

NO. 49116-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER JACKIN,

Appellant.

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

The Honorable Derek Vanderwood, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court improperly admitted extrinsic impeachment evidence to convict Christopher Jackin by calling Acacia Kirkland as a witness for the primary purpose of impeaching her and to produce otherwise inadmissible evidence.

2. The withdrawal of an objection by trial counsel to extrinsic impeachment evidence by Ms. Kirkland, introduced for the primary purpose of producing otherwise inadmissible evidence, constituted ineffective assistance of counsel.

3. Trial counsel's failure to cross-examine the complaining witness on critical prior inconsistent statements constituted ineffective assistance of counsel.

4. The trial court erred when it declined to give a proposed instruction based on WPIC 6.41.

5. Cumulative error deprived Mr. Jackin of a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err by permitting the prosecution to elicit testimony from Acacia Kirkland regarding an alleged admission by the defendant, where the primary purpose of obtaining the admission was to use it as substantive evidence to secure a conviction rather than as impeachment evidence? Assignment of Error 1.

2. Did trial counsel's withdrawal of an objection when the State

elicited impeachment on a collateral issue constitute ineffective assistance of counsel when the admission of the impeachment evidence is so prejudicial that it denied the defendant a fair trial? Assignment of Error 2.

3. Where the only direct evidence of the crime charged was the testimony of the complaining witness, does trial counsel's failure to cross-examine the complaining witness on critical prior inconsistent statements constitute ineffective assistance of counsel, when that failure falls below the standard of a reasonably prudent attorney and but for that failure, the jury more likely than not would have returned a verdict of acquittal? Assignment of Error 3.

4. Mr. Jackin was alleged by law enforcement to have told his girlfriend—Ms. Kirkland—that he “touched” the complaining witness. This alleged statement—which the Mr. Jackin and Ms. Kirkland both denied—became a material and significant part of the evidence for the prosecution allowing the State to obtain a conviction. Did the trial court err when it declined to give the defendant's proposed instruction based on WPIC 6.41? Assignment of Error 4.

5. Did the cumulative effect of trial errors deny Mr. Jackin a constitutionally fair trial? Assignment of Error 5.

C. STATEMENT OF THE CASE

1. Testimony Of Deputy Cooney, Deputy Brown, And Acacia Kirkland

In addition to the trial testimony included in the appellant's opening brief, the jury heard the following testimony of Clark County Deputy Sheriff Jeremy Brown, retired Deputy Sheriff Mike Cooney, and Acacia Kirkland. 4Report of Proceedings¹ (RP) at 411-472.

Deputy Cooney spoke by phone with J.M., who called police on July 13, 2015 to report the alleged incident. 4RP at 418. J.M. told him that Mr. Jackin would be returning to Clark County the next day when she picked up Mr. Jackin and Ms. Kirkland from the Portland airport. 4RP at 417-18.

Deputy Cooney and Deputy Brown went in separate vehicles to J.M.'s house near Battleground on July 14, 2015 to intercept J.M.'s car and arrest Mr. Jackin. 4RP at 415, 420, 455-60. Deputy Brown parked his vehicle to block the long driveway leading to the house and Deputy Cooney parked to the side of the driveway. 4RP at 420. After J.M.'s vehicle was stopped, Mr. Jackin was directed to get out of the car by Deputy Cooney, who placed him under arrest. 4RP at 421, 456.

Ms. Kirkland testified that she was in a relationship with Mr. Jackin for twelve years and they have four children together. 4RP at 428. She stated that she and Mr. Jackin went to Colorado to see Smashing Pumpkins for her birthday, and left their children with her sister J.M. in Battleground while they were gone. 4RP at 429.

¹The record of proceedings consists of the volumes referenced in the Brief of Appellant, p. 2, footnote 1, and 4RP (May 23, 2016, jury trial, afternoon session).

Ms. Kirkland said that she and Mr. Jackin arranged to stay at J.M.'s house and for her to take them to the Portland airport the next day. She had not previously been to her sister's house. 4RP at 430. She testified that after they arrived at J.M.'s house after driving from their house in Spokane on July 10, 2015, she may have had one beer when she was at the house, and denied that anyone was smoking marijuana. 4RP at 431-32. Ms. Kirkland said that she fell asleep on the sectional couch in the living room and J.M.'s son, I., was playing with toys and watching television in the room. 4RP at 438. J.M. was sleeping on a recliner near the couch. 4RP at 433.

Ms. Kirkland fell asleep and was awakened by her sister, who was "yelling and screaming" for her to wake up. 4RP at 434. She said that J.M. was also yelling at Mr. Jackin and said that he had touched her vagina. 4RP at 435. Ms. Kirkland testified that Mr. Jackin did not say anything and was quiet while J.M. was yelling. 4RP at 437.

Following the accusation, Mr. Jackin went to sleep in their van. 4RP at 437-38. The next morning J.M. made them coffee and drove them to the airport. 4RP at 439, 449. She said that the vacation to Colorado was paid for and she did not want to cancel it despite the incident. 4RP at 439.

Ms. Kirkland said that J.M. called her on her birthday—the day of the concert—to wish her a happy birthday, and that J.M. picked them up from the airport when they returned on July 14. 4RP at 441.

When asked if Mr. Jackin had talked with her about the incident while

they were in Denver, she stated: “You know, really, we were trying to enjoy our vacation that we had planned for so long, and we didn’t have much time to talk about it. We had—you know, we thought that we would have time when we got home to figure things out. Never made it home.” 4RP at 440.

Ms. Kirkland acknowledged that she talked to Deputy Brown at the time that Mr. Jackin was arrested on July 14, 2015, but she explained that she told the deputy that he was inaccurately recording what she was telling him and that she then stopped talking to him because of that. 4RP at 442-43. During direct examination of Ms. Kirkland, the following took place:

Q: Do you recall speaking with a deputy there after Mr. Jackin had been arrested, ma’am?

A: Yes.

Q: All right. And do you remember him asking you some questions?

A: Yes.

Q: All right. Do you remember if you told the deputy that----“?

4RP at 443. Defense counsel objected that the question called for hearsay. The State argued that it was a prior inconsistent statement. 4RP at 442. The court permitted the question. The State then continued with direct examination:

Q: Do you recall telling the deputy that Chris Jackin had told you on vacation that he had touched [J.]?

A: No.

Q: No. Did he tell you anything like that on the vacation?

A: No.

Q: No. Okay. Do you deny telling that to the officer?

A: I deny telling that to the officer. I never said anything like that to the officer.

Q: Okay. Did you ever say anything to the officer about Chris

admitting having done anything with [J.]?

A: No.

Q: Did Chris ever admit anything to you about anything having happened with [J.]?

A: No.

Q: Did he ever tell you it didn't happen?

A: Yes.

Q: Okay.

A: Several times.

Q: On the vacation?

A: Whenever it's come up.

Q: All right. So just to be clear, you would not have told the police that he said that he touched her while were in Denver?

A: No.

Q: Because from your testimony that it don't occur?

A: No.

Q: All right. Do you recall if---what do you recall about that conversation with the deputy? What did you tell him?

A: He asked me if we had talked about it while we were on vacation. I told him not really. And he said, [{"]oh, so he admitted it to you?["] I said [{"]no, he never admitted it to me. I did not say that.["] At that point I had stopped talking to him because he was telling me what I was saying rather than listening to the words I was trying to tell him.

4RP at 442-43 (internal quotation marks added for clarity).

After Ms. Kirkland acknowledged during her testimony that she had spoken with Deputy Brown but that he was "telling [her] what [she] was saying," the State called Deputy Brown. The deputy stated that Ms. Kirkland was upset that Mr. Jackin was arrested. 4RP at 456. He then testified to the following: "I quoted her in my report as saying---I'll have to find it but---yeah, he touched her is what she said." 4RP at 457.

Defense counsel initially objected to the State's question to the deputy,

“Did she say how she had gained that information?” 4RP at 457. The prosecution argued that it was admissible for the limited purpose of impeachment of Ms. Kirkland as a prior inconsistent statement. 4RP at 457. Defense counsel then withdrew the objection. 4RP at 458. The court stated that because the objection was withdrawn, the deputy was permitted to testify regarding the alleged inculpatory statement. 4RP at 458. Deputy Brown testified that Ms. Kirkland told him that she and Mr. Jackin were on vacation, “She said that Jackin told her he touched her.” 4RP at 458.

D. ARGUMENT

1. THE COURT ERRED BY PERMITTING TESTIMONY OF MS. KIRKLAND REGARDING AN ALLEGED ADMISSION BY MR. JACKIN, WHERE THE STATE CALLED MS. KIRKLAND FOR THE PRIMARY PURPOSE OF IMPEACHMENT,

a. Standard of review

A trial court's decision to admit evidence is reviewed for abuse of discretion. *State v. Nieto*, 119 Wn.App. 157, 161, 79 P.3d 473 (2003). If the trial court based its evidentiary ruling on an incomplete legal analysis or a misapprehension of legal issues, the ruling may be an abuse of discretion. *City of Kennewick v. Day*, 142 Wn.2d 1, 15, 11 P.3d 304 (2000); *Nieto*, 119 Wn.App. at 161, 79 P.3d 473.

b. The impeachment evidence constituted the only substantive evidence against Mr. Jackin in the absence of forensic evidence or any witness to the alleged offense other than J.M.

The trial court erred by admitting Ms. Kirkland's statements to the Deputy Brown as prior inconsistent statements to impeach her testimony. 4RP at 442, 457. A witness's prior inconsistent statement may be admissible for impeachment, to allow the trier of fact to compare the witness's prior statement with his or her testimony, to ascertain the witness's credibility. ER 613(b); *State v. Spencer*, 111 Wn. App. 401, 409, 45 P.3d 209 (2002), review denied, 148 Wn.2d 1009, 62 P.3d 889 (2003).

Under ER 613(b), extrinsic evidence of a witness's prior inconsistent statement is not admissible unless the witness is first given an opportunity to admit or to deny the inconsistency and to explain it. *State v. Babich*, 68 Wn. App. 438, 443, 842 P.2d 1053, review denied, 121 Wn.2d 1015 (1993). If the witness admits making the prior inconsistent statement, however, extrinsic evidence of the statement is not allowed. *State v. Dixon*, 159 Wn.2d 65, 76, 147 P.3d 991 (2006); *Babich*, 68 Wn. App. at 443. If on the other hand, the witness denies having made the writing or statement, the writing or a witness is brought forth to demonstrate that the impeached witness did make the writing or statement.

In this case, however, the State called Ms. Kirkland for the primary purpose of setting her up for impeachment through Deputy Brown's testimony. The purpose of the impeachment was an effort to put before the jury an alleged confession by Mr. Jackin to Ms. Kirkland while they were on vacation in

Denver, rather than merely challenging her credibility as a witness.

Mr. Jackin denied making a confession to Ms. Kirkland. 3RP at 328. The testimony at issue by Ms. Kirkland where the alleged confession was brought before the jury was this question by the State: "Do you recall telling the deputy that Chris Jackin had told you on vacation that he had touched [J.]" 4RP at 442. Ms. Kirkland denied the allegation, and Deputy Brown subsequently reiterated the allegation, stating that Ms. Kirkland told him that "he touched her," which he stated that he wrote in his report and placed in quotes. 4RP 457.

Generally, the credibility of a witness can be attacked by any party, including the party who initially called the witness. ER 607. "A witness may be impeached with a prior out-of-court statement of a material fact that is inconsistent with his testimony in court, even if such a statement would otherwise be inadmissible as hearsay." *State v. Clinkenbeard*, 130 Wn.App. 552, 569, 123 P.3d 872 (2005); *State v. Dickerson*, 48 Wn.App.457, 466, 740 P.2d 312 (1987). Impeachment evidence pertains solely to a witness's credibility and not probative of the substantive facts encompassed by the evidence. *Clinkenbeard*, 130 Wn.App. at 569; *State v. Johnson*, 40 Wn.App. 371, 377, 699 P.2d 221 (1985). The State is prohibited from using impeachment evidence as a guide for submitting to the jury substantive evidence that would otherwise be inadmissible. *Clinkenbeard*, 130 Wn. App. at 569-70, *State v. Hancock*, 109 Wn.2d 760, 763, 748 P.2d 611 (1988).

Here, the State very clearly relied upon impeachment evidence as substantive evidence to convict Mr. Jackin. In a case where there was a complete absence of forensic evidence and only one witness to the alleged crime, any evidence whatsoever---particularly evidence in the form of a confession---was likely to have a significant effect on the jury, despite the limiting instruction given by the court.

The issue in this case was whether the jury believed J.M.'s accusation that Mr. Jackin had touched her vagina while she was sleeping. No forensic evidence or witness to the alleged incident other than J.M.'s own testimony was presented. The deputy's testimony was simply a reiteration of the heart of the State's case—that Mr. Jackin committed the offense.

c. The court's error was not harmless

The appellant submits that he is entitled to a new trial because there is a high probability the jury's verdict would have been different absent admission of the impeachment evidence. The trial court's erroneous evidentiary ruling requires reversal if, within reasonable probabilities, the outcome of the trial would have been different had the error not occurred. See *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). Such is the case here.

The trial court's error was not harmless given the incendiary nature of the challenged evidence in this case. An evidentiary error requires reversal if, within reasonable probability, the error materially affected the verdict. *State v. Everybodytalksabout*, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). Here, Mr.

Jackin consistently disputed whether any contact had taken place. The question whether the alleged conduct occurred boiled down to the jury's determination of who was more credible—J.M. or Mr. Jackin. The improper admission of hearsay requires reversal. Ms. Kirkland's alleged statement was wrongly admitted as basically substantive evidence which the jury—despite the limiting instruction—could not be expected to simply ignore. Accordingly, the erroneous admission of her statement was not harmless beyond a reasonable doubt, and Mr. Jackin's conviction must be reversed. See *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Given the paucity of evidence, it is probable the jury's decision was materially affected by the improper testimony. Mr. Jackin's conviction should therefore be reversed.

2. **THE FAILURE OF TRIAL COUNSEL TO OBJECT WHEN THE STATE ELICITED IMPEACHMENT ON A COLLATERAL ISSUE, AND TRIAL COUNSEL'S FAILURE TO IMPEACH THE COMPLAINING WITNESS ABOUT TWO PRIOR INCONSISTENT STATEMENTS, VIOLATED THE DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL**

The Sixth Amendment to the United States Constitution and article 1, § 22 of the Washington State Constitution guarantee effective assistance of counsel. *In re Pers. Restraint of Riley*, 122 Wn.2d 772, 779–80, 863 P.2d 554 (1993); *State v. Sardinia*, 42 Wn.App. 533, 538, 713 P.2d 122 (1986). Washington follows the ineffective assistance of counsel test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In re Pers. Restraint of Stenson, 142 Wn.2d 710, 720, 16 P.3d 1 (2001). In order to show ineffective assistance of counsel, an appellant must demonstrate that counsel's representation was deficient, and that the deficient representation prejudiced him. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999), citing *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The *Strickland* test has two prongs. 466 U.S. at 687. First, the defendant must show that counsel's performance was so deficient as to no longer function as the counsel guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687. Deficient performance is shown by demonstrating that counsel's performance fell below an objective standard of reasonableness. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Second, the defendant must show that counsel's deficient performance prejudiced the defendant's case. *Strickland*, 466 U.S. at 687. Prejudice is shown by demonstrating "that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *Reichenbach*, 153 Wash.2d at 130, 101 P.3d 80.

A legitimate trial strategy cannot serve as the basis for deficient performance. *Aho*, 137 Wn.2d at 745. When an ineffective assistance claim rests on counsel's failure to object, the defendant bears the burden to show that the objection would have succeeded. *State v. McFarland*, 127 Wn.2d 322, 333–34, 899 P.2d 1251 (1995).

A claim of ineffective assistance of counsel may be considered for the

first time on appeal as an issue of constitutional magnitude.” *State v. Nichols*, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). Appellate courts review ineffective assistance claims *de novo*. *State v. Shaver*, 116 Wn. App. 375, 382, 65 P.3d 688 (2003).

Here, Mr. Jackin claims ineffective assistance based upon (1) trial counsel’s withdrawal of his initial hearsay objection when the State called a witness to impeach a prior witness, and (2) when defense counsel failed to cross-examine the complaining witness, J.M., on prior inconsistent statements on a critical claim she made against the defendant.

- a. **Trial counsel provided ineffective assistance when he failed to object when the State elicited impeachment its own witness on a potentially collateral issue.**

As noted in Section 1, *supra*, the trial court allowed the State to elicit evidence from Deputy Brown that when he talked with Ms. Kirkland, whom he alleged had told him that when she and Mr. Jackin were in Colorado he told her that he had “touched” J.M. 4RP at 457.

The appellant anticipates that the State will argue that Deputy Brown’s testimony was admissible as a prior inconsistent statement by Ms. Kirkland under ER 801(d)(1)(i), since on direct examination, Ms. Kirkland denied ever making such a statement to Deputy Brown, and instead told him that he was misstating what she was telling him and therefore she would not talk to him any longer. 4RP at 442. However, any such argument would be in error because

the evidence constituted impeachment on a potentially collateral issue.

Under ER 801(d)(1)(i), a prior inconsistent statement by a witness who testifies at trial is not hearsay, and may be elicited to rebut the witness's testimony, if (1) the witness denies having made the prior statement, and (2) the prior statement is contrary to the evidence given at trial. *State v. Wilder*, 4 Wn.App. 850, 486 P.2d 319 (1971). A party, however, is precluded from eliciting extrinsic evidence of a prior inconsistent statement if that extrinsic evidence constitutes impeachment on a collateral matter. *State v. Oswald*, 62 Wn.2d 118, 121, 381 P.2d 617 (1963). A matter is "collateral" for the purposes of impeachment if the fact as to which error is predicated, could not have been shown in evidence for any purpose independent of the contradiction. *State v. Rosborough*, 62 Wn.App. 341, 814 P.2d 679 (1991). See generally 5A K. Tegland, *Washington Practice, Evidence* § 227 (3d Ed.1989).

Here, the alleged statement was ambiguous at best and potentially merely a collateral issue. Deputy Brown's statement was that at the time of the arrest, Ms. Kirkland told him that "he touched her." 4RP at 457. The record does not indicate if the alleged touch was sexual in nature, whether the admission was to touching J.M.'s vagina, which was the allegation she made, or whether the statement was merely to benign or inadvertent touching.

Under these rules, Deputy Brown's testimony concerning what he said that Ms. Kirkland told him that Mr. Jackin said was not admissible at trial, independent of the State's claim that it was inconsistent with Ms. Kirkland's

testimony of what the defendant told her. Therefore, Deputy Brown's testimony concerning Ms. Kirkland's prior statement about what the defendant told him was potentially collateral evidence---an element that was not ascertained by the trial court, and as such was not admissible. Thus, as argued in section 1 *supra*, the trial court erred when it allowed Deputy Brown to testify concerning Ms. Kirkland's alleged prior inconsistent statement.

Moreover, this evidence was highly prejudicial to the defense because it went to the heart of the defendant's claim that he did not have any sexual contact—or contact of any degree—with J.M. See ER 403. Ms. Kirkland was the long-term girlfriend of Mr. Jackin and the sister of J.M. Ms. Kirkland, as the defendant's girlfriend, had no motive to lie to support J.M.'s claims of sexual contact. Therefore, while the jury might well have looked with a jaundiced eye at the claims from another witness that the defendant had confessed, it had no reason to doubt such a claim from the defendant's girlfriend, who had no motive to lie. As a result, by withdrawing the objection to the admission of this improper evidence, trial counsel fell below the standard of a reasonably prudent attorney, and that failure caused prejudice. Thus, the defendant is entitled to a new trial.

b. Trial counsel's failure to cross-examine J.M. regarding a prior inconsistent statement constituted ineffective assistance of counsel.

Although there is a presumption that trial counsel's performance was adequate, and deference must be given when evaluating counsel's strategic

decisions, *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. Trial counsel's conduct cannot, in this case, be characterized as legitimate trial strategy or tactics. Cross-examination is particularly important in two circumstances: (1) where a case rests essentially on the jury believing or disbelieving 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). Both circumstances are present in this case. A decision not to cross examine a witness can, at times, be a legitimate tactic because counsel may be concerned about opening the door to damaging rebuttal or because cross examination may not provide evidence useful to the defense. *In re the Personal Restraint of Brown*, 143 Wn.2d 431, 451, 21 P.3d 687 (2001). But here, the State's only evidence that a crime occurred was the testimony of J.M.; her testimony was the State's entire case. J.M. took the stand and told the jury that while sleeping on a reclining chair in the living room she woke up and Mr. Jackin was standing over her, rubbing her vagina, and she asked what he was doing, and testified that he said "I was just wanting to get a piece." 2RP at 198.

She further testified that he apologized and she stood up and "kind of started scolding him . . ." 2RP at 199. She stated that she then woke up her sister, Ms. Kirkland, who was sleeping on the sectional couch. 2RP at 199. In the Presentence Investigation Report, however, which states that in information "taken from official reports regarding the incident[,]" J.M. "opened her eyes to

see Christopher standing beside her, with his hand down her pants. He was rubbing her vaginal area with his fingers. JRM said she reacted both *verbally and physically* to make him stop and he withdrew his hand.” CP 93 (emphasis added). The “official report” is presumably a police report, which was of course available to the defense prior to trial.

The claims by J.M. were critical in this case because there were no witnesses to the alleged sexual contact and there was no physical evidence to support the claims made. This lack of witnesses and corroborating physical evidence illustrates the critical nature that credibility played in this case.

Other than J.M.’s testimony, there was no evidence of sexual contact, direct or circumstantial. Therefore, it was critical for counsel to ask J.M. about the variation between what she told police and her subsequent testimony at trial.

In spite of the fact that the verdict in this case turned on the credibility balance between the claims of the complaining witness and the denials of the defendant, trial counsel in this case failed to cross-examine the complaining witness on a key part of her testimony that would have eroded her credibility in the eyes of the jury. This key piece of evidence was the fact that in the “official report,” she asserted that she not only yelled, but that she “physically reacted” to make him stop. But by the time she testified, she merely woke up and “scolded” him after asking what he was doing. This was not meaningless or insignificant part of her story of being touched. Instead rather, this was obviously a key point for cross-examination---one that no reasonable defense attorney would fail to

explore.

No reasonable defense attorney would fail to cross-examine the complaining witness on a critical as her prior inconsistent account of the alleged abuse. Thus, counsel's failure fell below the standard of a reasonable prudent attorney.

In addition, this failure caused prejudice. This prejudice arose from the fact that, as already mentioned, the jury's decision in this case turned on the issue of credibility between the defendant and the complaining witness---the testimony was a classic "he said/she said" and the case hinged on witness credibility. Thus, had defense counsel properly cross-examined the complaining witness, it would more likely than not have been sufficient to raise a reasonable doubt in the eyes of the jury. As a result, trial counsel's failure denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

3. **THE TRIAL COURT ERRED WHEN IT DECLINED TO GIVE A PROPOSED INSTRUCTION UNDER WPIC 6.41**

The trial court declined to give the defense's proposed instruction under WPIC 6.41 pertaining to the statement allegedly made by Mr. Jackin to Ms. Kirkland that he touched J.M. 3RP at 250-58; CP 44. Although WPIC 6.41 commonly applies to questions of voluntariness of custodial statements to law enforcement officials admitted after a CrR 3.5 motion, defense counsel noted

that there was not “a specific, absolute exclusion” of use of the instruction regarding statements to private citizens. 3RP at 253. The State disagreed, arguing that under *State v. Smith*, 36 Wn.App. 133, 672 P.2d 759 (1983), the “commentary suggest that it is only given when there a custodial statement that the defense is disputed having been made voluntarily.” 4RP at 251. After hearing argument, the court stated:

I do think the general credibility language within WPIC 1.02 that we are going to be providing to the court [sic], which is the same language that was identified here in the Smith case, provides more than adequate opportunity for the defense to be able to argue what the[y] want to about whether or not the statement was accurate, whether or not in this particular case the alleged victims representation of the statement is accurate or not, to what extent she is credible on giving that information, and be able to argue those issues to the jury.

So, I think that allows the defense to get into all of those issues, and I think offering this would get into some confusion her with the context of the statement to this private party, as well. So I will not offer the 6.41 as requested by Defense. 3RP at 253.

Defense counsel noted his objection to the court’s failure to give the instruction. 3RP at 343.

WPIC 6.41 provides as follows:

You may give such weight and credibility to any alleged out-of-court statements of the defendant as you see fit, taking into consideration the surrounding circumstances.

This instruction must be given upon the request of the defendant when, after a CrR 3.5 hearing, the trial court has ruled that an out of court statement is admissible and the defense has raised the issue whether the out of court statement was voluntary through the evidence offered or cross-examination of witnesses. See WPIC 6.41, Note on Use. The Note on Use provides:

This instruction must be given upon request of a defendant when, after a CrR 3.5 hearing, the trial court has ruled that an out of court statement is admissible and the defense has raised the issue whether the out of court statement was voluntary through evidence offered or cross-examination of witnesses.

WPIC 6.41, Note on Use.

However, the instruction may also be used when the prosecution offers an alleged confession and the defendant denies making the confession. See *State v. Hubbard*, 37 Wn.App. 137, 679 P.2d 391 (1984), reversed on other grounds 103 Wn.2d570, 693 P.2d 718 (1985). It is this nuance that the court failed to appreciate when it relied on *Smith*, supra, to deny the defense's request for the instruction.

Mr. Jackin was severely prejudiced when WPIC 6.41 was not given by the court. As argued in section 1, supra, the State introduced the alleged statement to impeach Ms. Kirkland as a prior inconsistent statement during cross examination, Mr. Jackin denied the allegation that he made any kind of incriminating statement to Ms. Kirkland. He stated:

Q: So you go on vacation with Ms. Kirkland. And on the vacation, you told her that you touched her sister, didn't you?

A: No.

Q: No?

A: No. I told her several times I did not do this, and I don't know why her sister is saying this.

Q: Okay. So you told her the exact opposite of what we heard from Deputy Brown?

A: Yes.

3RP at 335.

According to the Comment to WPIC 6.41:

Although the instruction is normally used when the defendant challenges the voluntariness of a confession, **the instruction may also be used when the prosecution offers an alleged confession and the defendant denies making the confession.** *State v. Hubbard*, 37 Wn.App. 137, 679 P.2d 391 (1984), reversed on other grounds, at 103 Wn.2d 570, 693 P.2d 718 (1985).

WPIC 6.41, Comment (emphasis added).

The State argued during its closing:

The other thing that we have to talk about is Acacia Kirkland. And we hear the defense said, "I denied it. I told her I didn't do it." And that's what Acacia said. But we heard from Deputy Brown---that what Deputy Brown says is that Acacia told him that, while they were on vacation, the defendant told her that he had touched [J.M.]

3RP at 376.

After discussion of the limiting instruction² the prosecutor continued:

²The court gave the following limiting instruction:

Now, I think I you look at what's going on here, pretty clear given the discrepancies between her testimony and what she told the police, there is something going on and they're not good things. They live together. They have children and they love each other. I think it's pretty plain what's going on there, why we have the shift.

3RP at 376-77.

Mr. Jackin was prejudiced by the refusal of the trial court to allow argument to the jury that they could give such weight and credibility to any alleged out-of-court statements by the appellant. The defense should have been able to counter the State's argument concerning Mr. Jackin's alleged admission during closing argument by discussing the circumstances of the vacation, the nature of the relationship with Ms. Kirkland, and the fact that Ms. Kirkland was upset and angry at the time of the arrest.

The error in denying the instruction regarding the voluntariness of the statement on the mistaken belief that it was only available if made to law enforcement constituted prejudicial error requiring reversal.

4. **CUMULATIVE ERROR DEPRIVED MR. JACKIN OF A FAIR TRIAL.**

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of alleged statements Acacia Kirkland made to Deputy Jeremy Brown and may be considered by you only for assessing the credibility of Ms. Kirkland. You may not sider it for any other purpose. Any discussion of the evidence during your deliberation must be consistent with this limitation. CP 69-83.

Pursuant to the cumulative error doctrine, even where no single error standing alone merits reversal, a reviewing court may nonetheless find the combined errors denied a defendant a fair trial. *State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 685 P.2d 668 (1984). The doctrine requires reversal where the cumulative effect of otherwise nonreversible errors materially affected the outcome of the trial. *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 150 (1992).

Here, Mr. Jackin contends that each error set forth above and in the opening brief of appellant, viewed alone, engendered sufficient prejudice to merit reversal. Alternatively, however, he argues the errors, taken together, created a cumulative and enduring prejudice that was likely to materially affect the jury's verdict and the integrity of the verdict cannot be assured. This Court must reverse his conviction and order a new trial.

5. **THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY ANY REQUEST FOR COSTS.**

If Mr. Jackin does not substantially prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. See RAP 14.2. The record does not show that he had any assets, although the court found that did have the ability to pay legal financial obligations. 3RP at 402. At sentencing, the court imposed fees, including \$500.00 victim assessment, court appointed attorney and defense expert fees, \$450.00 court costs, and \$100.00 felony DNA collection fee. CP 115.

The trial court, however, found him indigent for purposes of this appeal.

CP 124. There has been no order finding Mr. Jackin's financial condition has improved or is likely to improve since that finding. Under RAP 15.2(f), "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent."

This Court has discretion to deny the State's request for appellate costs. Under RCW 10.73.160(1), appellate courts "may require an adult offender convicted of an offense to pay appellate costs." "[T]he word 'may' has a permissive or discretionary meaning." *State v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). The commissioner or clerk "will" award costs to the State if the State is the substantially prevailing party on review, "unless the appellate court directs otherwise in its decision terminating review." RAP 14.2. Thus, this Court has discretion to direct that costs not be awarded to the State. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016). Our Supreme Court has rejected the concept that discretion should be exercised only in "compelling circumstances." *State v. Nolan*, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In *Sinclair*, Division One concluded, "it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant's brief. *Sinclair*, 192 Wn. App. at 390. Moreover, ability to pay is an important factor that may be considered. *Id.* at 392-94. Based on Mr. Jackin's continuing indigence, this Court should exercise its discretion and deny any requests for costs in the event the State

is the substantially prevailing party.

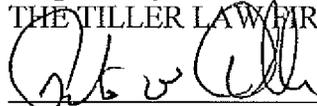
E. CONCLUSION

For the foregoing reasons, and as argued in the opening brief of appellant Mr. Jackin respectfully requests this Court reverse his conviction and dismiss, or, in the alternative, reverse and remand for a new trial.

This Court also should exercise its discretion and deny any request for appellate costs, should Mr. Jackin not prevail in his appeal.

DATED: March 1, 2017.

Respectfully submitted,
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CERTIFICATE

I certify that I sent by JIS a copy of the Opening Brief of Appellant and to Clerk of Court of Appeals and to Anne Cruser, Deputy Prosecuting Attorney, and mailed copies, postage prepaid on March 1, 2017, Christopher Jackin:

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March 01, 2017 - 4:41 PM

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