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NO. 35573-0-III

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

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY COUNTS,
Appellant.

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

Spokane Cause No. 16-1-00461-1

The Honorable Linda G. Tompkins, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Defense counsel was ineffective when he failed to object to hearsay statements S.S. made to the State's expert.
2. Defense counsel was ineffective when he failed to interview the State's expert prior to trial, which led to his failure to procure a rebuttal expert.
3. The trial court abused its discretion by denying the defense motion for a continuance.

B. ISSUES PRESENTED ON APPEAL

1. Defense counsel was ineffective when he failed to object to cumulative hearsay statements S.S. made to the State's expert which had the effect of bolstering S.S.'s credibility
2. Defense counsel was ineffective when he failed to interview the State's expert prior to trial, which did not leave time to secure a rebuttal expert.
3. The trial court abused its discretion in denying defense counsel a continuance which forced counsel to proceed to trial unprepared.

C. STATEMENT OF THE CASE

1. Procedural History

Jeffrey Counts was charged with one count of Rape of a Child in the Second Degree (RCW 9.94A.44.076) and one count of Child Molestation in the Second Degree (RCW 9.94A.086), with an aggravating factor that the offenses were part of an ongoing pattern of sexual abuse of the same victim (RCW 9.94A.535(3)(g)). CP 1.

After trial a jury convicted Counts of both charges and found the behavior to be part of an ongoing pattern of abuse. CP 142-45. Counts timely appeals. CP 195.

2. Substantive Facts

a. Failure to Investigate/Continuance Denied

Three court days prior to trial, defense counsel moved for a continuance to interview Susann Clinton, the nurse who examined the victim. Defense counsel explained that after recently interviewing Susan Counts, the only other witness with knowledge of the interactions between Counts and S.S., counsel learned of other avenues he needed to explore and other records he needed to obtain. RP 7-8, 10.

Counsel explained that he was unable to interview witnesses earlier due to a heavy workload and would not be able to provide effective assistance of counsel by the currently scheduled trial date. RP 9-10, 16.

The trial court denied Counts' motion to continue trial because there had been six prior continuances and the victim deserved resolution of the matter. RP 11.

b. Trial Testimony

In 2012, S.S. was an eleven-year-old dependent in Nevada. RP 133, 160. Her uncle, Jeffrey Counts, and his wife, Ms. Counts, agreed to let her live with them in Spokane. RP 247-48. S.S. lived with the Counts while she was in sixth and seventh grade. RP 79, 166. Social worker Shirley Dicus was assigned to S.S.'s case and met with the family at least once every 30 days. RP 139.

S.S. enjoyed living with the Counts family and Mr. Counts was willing to adopt her. RP 173. However, Ms. Counts was hesitant about the adoption and Dicus expressed concern about the Counts' parenting. RP 116, 134, 136, 144,145. S.S. was a needy child and often wanted hugs or other physical contact, including sitting on Mr. Counts' lap. RP 161, 297.

S.S. was also sneaky and argumentative about rules. RP 170-71. Mr. Counts did not set appropriate boundaries and often spoiled S.S., leaving Ms. Counts to be the disciplinarian. RP 238, 302. S.S. often fought with Ms. Counts. One fight turned physical when S.S. threw her phone at Ms. Counts. RP 144, 172. In contrast, Mr. Counts took S.S. and her friends to parks and many activities such as roller skating, swimming, and going to the movies. RP 263. Mr. Counts bought S.S. gifts such as a bed, a tablet, and a phone. RP 94, 116, 274.

This led to what Cindi Fuller, the mental health therapist assigned to the family, called “parent splitting”. RP 238, 243. Fuller observed, “[S.S.] is quickly taking control of this family and the placement is at risk of disruption.” RP 243. Fuller expressed concern that S.S. was manipulative and that if she did not get what she wanted from Ms. Counts, she would ask Mr. Counts and he would acquiesce. RP 243.

Mr. Counts worked as a truck driver and was often away from home during the week, so S.S. communicated with him through a texting app she downloaded to her tablet. RP 93, 95. Soon S.S. began sending Mr. Counts text messages while they were both in the

house, often while the whole family was watching television. RP 260.

The Counts tried to bond with S.S. by tucking her into bed and saying a prayer with her at night. RP 117, 120. After the prayer, Ms. Counts usually left the room and Mr. Counts stayed to rub S.S.'s back. RP 120.

Dicus told Mr. Counts rubbing S.S.'s back was an inappropriate bonding method. RP 136. Dicus also expressed concern about the way Mr. Counts played with S.S. during a visit, where she witnessed S.S. touch the back of Mr. Counts' leg with her foot while she was sitting on the couch. Mr. Counts responded by climbing on top of her and wrestling with her. RP 136, 137.

Fuller also warned Mr. Counts to maintain strict boundaries with S.S. to protect himself from any opportunity for an allegation and to protect S.S. from anything inappropriate. RP 238, 240-41. She told Mr. Counts to stop going into S.S.'s bedroom at night to give her back rubs and not to be alone with her. RP 239.

Based on the Counts' poor parenting skills, Fuller eventually recommended removal. RP 244. The State removed S.S. from the Counts' home and placed her with a foster parent, Liz Ashby, in Nevada. RP 86-87, 123. After S.S. left, the Counts discovered S.S.

had charged almost \$500 on itunes to their credit card. RP 171.

Susan made a police report. RP 172.

When S.S. was placed with Ashby, she wrote Ashby a letter alleging that Mr. Counts came into her room and had sex with her multiple times a week, during the whole period she lived with the Counts. RP 86, 121.

S.S. stayed with her foster mother for about a month, then she went to live in Arizona. RP 79, 123. Nurse practitioner, and forensic nurse, Susann Clinton examined S.S. at Flagstaff Medical Center Safe Child Center in Arizona. RP 201, 203, 206. During the exam, S.S. asked Clinton to only ask yes or no questions. RP 207-08. Clinton complied and mostly asked S.S. very leading questions, which required yes or no answers during the medical history portion. RP 210. The State called Clinton as an expert in forensic medical exams. RP 204.

Clinton testified that she asked S.S. the following questions:

Did Mr. Counts do something perverted to you? Did Mr. Counts touch you? RP 209. Did Mr. Counts touch your breast? RP 210. Did Mr. Counts touch you with his hands? Did Mr. Counts touch your private part where you pee? RP 210. Did Mr. Counts touch you with

his private part? RP 212.

When Clinton asked S.S. whether the touching was inside or outside her body, she responded that it went inside the tissue box. S.S. explained that she was interviewed by a detective in Carson City who used a tissue box to describe her genital area. RP 211. Clinton's report was not entered as an exhibit at trial. RP 194.

Clinton admitted that best practice when interviewing a child is to ask general questions instead of yes or no questions. RP 223-24. S.S.'s exam was normal and there was no evidence S.S. was sexually assaulted. RP 215. However, Clinton testified that it was very common with child sexual abuse that the child's anal-genital examination would not show any findings of acute or chronic trauma. RP 216.

S.S. testified at trial that she left the letter for her foster mother outlining the alleged abuse because she was upset that no one told her why she was removed from the Counts' care. RP 85-86. S.S. said the abuse started one night after their family prayer when Ms. Counts left her room and Mr. Counts started rubbing her back and then touched her vagina. RP 84. S.S. said on several other occasions, Mr. Counts put his penis inside her vagina. RP 82-83.

She recalled one time, while Ms. Counts was at urgent care getting X-rays for a broken finger, Mr. Counts took her home, dragged her into her room, threw her on her bed and raped her. RP 85.

Ms. Counts remembered the day she went to urgent care. Mr. Counts and S.S. went with her but left when she went in to get X-rays. RP 165. When she called Mr. Counts, less than an hour later, he and S.S. went back to pick her up. RP 165. That night, Ms. Counts took some medication and went to bed, but when she could not sleep she got up and saw Mr. Counts coming out of S.S.'s room. RP 164. Mr. Counts testified that he was in S.S.'s room to tell her to put away her tablet, but told Ms. Counts he was tucking S.S. into bed to avoid a fight. RP 281-83. Ms. Counts testified she never saw any sexual behavior between Mr. Counts and S.S. while S.S. lived with them. RP 179.

Mr. Counts' theory of the case was that he may have exhibited poor parenting in failing to set appropriate boundaries and spoiling S.S., but he did not sexually abuse her. RP 246, 344. After discussions with Dicus and Fuller, Mr. Counts tried to adjust his boundaries by no longer allowing S.S. to sit on his lap. RP 297. Mr. Counts also explained that he went into S.S.'s room during the night

because she had nightmares and would yell out, a fact Ms. Counts confirmed. RP 175, 257.

During deliberation, the jury inquired as follows:

We would like to know the date Susan Counts went to urgent care and the time of day and how long she was there. RP 352; CP 141.

The court responded by instructing the jury to refer to their instructions. The jury convicted Mr. Counts of both counts and found the conduct was part of a pattern of sexual abuse against the same victim. RP 361-62.

D. ARGUMENT

1. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO HEARSAY STATEMENTS MADE TO THE STATE'S EXPERT AND FOR FAILING TO INTERVIEW THE STATE'S EXPERT PRIOR TO TRIAL.

The Sixth Amendment to the United States Constitution and Wash. Const. art. I, § 22 guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const. Amend. VI; *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). The Court reviews ineffective assistance of counsel claims de novo. *State v. Wooten*, 178 Wn.2d 890, 895, 312 P.3d 41 (2013).

To prevail on an ineffective assistance of counsel claim, the defendant must show that defense counsel's representation was deficient and that the deficient representation was prejudicial. *Grier*, 171 Wn.2d at 32-33. Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Counsel's performance is deficient if it falls below an objective standard of reasonableness, and there is "a strong presumption that counsel's performance was reasonable." *Grier*, 171 Wn.2d at 33 (quoting *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). Counsel's performance is not deficient if it can be characterized as legitimate trial strategy. *Grier*, 171 Wn.2d at 33. To establish actual prejudice, Counts must show there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. *Grier*, 171 Wn.2d at 34.

a. Counts was prejudiced by defense counsel's failure to object to S.S.'s hearsay statements to nurse Clinton.

Although S.S.'s hearsay statements to Clinton fell under the medical diagnosis exception to the hearsay rule, they were more prejudicial than probative, were unnecessarily cumulative, and only served to bolster S.S.'s credibility.

Under ER 801(c), “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.” Hearsay generally is inadmissible under ER 802, but ER 803(a)(4) provides a hearsay exception for statements made for the purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations.

This exception applies to statements reasonably pertinent to medical diagnosis or treatment. *State v. Doerflinger*, 170 Wn. App. 650, 664, 285 P.3d 217 (2012). A statement is reasonably pertinent to diagnosis or treatment when (1) the declarant's motive is to promote medical treatment and (2) the medical professional reasonably relies on the statement for treatment purposes. *Doerflinger*, 170 Wn. App. at 664.

A statement admissible under this exception is also subject to exclusion under ER 403 if unnecessarily cumulative or overly prejudicial. *State v. Bedker*, 74 Wn. App. 87, 93, 871 P.2d 673 (1994); *In re Dependency of Penelope B.*, 104 Wn.2d 643, 656, 709 P.2d 1185 (1985). (Discussing that medical hearsay is also subject to ER 403).

If counsel had objected, the court would have weighed the prejudicial versus the probative under ER 403 and likely suppressed parts of Clinton's testimony because the questions she asked S.S. were leading and S.S.'s answers were cumulative. *Bedker*, 74 Wn. App. at 90. In *Bedker*, the Court of Appeals upheld the trial court's ER 403 analysis and excluded some of the statements as cumulative. *Bedker*, 74 Wn. App. at 93-94.

Here, defense counsel did not object to S.S.'s hearsay statements made in response to Clinton's leading questions. While a child's credibility in a child sex case is always significant, See generally, e.g., *State v. Alexander*, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992) (discussing the significance of credibility in child sex abuse cases), S.S.'s credibility was even more significant here because the State's entire case rested on whether the jury believed her.

Counsel's failure to object was deficient representation under *Bedker* because Clinton's testimony regarding S.S.'s hearsay statements did not provide any information that was new or different than S.S.'s own testimony, but rather Clinton's testimony was cumulative and only served to bolster S.S.'s credibility. Additionally,

due to the leading questions and 'yes/no' responses, defense counsel was unable to cross-examine S.S. which prevented counsel from establishing that S.S. may not have been truthful.

Fact "repetition is not generally a valid test for veracity." *State v. Thomas*, 150 Wn. 2d 821, 867, 83 P.3d 970 (2004) (quoting *State v. Harper*, 35 Wn. App. 855, 857, 670 P.2d 296 (1983)). Here, Counts was prejudiced by counsel's deficient performance because the jury was able to infer without legitimate challenge that the repetition of the hearsay statements were consistent with S.S.'s trial testimony. *Id.*

State v. Kilgore, 107 Wn. App. 160, 169–70, 26 P.3d 308 (2001), *aff'd*, 147 Wn.2d 288, 53 P.3d 974 (2002) is also illustrative regarding when testimony from an expert can be prejudicial in a child sexual abuse case. In *Kilgore*, the defendant was charged with first degree child molestation and first degree child rape for two incidents with his step-niece, C.M. *Kilgore*, 107 Wn. App. at 166.

At trial, a nurse practitioner testified that she examined C.M., and that her observations of C.M.'s hyman were "worrisome". The nurse practitioner testified that her findings were consistent with what C.M. had told her, but she could not say that any of Kilgore's conduct

caused the findings. *Kilgore*, 107 Wn. App. at 170. The trial court admitted this testimony over the defense's objection. However, the trial court suppressed evidence that someone else had previously abused C.M. *Kilgore*, 107 Wn. App. at 177.

The only evidence implicating Kilgore, other than C.M.'s direct testimony, was circumstantial. Because the physical finding indirectly implicated Kilgore, evidence of someone else abusing C.M. was relevant. C.M.'s credibility was a central issue and the physical corroborative evidence served to aid the jury in weighing that credibility. *Kilgore*, 107 Wn. App. at 178-79. The Court of Appeals reversed Kilgore's conviction because the prior abuse evidence was admissible to explain the physical findings. *Kilgore*, 107 Wn. App. at 178-79.

Although Kilgore involved excluding relevant evidence, and this case involves excluding cumulative and unfairly prejudicial evidence, the analysis in *Kilgore* demonstrates introducing cumulative evidence in the absence of physical evidence and testifying that this absence of physical evidence did not establish a lack of physical abuse can be prejudicial.

Similar to *Kilgore*, S.S.'s credibility was a central issue.

Admitting S.S.'s hearsay statements through Clinton lent credibility to S.S.'s statements. Clinton's testimony that it was common to not have physical findings in child sex abuse cases allowed the jury to simply believe Clinton's narrative which was not S.S.'s story, but rather a series of questions S.S. could answer without telling her story.

Failing to object to the leading questions in the medical examination bolstered S.S.'s credibility just as the nurse practitioner's testimony bolstered C.M.'s credibility by testifying the finding was consistent with what C.M. told her. *Kilgore*, 107 Wn. App. at 178-79.

Defense counsel is ineffective when he fails to object to inadmissible and prejudicial evidence. See *State v. Dawkins*, 71 Wn. App. 902, 907-10, 863 P.2d 124 (1993) (defense counsel ineffective for failing to object to "lustful disposition" evidence the court would have otherwise excluded).

Admitting S.S.'s hearsay statements through Clinton prejudiced Counts because Clinton's testimony explaining the absence of physical evidence served to aid the jury in weighing S.S.'s credibility, just as the nurse practitioner's testimony did in

Kilgore. Defense counsel was therefore ineffective because the trial court would likely have suppressed Clinton's testimony under ER 403. *Kilgore*, 107 Wn. App. at 178-79.

b. Counts was prejudiced by defense counsel's failure to timely interview the State's expert prior to trial and failure to call an expert for the defense.

Trial counsel did not interview the State's expert until after the trial had begun. Trial counsel also did not call its own expert. Trial counsel has a duty to investigate the case and to interview witnesses. *State v. Jones*, 183 Wn. 2d 327, 339, 352 P.3d 776 (2015) (citing *State v. Ray*, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991)). Failure to interview a particular witness may constitute deficient performance depending on the reason for the failure. *Jones*, 183 Wn. 2d at 340.

In *Jones*, 183 Wn. 2d at 340, defense counsel was ineffective because he failed to interview three eye witnesses with differing opinions on what they viewed. Specifically, defense counsel's failure to interview Lori Brown who witnessed a street fight between Jones and the victim, but who unlike the other witnesses never saw a weapon, and she did not hear a reference to a knife until the victim's three friends joined the fight. *Jones*, 183 Wn.2d at 333.

Trial counsel admitted that he would have changed his trial strategy if he had known of Brown's testimony before trial. *Jones*, 183 Wn.2d at 344. The Supreme Court held that failing to interview Brown was prejudicial because if defense counsel had known about her testimony before trial, he would have made it the centerpiece of his case and the focal point of cross-examination of other witnesses. This would have likely altered the outcome of the case because the jury might not have rejected Jones' self-defense claim. *Jones*, 183 Wn.2d at 343-45.

Here, as in *Jones*, defense counsel did not know what Clinton would testify to until after trial began. If counsel had interviewed Clinton prior to trial he would have known that Clinton asked leading questions, and known that an expert could have addressed the lack of reliability of asking children leading questions, which could have altered the outcome of the case. RP 9-11, 16-17. Defense counsel's failure to call an expert was not a trial strategy because a few days prior to trial defense counsel admitted that his decision to call an expert would depend on Clinton's testimony. RP 16-17.¹ Ultimately, Counts was

¹ . *Cf. State v. Willis*, 151 Wn. 2d 255, 262, 87 P.3d 1164 (2004) (Dr. Yuille's testimony on child interviewing techniques was properly excluded, but Supreme Court reiterated that it is not a categorical prohibition on such testimony. Instead, the

prejudiced by counsel's deficient performance. For this reason, this Court should reverse and remand for a new trial.

2. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED DEFENSE COUNSEL MOTION FOR A CONTINUANCE AND FORCED COUNSEL TO PROCEED TO TRIAL UNPREPARED.

A trial court's denial of a continuance is reviewed for abuse of discretion. *In re A.D.R.*, 185 Wn. App. 76, 85, 340 P.3d 252 (2014). The trial court abuses its discretion only where no reasonable person would take the view adopted by the trial court. *A.D.R.*, 185 Wn. App. at 85. In deciding a motion to continue, the trial court takes into account a number of factors, including diligence, due process, the need for an orderly procedure, the possible effect on the trial, and any prior continuances. *A.D.R.*, 185 Wn. App. at 85; *State v. Downing*, 151 Wn. 2d 265, 273, 87 P.3d 1169 (2004).

In *State v. Campbell*, 103 Wn. 2d 1, 14-15, 691 P.2d 929 (1984), the Supreme Court upheld the trial court's decision to grant a continuance requested by defense counsel over the defendant's

admissibility of expert testimony is governed by ER 702 and requires a case by case inquiry).

objection to ensure defense counsel could effectively represent the defendant. The trial court found that discovery would not be completed prior to trial and that defense counsel could not ensure the defendant would receive a fair trial. *Campbell*, 103 Wn.2d at 15.

Here, defense counsel stated on the record that he could not provide Mr. Counts an adequate defense if the trial proceeded as scheduled. RP 9-10. Defense counsel had recently interviewed Ms. Counts and discovered there were records he needed to obtain that could support Mr. Counts' defense. RP 8. In addition, defense counsel had not yet interviewed the State's expert, Susann Clinton and he did not know what her testimony would consist of and whether a rebuttal expert would be needed. The State did not object and in fact stated that it would not be prejudiced by a continuance. RP 9.

Because defense counsel was unable to interview Clinton prior to trial, he was unable to secure a rebuttal expert and he was unprepared to cross-examine Clinton. Given the seriousness of the crime, and defense counsel's lack of familiarity with the case, no reasonable judge would have denied Mr. Counts a continuance. Therefore, the trial court abused its discretion and Mr. Counts is entitled to a new trial.

E. CONCLUSION

Jeffrey Counts respectfully requests this Court reverse his conviction and remand for a new trial based on ineffective assistance of counsel and based on the trial court's abuse of discretion in denying counsel a needed continuance.

DATED this 26th day of March 2018.

Respectfully submitted,

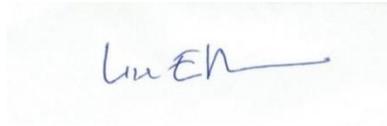


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I, Lise Ellner, a person over the age of 18 years of age, served the
Spokane County Prosecutor's Office
SCPAAppeals@spokanecounty.org and Jeffrey
Counts/DOC#400108, Coyote Ridge Corrections Center, PO Box
769, Connell, WA 99326 a true copy of the document to which this
certificate is affixed on March 26, 2018. Service was made by
electronically to the prosecutor and Jeffrey Counts by depositing in
the mails of the United States of America, properly stamped and
addressed.

A rectangular area containing a handwritten signature in blue ink. The signature appears to be "Lise Ellner" with a horizontal line extending to the right.

Signature

LAW OFFICES OF LISE ELLNER

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