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Court of Appeals  
Division I  
State of Washington

NO. 73850-0-I

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

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STATE OF WASHINGTON,

Respondent,

v.

DERRIUS FORCHA-WILLIAMS,

Appellant.

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

The Honorable Tanya Thorp, Judge

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BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENT OF ERROR</u> .....	1
<u>Issue Pertaining to Assignment of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
1. <u>Procedural History</u> .....	1
2. <u>Trial Testimony</u> .....	2
3. <u>Impeachment Evidence</u> .....	6
C. <u>ARGUMENT</u> .....	11
1. FORCHA-WILLIAMS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO FOLLOW THE PROCEDURE NECESSARY TO ALLOW IMPEACHMENT OF THE COMPLAINING WITNESS .....	11
a. <u>Defense counsel’s failure to lay necessary foundation for impeachment evidence constituted deficient performance.</u> ....	12
b. <u>Defense counsel’s failure to introduce impeachment evidence prejudiced Forcha-Williams.</u> .....	19
2. APPEAL COSTS SHOULD NOT BE IMPOSED.....	21
D. <u>CONCLUSION</u> .....	23

**TABLE OF AUTHORITIES**

	Page
<u>WASHINGTON CASES</u>	
<u>Staats v. Brown</u> 139 Wn.2d 757, 991 P.2d 615 (2000).....	22
<u>State v. Allen S.</u> 98 Wn. App. 452, 989 P.2d 1222 (1999) <u>review denied sub nom. State v. Swagerty</u> 140 Wn.2d 1022, 10 P.3d 405 (2000).....	13
<u>State v. Babich</u> 68 Wn. App. 438, 842 P.2d 1053 <u>rev. denied</u> , 121 Wn.2d 1015 (1993). ....	14
<u>State v. Blazina</u> 182 Wn.2d 827, 344 P.3d 680 (2015).....	22
<u>State v. Curtis</u> 110 Wn. App. 6, 37 P.3d 1274 (2002).....	13
<u>State v. Horton</u> 116 Wn. App. 909, 68 P.3d 1145 (2003).....	14, 15, 16, 19, 20, 22
<u>State v. Johnson</u> 90 Wn. App. 54, 950 P.2d 981 (1998).....	14
<u>State v. Nichols</u> 161 Wn.2d 1, 162 P.3d 1122 (2007).....	13
<u>State v. Peterson</u> 2 Wn. App. 464, 469 P.2d 980 (1970).....	20
<u>State v. Roberts</u> 25 Wn. App. 830, 611 P.2d 1297 (1980).....	20
<u>State v. Shaver</u> 116 Wn. App. 375, 65 P.3d 688 (2003).....	13

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Sinclair</u> 192 Wn. App. 380, 367 P.3d 612 (2016).....	22
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	12, 19, 22
<u>State v. Yarbrough</u> 151 Wn. App. 66, 210 P.3d 1029 (2009).....	12
 <u>FEDERAL CASES</u>	
<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	12
 <u>OTHER JURISDICTIONS</u>	
<u>Ellyson v. State</u> 603 N.E.2d 1369 (Ind. Ct. App. 1992)	
<u>Wright v. State</u> 581 N.E.2d 978 (Ind. Ct. App. 1991) .....	16
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
5A K. Tegland, Washington Practice: Evidence § 258 (1989).....	14
ER 607 .....	13
ER 613 .....	10, 13, 14, 15, 18
RAP 14.....	22
RAP 15.2.....	23
RCW 9.94A.507 .....	23

**TABLE OF AUTHORITIES (CONT'D)**

	Page
RCW 9.95.420 .....	23
RCW 10.73.160 .....	22
U.S. CONST. amend. VI.....	12
CONST. art. I, § 22 .....	12

A. ASSIGNMENT OF ERROR

Appellant was denied effective assistance of counsel when his attorney failed to follow the proper procedure necessary to allow impeachment of the complaining witness.

Issue Pertaining to Assignment of Error

Appellant sought to impeach the complaining witness with extrinsic evidence of her prior statements to police regarding her use of drugs and alcohol in the hours leading up to the alleged incident. The trial court denied appellant's request to present the impeachment evidence, finding that it was an improper use of extrinsic evidence. Defense counsel did not request the witness be recalled so proper foundation could be laid for impeachment purposes. Was defense counsel ineffective for failing to properly question the complaining witness so as to allow the introduction of the extrinsic impeachment evidence?

B. STATEMENT OF THE CASE

1. Procedural History

The King County prosecutor charged appellant Derrius Forcha-Williams with one count of first degree rape. CP 1-6. The State alleged that on December 3, 2012, Forcha-Williams engaged in sexual intercourse with P.C. by forcible compulsion. CP 1-6. On April 15, 2015, the State amended the information to add an additional charge of second degree

assault, alleging that Forcha-Williams recklessly inflicted substantial bodily harm upon P.C. CP 8-9; RP 46-47.

A jury declined to find Forcha-Williams guilty of either first degree rape or second degree assault. CP 92, 94; RP 890-91. The jury found guilty Forcha-Williams guilty of the lesser degree offense of second degree rape. CP 93; RP 891. The jury found Forcha-Williams not guilty of third degree assault. CP 95; RP 891.

The trial court imposed a standard range indeterminate sentence of 120 months to life. CP 97-108; RP 931-32. The trial court waived all non-mandatory legal financial obligations (LFOs). CP 99; RP 932. Forcha-Williams timely appeals. CP 110-22.

## 2. Trial Testimony

On the morning of December 3, 2012, P.C. walked into a Jack in the Box restaurant in Federal Way. RP 268-71, 285, 363. P.C. had blood on her face and her pants were unbuttoned. RP 197, 211, 247-48, 270-72, 301, 309. P.C. was crying but restaurant employees could not understand what she was saying. RP 273-74, 363. A restaurant employee took P.C. to the bathroom while another employee called 911. RP 272-73, 364, 405.

Police arrived at the restaurant and spoke with P.C. when she left the bathroom. RP 196, 247, 366, 405. P.C.'s clothes were wet and had blood on them. RP 197, 248. A cut above her right eye was bleeding.

P.C. had trouble speaking because of swelling around her mouth. RP 197, 211, 247-48. P.C. told police she had been hit in the face several times by a tall black man wearing a black jacket and pants. RP 200-02, 282.

Based on P.C.'s description, police stopped Forcha-Williams in a parking lot north of the restaurant. RP 202, 290-93, 305-08. Forcha-Williams had no blood on his clothes. RP 307, 311. Police saw no injuries on Forcha-Williams' hands. RP 309, 314.

P.C. was brought to the scene in an attempt to identify Forcha-Williams. RP 203, 294. From a distance of 75 to 100 feet away, P.C. initially identified Forcha-Williams as the person who hit her. RP 295, 307. P.C. asked to move closer toward Forcha-Williams however. From four to five yards away, P.C. looked at Forcha-Williams again and said he was not the person who hit her. RP 204-05, 249, 295, 307, 366-67. Nothing was blocking P.C.'s view and the lighting at the scene was bright "enough for her to be able to see the person well." RP 205-06.

Police released Forcha-Williams. RP 295, 307. Police found no physical evidence at the scene of the alleged incident. RP 299-302. Police were also unable to find any other witnesses who saw or heard anything at the time of the alleged incident. RP 226-27, 233, 296, 436-37.

Meanwhile, P.C. was taken to the hospital. RP 207, 367. The cut above P.C.'s eye did not require stitches. RP 580. Blood tests confirmed

P.C. had cocaine and marijuana in her system. RP 583, 597. No other drugs or alcohol were detected. RP 583-84. Because P.C. was not cooperative and her “judgmental capacity was impaired[,]” P.C. was sedated without her consent so a CT scan could be performed. RP 578, 580, 585-88. The CT scan showed displaced nasal bones. RP 589. P.C. had no brain injuries. RP 597. There were no injuries to P.C.’s throat that were consistent with strangulation. RP 499, 530, 541-42. P.C. was admitted to the hospital but no specific treatment was ordered as a result of testing. RP 370, 414, 589-90.

P.C. reported at the hospital that she had been sexually assaulted and requested a sexual assault evaluation. RP 209, 307, 370, 407, 447, 451-54, 517-20. P.C. told nurse Eileen Francisco that the alleged assault involved oral and vaginal penetration. RP 457. P.C. denied that drugs or alcohol were involved in the incident. RP 468, 496. The evaluation was completed 38 hours after the alleged incident. RP 483-84, 489, 530, 539. P.C. had showered in the interim. RP 470, 489, 543-44. The exam revealed no genital injuries. RP 477, 527, 542. Nurses collected vaginal swabs from P.C. RP 478, 531, 536-37.

Police concluded that spermatozoa found in P.C.’s vaginal swab matched Forcha-Williams’ DNA profile, and the match was not expected to occur more frequently than one in 3.4-sextillion. RP 615, 718, 726-27,

732, 735-36. As a result, police detained Forcha-Williams and brought him in for questioning. RP 549-50, 619, 623-24, 663. Forcha-Williams was cooperative. RP 565, 627. Forcha-Williams initially denied knowing P.C. RP 554, 628-29, 675-76, 679. After being assured by police that he was not being investigated for prostitution crimes, Forcha-Williams acknowledged paying P.C. for sexual contact. RP 555, 561, 628-29, 675-76, 679. Forcha-Williams observed injuries on P.C. but was uncertain how she received them. RP 555.

Forcha-Williams' encounter with P.C. started when she approached him and asked to use his cell phone. RP 323-26. Forcha-Williams agreed on the condition that P.C. buy a cigar for him. RP 323-27. Forcha-Williams gave P.C. five dollars to purchase the cigar and she went into a convenience store. RP 328-29, 388-89. P.C. gave the money back to Forcha-Williams explaining that the store was out of cigars, and asked again to use his phone. RP 329.

P.C. acknowledged she agreed to perform fellatio on Forcha-Williams for \$50 because she was homeless and would do "pretty much anything for money." RP 330, 392-93. P.C. maintained the exchange of money for sexual services was Forcha-Williams idea. RP 331, 393.

P.C. and Forcha-Williams walked to a parking area behind the convenience store. Upon arrival, P.C. told Forcha-Williams she was

having second thoughts about the agreed exchange and tried to walk away. RP 333-34, 339, 395. P.C. testified that Forcha-Williams then put her in a chokehold and told her he would break her neck if she did not do what she agreed to. RP 334, 339-41. Forcha-Williams pulled his penis out of his pants and pushed Forcha-Williams down. RP 344-46, 397. Forcha-Williams became upset when P.C. bit him and pushed her to the ground and took her pants off. RP 346-47, 350-51. Forcha-Williams and P.C. had vaginal intercourse. RP 354-55, 398. P.C. tried to push Forcha-Williams off but was unable. RP 348, 353. During the alleged encounter, P.C. was struck in the face and legs several times. RP 349, 400. P.C. was not certain whether Forcha-Williams used a condom or where he ejaculated. RP 356.

Forcha-Williams left after the encounter but returned a short time later. RP 347-48, 359-61. P.C. was then struck in the right eye. RP 360-62. After Forcha-Williams left again, P.C. put her pants on and went into the the Jack in the Box. RP 362-63.

### 3. Impeachment Evidence

Before trial, Forcha-Williams sought to admit P.C.'s recent drug and alcohol use. Defense counsel argued the recent drug use was relevant to P.C.'s ability to accurately perceive and remember the alleged incident. CP 15-16; RP 23-26, 29-30. Defense counsel explained that P.C.'s

toxicology reports from the hospital indicated she had amphetamine, cocaine, THC, and alcohol inside her body. RP 23. The State conceded P.C.'s recent drug use was relevant to P.C.'s "perception of the events and her memory of the events." RP 26-27. The trial court agreed and admitted evidence of P.C.'s use of intoxicants near the time of the alleged incident. RP 30.

At trial, P.C. acknowledged consuming methamphetamine, cocaine, and alcohol the day before the alleged incident. RP 319, 382-83, 409-10, 415. P.C. testified that she did not consume any intoxicating substances after 6 p.m. the evening the before the alleged incident. RP 409, 415. P.C. denied feeling the effects of the drugs at the time of the incident. RP 409.

P.C.'s trial testimony about her use of intoxicants was inconsistent with several statements that she made to Detective Krusey at the hospital the day of the incident. RP 602-04. While discussing the incident, Krusey asked P.C. if she was "intoxicated or impaired from using any kind of drug or alcohol." Ex. 53. P.C. told Krusey that "she had 'a few beers that morning.'" Ex. 53. P.C. also told Krusey "that she had recently used Oxycotin earlier that night and also took an unknown blue pill that was given to her by an unknown subject not involved in the sexual assault." Ex. 53.

During cross-examination at trial, defense counsel probed P.C.'s use of intoxicants in the hours before the alleged incident:

Counsel: Now do you remember being at the hospital and talking to a detective?

P.C.: No.

Counsel: At the hospital? You don't remember a Detective Krusey coming in and talking to you?

P.C.: Huh-uh. I remember three officers. I don't know if they were detectives. I know two of them had on uniforms, and I don't know what Lieutenant Robinson was wearing.

Counsel: So do you remember telling one of the officers that you had a few beers that morning?

P.C.: No, I don't remember.

Counsel: Do you remember telling one of the officers that you had had some Oxy that morning?

P.C.: I don't do Oxy.

Counsel: Do you remember telling one of the officers that you had taken a blue pill earlier that morning?

P.C.: No, I don't.

Counsel: Do you know what a blue pill would be?

P.C.: No. The only blue pill I know of is not for women.

RP 383-84.

Defense counsel did not attempt to refresh P.C.'s recollection with Krusey's statement or confront her with her prior inconsistent statements to Krusey.

Krusey testified two days after P.C. On cross, defense counsel attempted to question Krusey about P.C.'s statements to him regarding her use of drugs and alcohol:

Counsel: You asked her if she had any drugs or alcohol that morning?

Krusey: Yes, I did.

Counsel: And she had indicated that she had had a few beers that morning.

Krusey: Yes.

RP 648-49.

The State's objection to defense counsel's questions on the basis of hearsay was sustained. RP 649. Defense counsel requested a hearing outside the presence of the jury. RP 649.

Defense counsel argued his questions to Krusey were proper impeachment under ER 607 because P.C. either denied her statements to Krusey or claimed she did not have an independent memory of them. RP 650-51. Counsel maintained that his questions to P.C. afforded her an opportunity to answer questions about her use of drugs and alcohol. RP

651. Counsel noted that the questions about P.C.'s drug and alcohol use went to her credibility and bias, as well as, her ability to perceive events and relate them accurately. RP 651.

The prosecutor explained that she had replayed P.C.'s testimony and that P.C. never denied that she had made statements to Krusey, but rather, that she did not remember making them. RP 652-53. The prosecutor objected to the questions posed to Krusey as improper impeachment under ER 613 and hearsay. RP 652-53.

The trial court sustained the prosecutor's objection. RP 653. The trial court concluded defense counsel's questions to Krusey were improper extrinsic evidence under ER 613. RP 65051, 653-54. The court further concluded that if defense counsel was seeking to admit the questions as substantive evidence rather than impeachment, then there was no valid hearsay exception. RP 654-55.

The court explained its ruling as follows:

What I am saying is the – the testimony, as I recall it, is – is similar as Ms. Kaake [prosecutor] put on the record, that it wasn't 'Did you tell the officers you drank three beers?' It is 'Do you remember?' And her answer to that question – I mean it is – it may be technical, but it is important – to the extent that the question was calling as to whether or not she remembered. It wasn't a statement of 'did you tell them that or no?' ... there is nothing in front of me to show that this is more than a collateral matter of her inability to recall such that extrinsic evidence would be permitted for

impeachment much less the ability for it to be admitted into evidence still requires a hearsay exception.

RP 655-56.

Defense counsel never requested that P.C. be recalled as a witness so that proper foundation could be established for impeachment purposes as to her inconsistent statements.

C. ARGUMENT

1. FORCHA-WILLIAMS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO FOLLOW THE PROCEDURE NECESSARY TO ALLOW IMPEACHMENT OF THE COMPLAINING WITNESS

Defense counsel wanted to impeach P.C.'s credibility with her statement to police that she had consumed alcohol and oxycontin in the hours before the alleged incident. However, he inexplicably failed to follow the proper procedure for allowing introduction of this impeachment evidence. This amounted to ineffective assistance of counsel because it was entirely to Forcha-Williams' detriment. Reversal is required.

Every accused person enjoys the right to effective assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. 1, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) the attorney's performance was deficient and (2)

the deficiency prejudiced the accused. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Counsel's performance is deficient when it falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. If counsel's conduct demonstrates a legitimate trial strategy or tactic, it cannot serve as a basis for an ineffective assistance claim. Strickland, 466 U.S. at 689; State v. Yarbrough, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009).

Prejudice occurs when there is a reasonable probability that but for counsel's deficiency, the result would have been different. Thomas, 109 Wn.2d at 226. The accused "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Strickland, 466 U.S. at 693. A reasonable probability is one sufficient to undermine confidence in the outcome. Thomas, 109 Wn.2d at 226.

"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).

- a. Defense counsel's failure to lay necessary foundation for impeachment evidence constituted deficient performance.

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

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

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

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

statement, extrinsic evidence of the statement is admissible unless it concerns a collateral matter. Babich, 68 Wn. App. at 443.

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

Horton provides a useful analogy. There, Horton was accused of raping and molesting 13-year-old S.S. Horton, 116 Wn. App. at 911. A medical examination of S.S. revealed penetrating trauma to her hymen. Id. Before trial, S.S. told a child protective services (CPS) investigator she had been having sex with a boy. Id. at 913. Defense counsel also interviewed S.S.'s friend, who said S.S. bragged in detail about being sexually active with a boyfriend two years earlier. Id.

During cross-examination, S.S. denied having sex with anyone but Horton. Id. Defense counsel did not ask S.S. to explain or deny her inconsistent pretrial statements. Id. Nor did she ask for S.S. to remain in attendance after testifying. Id. Later, defense counsel attempted to call

the CPS investigator and S.S.'s friend to relate S.S.'s prior inconsistent statements about her sexual activity. Id. at 914. The court excluded this testimony because defense counsel failed to comply with ER 613(b). Id.

The appellate court held defense counsel's failure to comply with ER 613(b) amounted to ineffective assistance. Id. at 924. Counsel wanted to impeach S.S.'s trial testimony with extrinsic witnesses. Id. at 916. Before she could do that, though, ER 613(b) required her to give S.S. an opportunity to explain or deny her prior statements by calling them to S.S.'s attention on the stand, or by arranging for S.S. to remain in attendance after testifying. Id. Nothing in the record showed why counsel failed to do so. Id. Further:

The record shows that non-compliance with ER 613(b) was entirely to Horton's detriment; that compliance with ER 613(b) would have been only to his benefit; and thus that counsel's non-compliance could not have been a strategy or tactic designed to further his interests.

Id. at 916-17 (emphasis in original). The court held defense counsel's performance fell below an objective standard of reasonableness. Id. at 917.

Counsel's deficient performance prejudiced Horton. Id. at 922. When S.S. testified she had never had sex with anyone but Horton, she necessarily implied Horton was the cause of the penetrating trauma to her hymen. Id. Defense counsel could have defused the implication, at least

in part, by presenting evidence that S.S. made prior inconsistent statements to two different people about her sexual history. Id. “[T]he resulting void was extremely detrimental to Horton’s position at trial.” Id.

In reaching this conclusion, the Horton court discussed two Indiana cases where the courts reached the same result on similar facts. Id. at 922-23 (citing Ellyson v. State, 603 N.E.2d 1369 (Ind. Ct. App. 1992); Wright v. State, 581 N.E.2d 978 (Ind. Ct. App. 1991)).

For instance, Ellyson was charged with raping his estranged wife and burglarizing her home. Ellyson, 603 N.E.2d at 1371-72. Defense counsel tried, but failed, to introduce the wife’s prior inconsistent statements at trial, as well as a rape kit tending to show she did not have intercourse on the night of the alleged rape. Id. at 1372-74. The appellate court held counsel was ineffective because he failed to produce the witnesses necessary to authenticate the rape kit and failed to lay the proper foundation for the wife’s prior inconsistent statements. Id. at 1373-74.

Likewise, in Wright, defense counsel “blundered” by failing to lay the proper foundation for testimony that would impeach the complaining witness. 581 N.E.2d at 980. The appellate court held this constituted ineffective assistance because it “resulted in relevant and probative evidence not being admitted.” Id. This, in turn, “undermine[d] the confidence in the verdict.” Id.

These cases demonstrate that defense counsel's performance falls below an objective standard of reasonableness when he seeks to admit relevant impeachment evidence but fails to take the necessary procedural steps for admission. This is precisely what happened here.

P.C. outright denied that ever she used oxycontin. RP 384. She did not remember telling Krusey that she had "had a few beers that morning." RP 383-84; Ex. 53. Contrary to P.C.'s trial testimony however, Krusey's written report makes clear that she acknowledged using both of these substances near the time of the alleged incident. Ex. 53. Defense counsel wanted to impeach P.C.'s testimony with this evidence because it directly contradicted her testimony that she stopped using intoxicating substances about 13 hours before the alleged incident, and cast doubt on her credibility. RP 409, 415. On cross, defense counsel asked P.C.:

Do you remember telling one of the officers that you had had some Oxy that morning?

RP 384. She responded, "I don't do Oxy." RP 384. P.C.'s statement to Krusey demonstrated this statement was false, making it admissible under ER 613(b).

Similarly, although P.C. testified that she did not remember telling Krusey about her alcohol use on the morning of the incident, under ER

612<sup>1</sup> defense counsel could have used Krusey's written report to refresh P.C.'s memory. If P.C. recalled the statement about alcohol use, and was given an opportunity to explain or deny it, this statement was also admissible under ER 613(b).

Counsel intended to have Krusey testify about the statements P.C. made to him about her use of oxycontin and alcohol. Before counsel could do that, he had to refresh P.C.'s recollection with the statements and give her an opportunity to admit, deny, or explain those pretrial statements by calling them to P.C.'s attention while she was on the stand, or by arranging for P.C. to remain in attendance after testifying. Counsel did neither, and so P.C.'s false statements were never contradicted.

Nothing in the record shows defense counsel's failure to follow the proper procedure necessary to permit impeachment of P.C. with her prior inconsistent statements was a strategic decision. The presumption of competence does not apply when defense counsel clearly wanted to introduce certain evidence but blundered in doing so. See Horton, 116 Wn. App. at 916-17. For instance, in Thomas, counsel failed to conduct

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<sup>1</sup> The rule provides in relevant part: "If a witness uses a writing to refresh memory for the purpose of testifying, either: while testifying, or before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness."

any investigation into a defense expert's complete lack of qualifications. 109 Wn.2d at 230. The trial court refused to allow the "expert" to testify and no other expert was called. Id. at 229. Given that an expert's testimony was important for establishing a voluntary intoxication defense, counsel's failure to investigate or call another witness constituted ineffective assistance. Id. at 230-32.

Similar to Thomas, defense counsel clearly wanted to introduce P.C.'s drug and alcohol use in the hours before the alleged incident but he failed to take the necessary steps to ensure its admission.

Like in Horton, defense counsel's inexplicable failure to take the necessary procedural steps for admission "could not have been a strategy or tactic designed to further his interests." Horton, 116 Wn. App. at 916. Because defense counsel could have impeached P.C.'s testimony had he followed the proper procedure, his failure to do so constitutes deficient performance.

b. Defense counsel's failure to introduce impeachment evidence prejudiced Forcha-Williams.

Counsel's deficient performance prejudiced Forcha-Williams. The opportunity to challenge the credibility of an accuser "is of great importance," particularly when the charged crime is a sex offense. State v. Roberts, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980). "In the

prosecution of sex crimes, the right of cross-examination often determines the outcome.” Id. This is so because, “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’[s] testimony.” State v. Peterson, 2 Wn. App. 464, 467, 469 P.2d 980 (1970).

The credibility of P.C. as to whether the sexual contact was consensual was the central issue in the case. She was the only testifying witness to the alleged incident. Her own identification of Forcha-Williams was extremely inconsistent. Within mere minutes of the alleged incident she could not identify Forcha-Williams as the perpetrator when he was brought to the scene by police. RP 204-05, 249, 295, 307, 367, 379. These facts demonstrated P.C.’s inability to recall details of the event.

The jury also questioned the credibility of P.C.’s testimony as to other details as evidenced by its not guilty verdict on the third degree assault charge and inability to reach verdicts on the remaining assault charges. CP 92-94; RP 890-91. Thus, any evidence capable of impeaching P.C.’s credibility and contradicting her version of events surrounding the alleged incident was of crucial importance.

P.C.'s statements to Krusey about her drug and alcohol use in the hours preceding the incident demonstrate P.C. was lying. She testified that she did not use oxycontin and testified that her use of drugs and alcohol ended about 13 hours before the incident. Her statements to Krusey refuted that testimony. This called into question P.C.'s entire story. If P.C. was lying about her drug and alcohol use, what else was she lying about?

The defense needed the opportunity to undermine P.C.'s credibility by demonstrating she made false statements on the stand about her drug and alcohol use in the hours before the incident. But this opportunity was lost because defense counsel failed to follow the proper procedure for allowing introduction of this impeachment evidence. There is a significant probability the outcome of the trial would have been different had that evidence been admitted. This Court should reverse and remand for a new trial because Forcha-Williams was denied effective assistance of counsel. Thomas, 109 Wn.2d at 232; Horton, 116 Wn. App. at 924.

2. APPEAL COSTS SHOULD NOT BE IMPOSED.

If Forcha-Williams does not substantially prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. RCW 10.73.160(1) provides that appellate courts “may require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a

permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). This Court has ample discretion to deny the State’s request for appellate costs. State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612, 615-18 (2016) (exercising discretion and denying State’s request for appellate costs).

The trial court made no finding of Forcha-Williams’ ability to pay, instead waiving all discretionary legal financial obligations. RP 932; CP 99; see also State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). The trial court did, however, find Forcha-Williams to be indigent and unable to pay for appellate review expenses. Supp. CP \_\_\_\_ (sub no. 116, Order of Indigency, dated 8/11/15). Forcha-Williams reported zero income, assets, or savings. Supp. CP \_\_\_\_ (sub no. 117, Motion for Order of Indigency, dated 8/11/15). The court imposed an indeterminate sentence with a 120-month minimum term and a maximum term of life.<sup>2</sup> CP 97-108; RP 931-32; RCW 9.94A.507.

Further, there has been no order finding Forcha-Williams’ financial condition has improved or is likely to improve. RAP 15.2(f) specifies “[t]he appellate court will give a party the benefits of an order of

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<sup>2</sup> An indeterminate sentence means Forcha-Williams may be incarcerated for his entire life if the Indeterminate Sentence Review Board determines, despite conditions of community custody, “it is more likely than not that the offender will commit sex offenses if released.” RCW 9.95.420(3)(a).

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 must therefore presume Forcha-Williams remains indigent and give him the benefits of that indigency. RAP 15.2(f). For all these reasons, this Court should not assess appellate costs against Forcha-Williams in the event he does not substantially prevail on appeal.

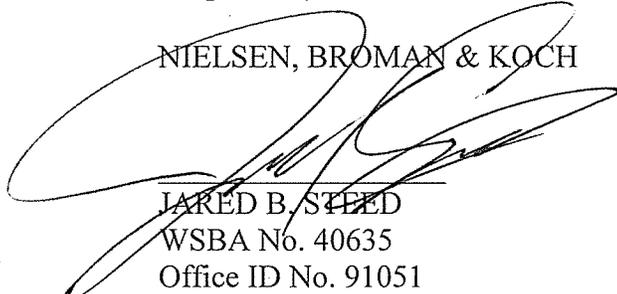
D. CONCLUSION

For the reasons discussed above, this Court should reverse Forcha-Williams' conviction and remand for a new trial. This Court should also exercise its discretion and deny appellate costs.

DATED this 25<sup>th</sup> day of July, 2016.

Respectfully submitted,

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