

Court of Appeals No. 49103-6-II

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

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STATE OF WASHINGTON

Plaintiff/Respondent,

v.

ROBERT DENGLER, JR.,

Defendant/Appellant.

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REPLY 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. REPLY

**Corrie Dengler’s testimony about T.M.’s admissions to lying and falsely accusing others of sexually abusing her in the past was not irrelevant evidence offered to impeach T.M. about a “collateral issue.”**

“Specific instances of conduct of a witness may not be inquired into on cross-examination unless they are probative of truthfulness or untruthfulness. ER 608(b).”<sup>1</sup> The trial court ruled that ER 608 permitted cross-examination of T.M. regarding the statements she had made to Corrie Dengler.<sup>2</sup> Therefore the trial court made a finding that T.M.’s comments to Corrie Dengler were probative of and relevant to T.M.’s truthfulness or untruthfulness.

ER 613 permits the impeachment of a witness through a prior inconsistent statement 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.<sup>3</sup> 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.<sup>4</sup> If the witness admits the prior statement, extrinsic evidence of the statement is not allowed because such evidence ““would waste time and

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<sup>1</sup> *State v. Sellers*, 39 Wn.App. 799, 804, 695 P.2d 1014 (1985).

<sup>2</sup> RP 358-359, 392-402.

<sup>3</sup> ER 613(b).

would be of little additional value.”<sup>5</sup> If the witness denies the prior statement, extrinsic evidence of the statement is admissible unless it concerns a collateral matter.<sup>6</sup>

Evidence of bias and interest is relevant to a witness's credibility.<sup>7</sup> “It is well settled that neither party may impeach a witness on a collateral issue; that is, on facts not directly relevant to the trial issue.”<sup>8</sup> However, **where the credibility of the complaining witness is crucial, her possible motive to lie is not a collateral issue.**<sup>9</sup>

T.M.’s credibility was the foundation of the State’s case. The “trial issue” regarding which Mr. Dengler sought to admit the testimony of Corrie Dengler was T.M.’s credibility and motive to lie. T.M.’s testimony 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 opened the door to impeaching her with extrinsic evidence, e.g. Corrie Dengler’s testimony, that T.M. had, in fact made those statements.

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<sup>4</sup> *State v. Babich*, 68 Wn.App. 438, 443, 842 P.2d 1053, *review denied*, 121 Wn.2d 1015, 854 P.2d 42 (1993).

<sup>5</sup> *Babich*, 68 Wn.App. at 443, 842 P.2d 1053 (quoting 5A K. Tegland, *Washington Practice: Evidence* § 258(2), at 315 (1989)).

<sup>6</sup> *Babich*, 68 Wn.App. at 443, 842 P.2d 1053.

<sup>7</sup> *State v. Whyde*, 30 Wn.App. 162, 632 P.2d 913 (1981).

<sup>8</sup> *State v. Aguirre*, 168 Wn.2d 350, 362, 229 P.3d 660 (2010).

Mr. Dengler testified that T.M. first made the allegations that he had molested her the day after he had grounded her for a week for staying out too late and lying to him about when she would be home.<sup>10</sup> Corrie Dengler testified that T.M. had told her that T.M.'s prior false allegations of sexual abuse had been made in order to allow T.M. to move out of the home where she was currently staying.<sup>11</sup> Mr. Dengler's defense theory was that when T.M. "doesn't like her living situation and gets in trouble or wants to move" she makes "a false allegation of some sort of sexual assault or misconduct" because she "knows the effect of what that will get her, which is immediately being transferred out from where she wants to be out from under."<sup>12</sup> Evidence of T.M.'s statements to Corrie Dengler were directly relevant to T.M.'s credibility and motive for lying about the alleged sexual misconduct by Mr. Dengler.

T.M.'s credibility and motive to lie was not a collateral matter. Corrie Dengler's testimony would have been admissible under ER 613 because it was extrinsic evidence that T.M. made the statements to

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<sup>9</sup> See *Whyde*, 30 Wn.App. at 166, 632 P.2d 913; *State v. Roberts*, 25 Wn.App. 830, 834-35, 611 P.2d 1297 (1980).

<sup>10</sup> RP 430-433, 440-441.

<sup>11</sup> RP 265-267.

<sup>12</sup> RP 435-436.

Corrie Dengler offered for purposes of impeaching T.M. and explaining her motive to lie.

**II. CONCLUSION**

It was ineffective assistance of counsel for Mr. Dengler's trial counsel to fail to move to have Corrie Dengler's testimony admitted under ER 613. For the reasons stated above and in Mr. Dengler's Opening Brief, this Court should remand Mr. Dengler's case for a new trial with new counsel.

DATED this 3rd day of April, 2017.

Respectfully submitted,



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Counsel for Appellant Dengler

**CERTIFICATE OF SERVICE**

I hereby certify under penalty of perjury under the laws of the State of Washington that on April 3, 2017, I delivered via email a true and correct copy of this document to Mark Lindquist, [mark.lindquist@co.pierce.wa.us](mailto:mark.lindquist@co.pierce.wa.us); Kathleen Proctor, [kprocto@co.pierce.wa.us](mailto:kprocto@co.pierce.wa.us); and Michelle Hyer, [pccpatcecf@co.pierce.wa.us](mailto:pccpatcecf@co.pierce.wa.us); and by US Mail to Appellant Dengler.

Signed at Gig Harbor, Washington on April 3, 2017.

  
Donna Melton

**RICHARD P PATRICK ATTORNEY AT LAW**  
**April 03, 2017 - 12:34 PM**  
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