements to Corrie Dengler were admissible under ER 613.

Extrinsic evidence of a prior inconsistent statement by a witness is admissible where 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. ER 613(b).

Mr. Dengler called T.M. in his case in chief and questioned her about her statements to Corrie Dengler. This gave T.M. an opportunity to explain or deny the statements and also gave the State the opportunity to question T.M. about the statement. Because T.M. denied telling Corrie Dengler she had lied about the prior sexual assaults and had faked the suicide attempts, Mr. Dengler should have been permitted to call Corrie

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recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.")

Dengler as a witness and introduce evidence of T.M.'s statements to Corrie Dengler under ER 613(b) as prior inconsistent statements.<sup>84</sup> The State would have had the opportunity to examine Corrie Dengler about T.M.'s statements to her and would have been able to call T.M. as a rebuttal witness to question her about the statements made to Corrie Dengler.

The testimony of Corrie Dengler would have been admissible under ER 613 and ER 801(c) because it was extrinsic evidence that T.M. made the statements to Corrie Dengler offered for purposes of impeaching T.M.'s testimony, not for the truth of the matters asserted in the statements made to Corrie Dengler.

*d. It was not objectively reasonable, nor was it a legitimate trial strategy for Mr. Dengler's trial counsel to fail to seek to admit Corrie Dengler's testimony about T.R.'s statements under ER 613.*

“[T]he more essential the witness is to the prosecution's case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, credibility, or foundational matters.”<sup>85</sup> “Where a

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<sup>84</sup> It is anticipated that the State will argue that T.M.'s statements to Corrie Dengler would also have been inadmissible as hearsay. This argument fails. 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). Because of this definition, a witness' prior unsworn inconsistent statement is generally admissible to impeach, but not to prove the truth of the matters asserted therein. *State v. Williams*, 79 Wn.App. 21, 26, 902 P.2d 1258 (1995).

<sup>85</sup> *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002).

case stands or falls on the jury's belief or disbelief of essentially one witness, that witness' credibility or motive must be subject to close scrutiny.”<sup>86</sup>

In the prosecution of sex crimes, the right of cross-examination often determines the outcome. In such cases, the credibility of the accuser is of great importance, essential to prosecution and defense alike.

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It is fundamental that a defendant charged with commission of a crime should be given great latitude in the cross-examination of prosecution witnesses to show motive or credibility. . . . This is especially so in the prosecutions of sex crimes where, owing to natural instincts and laudable sentiments on the part of the jury, the usual circumstances of isolation of the parties involved at the commission of the offense and the understandable lack of objective corroborative evidence, the defendant is often disproportionately at the mercy of the complaining witness' testimony.

...

Here, it is undisputed that the defendant and Ms. A engaged in sexual intercourse. The only controverted issue is whether, as Roberts contends, the act was by mutual consent or, as Ms. A and the two other girls testified, under compulsion by the threat of a knife. **Credibility therefore was a key, if not determinative factor.**<sup>87</sup>

Here, trial counsel for Mr. Dengler was aware that T.M. had stated in the past that she had lied about being sexually assaulted in the past and

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<sup>86</sup> *Roberts*, 25 Wn.App. 830, 834, 611 P.2d 1297.

<sup>87</sup> *Roberts*, 25 Wn. App. at 835.

had staged a fake suicide attempt. Mr. Dengler's defense was general denial and that T.M. was lying about Mr. Dengler molesting her. T.M.'s testimony was the key component of both the State's prosecution of Mr. Dengler and of Mr. Dengler's defense to the State's allegations.

Mr. Dengler had a guaranteed right to introduce evidence to impeach T.M. and in this case where Mr. Dengler was charged with sex crimes attacking the credibility of his accuser was critical. Trial counsel for Mr. Dengler should have pursued every available means of impeaching T.M.'s credibility since T.M.'s testimony was the only evidence that suggested any crimes had occurred. Failing to attempt to introduce Corrie Dengler's testimony under ER 613 to impeach T.M. was not objectively reasonable nor can it be considered a legitimate trial strategy.

The jury was presented with the following choice: believe T.M.'s story that the abuse occurred and find Mr. Dengler guilty, or believe Mr. Dengler's sworn testimony and find him innocent. Failing to seek to introduce evidence that would significantly impeach T.M.'s credibility seriously diminished the strength of Mr. Dengler's defense.

Introduction of evidence that would impeach T.M.'s credibility could do nothing but strengthen Mr. Dengler's defense. It was ineffective assistance of counsel for Mr. Dengler's trial counsel to fail to seek to introduce Corrie Dengler's testimony about T.M.'s prior inconsistent

statement under ER 613.

- e. Mr. Dengler was prejudiced by his trial counsel's failure to seek to introduce Corrie Dengler's testimony as impeachment evidence under ER 613.*

As stated above, Mr. Dengler's right to confront his accuser and the witnesses against him included the right to introduce evidence that was probative of T.M.'s credibility. The failure of Mr. Dengler's trial counsel to seek to have Corrie Dengler's testimony regarding T.M.'s prior inconsistent statements constituted a breakdown in the adversary process of his trial.

Mr. Dengler was prejudiced by his trial counsel's failure to seek admission of Corrie Dengler's testimony because his rights to present a defense and to introduce evidence to impeach the credibility of the witnesses against him were violated, causing a breakdown in the adversary system. This evidence would have significantly bolstered Mr. Dengler's credibility and the strength of his defense of denial while at the same time significantly weakening the State's case.

## **VI. CONCLUSION**

Mr. Dengler received ineffective assistance of counsel where his trial counsel failed to seek to introduce impeachment evidence under ER 613 of prior inconsistent statements of the only witness who presented testimony that any crimes occurred.

For the reasons stated above, this court should vacate Mr. Dengler's conviction and remand this case back to the trial court for retrial.

DATED this 22nd day of October, 2016.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. Patrick', written over a horizontal line.

RICHARD PATRICK, WSBA No. 36770  
Counsel for Appellant Dengler

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**COURT OF APPEALS DIVISION II OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,  
Respondent.

No. 49103-6-II

Affidavit of Service

vs.

ROBERT DENGLER, JR  
Appellant.

STATE OF WASHINGTON )  
: ss.  
COUNTY OF PIERCE )

Donna Melton, being first duly sworn on oath, deposes and state:

1. I am a citizen of the United States and a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness therein.

2. On October 22, 2016 I emailed true and correct copies of each of the following documents to Mark Lindquist, mark.lindquist@co.pierce.wa.us; Kathleen Proctor, kprocto@co.pierce.wa.us; and Michelle Hyer, pcpatccf@co.pierce.wa.us:

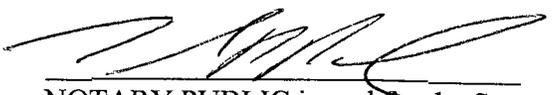
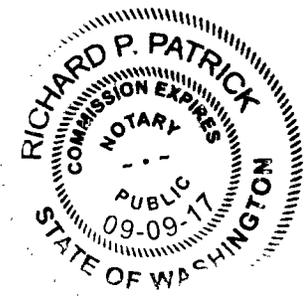
- Verbatim Report of Proceedings Volume I
- Verbatim Report of Proceedings Volume II
- Verbatim Report of Proceedings Volume III

- Verbatim Report of Proceedings Volume IV
- Verbatim Report of Proceedings Volume V
- Verbatim Report of Proceedings Volume VI
- Verbatim Report of Proceedings Volume VII
- Verbatim Report of Proceedings Volume VIII
- Verbatim Report of Proceedings Volume IX
- Appellant's Brief



Donna Melton

SUBSCRIBED AND SWORN to before me this 22nd day of October 2016.



NOTARY PUBLIC in and for the State of Washington, residing at Port Orchard  
My commission expires: 9/9/2017

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STATE OF WASHINGTON

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COURT OF APPEALS DIVISION II OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent.

vs.

ROBERT DENGLER, JR

Appellant.

No. 49103-6-II

Declaration of Service

I, Richard P. Patrick, Declare as Follows:

1. I am a citizen of the United States and a resident of the State of Washington, over the age of eighteen years, and competent to be a witness therein.

2. I am the Attorney for Appellant, Robert Dengler, Jr.

2. On October 27, 2016 I delivered a true and correct copy of each of the following documents, via USPS First Class Mail, Registered, Return Receipt Requested, to Appellant at:

Robert Dengler, Jr. #89853  
Bed H2021 Upper  
Stafford Creek Correction Center  
191 Constantine Way  
Aberdeen, WA 98520

- Verbatim Report of Proceedings Volume I
- Verbatim Report of Proceedings Volume II

Affidavit of Service - 1

RICHARD P. PATRICK  
5358 33<sup>rd</sup> Ave NW, Suite 102  
Gig Harbor, WA 98335  
(253) 858-6800 Fax: (253) 858-6805

- 1 • Verbatim Report of Proceedings Volume III
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- 3 • Verbatim Report of Proceedings Volume V
- 4 • Verbatim Report of Proceedings Volume VI
- 5 • Verbatim Report of Proceedings Volume VII
- 6 • Verbatim Report of Proceedings Volume VIII
- 7 • Verbatim Report of Proceedings Volume IX
- 8 • Appellant's Brief
- 9

10 I declare under penalty of perjury under the laws of the state of Washington that the  
11 foregoing is true and correct.

12 Signed at Gig Harbor Washington on October 28, 2016.

13 

14 \_\_\_\_\_  
15 Richard P. Patrick

# RICHARD P PATRICK ATTORNEY AT LAW

**October 22, 2016 - 3:58 PM**

## Transmittal Letter

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Court of Appeals Case Number: 49103-6

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Personal Restraint Petition (PRP)

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[richard@richardpatricklaw.com](mailto:richard@richardpatricklaw.com)