69508-8

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NO. 69508-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JON DEL DUCA,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LORI K. SMITH

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

A. ISSUE PRESENTED 1

B. STATEMENT OF THE CASE 1

1. PROCEDURAL FACTS 1

2. SUBSTANTIVE FACTS 2

C. ARGUMENT 4

DEL DUCA WAS NOT DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL 4

a. Counsel's Performance Was Not Deficient 8

b. Del Duca Was Not Prejudiced by His Attorney's Performance 14

D. CONCLUSION 17

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) 5

Washington State:

State v. Adams, 91 Wn.2d 86,
586 P.2d 1168 (1978) 6

State v. Fankhouser, 133 Wn. App. 689,
138 P.3d 140 (2006) 10

State v. Grier, 171 Wn.2d 17,
246 P.3d 1260 (2011) 6, 9

State v. Hernandez, 53 Wn. App. 702,
770 P.2d 642 (1989) 5

State v. Horton, 116 Wn. App. 909,
68 P.3d 1145 (2003) 7, 12, 13

State v. Jeffries, 105 Wn.2d 398,
717 P.2d 722 (1986) 5

State v. Lord, 117 Wn.2d 829,
822 P.2d 177 (1991) 5, 6

State v. Thomas, 109 Wn.2d 222,
743 P.2d 816 (1987) 5, 6

Constitutional Provisions

Federal:

U.S. Const. amend. VI 5

Rules and Regulations

Washington State:

ER 613 ..... 6, 12

Other Authorities

5A KARL B. TEGLAND, WASHINGTON PRACTICE:
EVIDENCE LAW AND PRACTICE (4th ed. 1999) 10, 11

A. ISSUE PRESENTED

To prevail on a claim of ineffective assistance of counsel, a criminal defendant must demonstrate deficient performance and prejudice. Del Duca's lawyer made reasonable strategic choices about how to cross-examine a ten-year-old girl alleging that his client had molested her. Although the trial court later refused to admit two prior inconsistent statements of the victim, Del Duca has not shown that his attorney could not have recalled the victim to perfect the impeachment if he wished, or that the extrinsic impeachment evidence was otherwise admissible. Moreover, he has not met his burden of demonstrating prejudice, when he has not shown that his attorney could have laid a foundation for the impeachment evidence without further damaging his case, and where substantial impeachment evidence was already in the record. Must Del Duca's claim of ineffective assistance of counsel be rejected?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On March 9, 2011, the State of Washington charged the defendant, Jon Del Duca, with two counts of Child Molestation in the First Degree. CP 1-2. Count I alleged that Del Duca had sexual contact with KS, an eight-year-old girl, in the late summer of 2010; count II alleged sexual contact during the same period with CS, KS's four-year-old brother.

CP 1-2. The matter proceeded to trial before the Honorable Lori K. Smith on August 16, 2012. 5RP.[1] Prior to trial, defense counsel recorded investigatory interviews with KS and CS. CP 84-103 (transcript of CS's interview); CP 104-34 (transcript of KS's interview). The jury found Del Duca guilty as charged with respect to count I, but acquitted him on count II. CP 161-62. The trial court sentenced Del Duca to an indeterminate term of 68 months to life, a standard range sentence. CP 192-202. This appeal timely followed. CP 190-91.

2. SUBSTANTIVE FACTS

In 2010, four-year-old CS and his sister, eight-year-old KS, lived with their parents, John and Cheryl Strojan,[2] on the shore of Trout Lake in Auburn, Washington. 9RP 133-40, 164-65. That summer, their next-door neighbor, an elderly man named Daniel Andrews, hired Del Duca to do some work on his property. 9RP 141-42, 176-77. Specifically, Del Duca was repairing a concrete dock. 9RP 142, 176. The work took several days to a week and a half to complete. 9RP 144, 181; 10RP 51. The Strojans were familiar with Del Duca from several years prior when he lived in the

[1] The sixteen volumes of the Verbatim Report of Proceedings are referred to as follows: 1RP is November 16, 2011; 2RP is April 27, 2012; 3RP is May 4, 2012; 4RP is June 21, 2012; 5RP is August 16, 2012; 6RP is August 20, 2012; 7RP is August 21, 2012; 8RP is August 22, 2012; 9RP is August 23, 2012; 10RP is August 28, 2012; 11RP is August 29, 2012; 12RP is August 30, 2012; 13RP is September 11, 2012; 14RP is September 20, 2012; 15RP is October 9, 2012; and 16RP is October 19, 2012.

[2] Because their last names are the same, this brief will refer to John and Cheryl Strojan by their first names.

area, although they were not particularly friendly with him. 9RP 142-43, 160-61, 177, 198-99.

While Del Duca was working on the dock, KS and CS were interested in the goings-on next door. 9RP 179. John was elsewhere, engaged in house projects or working in the garage. 9RP 181; 10RP 42-43. One day while KS was watching Del Duca work from the fence separating the two properties, Del Duca approached her and touched her vaginal and breast areas over her clothes.[3] 9RP 86-93; 10RP 40-42. He asked KS, "Do you like that?" 9RP 93. She said she did not. 9RP 93. He also told her not to tell her parents. 9RP 94-95.

Nonetheless, later that day, KS reported the touching to her mother. 9RP 94-95, 145; 10RP 43. She demonstrated for Cheryl the way that Del Duca had touched her. 9RP 145. Cheryl told KS to tell her father. 9RP 95, 146. She did. 9RP 95, 147, 181-83, 195; 10RP 44. John told his neighbor, who told Del Duca to stop working. 9RP 186, 197; 10RP 111.

Either that day or the next, Del Duca stopped by the house and spoke with John. 9RP 148-49, 187-88; 10RP 46. John confronted him about touching his children; Del Duca denied doing so, but hung his head

[3] Because Del Duca was acquitted of molesting CS, this statement of facts will not review the allegations supporting that charge in any detail.

and wouldn't look at him. 9RP 149, 158, 187-88. After an angry exchange, Del Duca left. 9RP 150-51, 188.

Some time later, in October 2010, John ran into Del Duca at a local store. 9RP 151, 189. John called the police, and followed Del Duca in his car. 9RP 126-28, 151, 190; 10RP 77. Del Duca tried to get away, drove down a dead end, and ended up backing into John's car, breaking the windshield. 9RP 151-52, 190; 10RP 46-47, 56.

C. ARGUMENT

DEL DUCA WAS NOT DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL

Del Duca contends that his trial attorney's failures to lay the foundation to impeach KS with a prior inconsistent statement denied him the effective representation of counsel. But counsel made a strategic decision regarding the manner of cross-examining KS, a young child. Further, Del Duca cannot show that his attorney was precluded from recalling KS to perfect the impeachment, instead of making a reasoned choice not to do so. And, with respect to at least one statement, impeachment with an extrinsic statement would have been improper in any event. Finally, Del Duca cannot prove that he was prejudiced, because he cannot show that a proper foundation could have been laid

without additional damaging testimony having come out, and because there was significant other impeaching evidence in the record.

A defendant claiming ineffective assistance of counsel must demonstrate (1) that his counsel's performance was so deficient that he was not functioning as the "counsel" guaranteed by the Sixth Amendment, and (2) that the defendant was prejudiced by reason of his attorney's actions, such that the defendant was deprived of a fair hearing. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also State v. Jeffries, 105 Wn.2d 398, 417-18, 717 P.2d 722 (1986) (adopting the Strickland standard in Washington). There is a strong presumption that counsel's representation was effective. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). The presumption of effectiveness will be overcome only by a clear showing of ineffectiveness derived from the record as a whole. State v. Hernandez, 53 Wn. App. 702, 708, 770 P.2d 642 (1989).

Counsel is deficient if his "representation fell below an objective standard of reasonableness based on consideration of all of the circumstances." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Examination of counsel's performance is highly deferential, and courts must indulge in a strong presumption of reasonableness. Id. If the trial conduct complained of can be characterized as legitimate strategy or

tactics, that performance is not deficient. State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011); State v. Adams, 91 Wn.2d 86, 586 P.2d 1168 (1978). And, attorney performance must be evaluated from counsel's perspective at the time, without the distorting effects of hindsight. Grier, 171 Wn.2d at 34.

Prejudice results when it is reasonably probable that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." Lord, 117 Wn.2d at 883-84. A reasonable probability is one that undermines confidence in the outcome of the trial. Thomas, 109 Wn.2d at 226. The defendant bears the heavy burden of proving both deficient performance and prejudice. Grier, 171 Wn.2d at 32-34. Here, Del Duca has failed to prove either prong.

Del Duca's claim of ineffective assistance of counsel is predicated on his lawyer's failure to lay the proper foundation to impeach KS with two prior inconsistent statements. A testifying witness may be impeached with extrinsic evidence of a prior inconsistent statement only if the witness is afforded an opportunity to explain or deny making the statement, "or the interests of justice otherwise require." ER 613(b). Under this rule, the witness must typically be afforded an opportunity to explain the inconsistent statement, but that opportunity need not occur before the inconsistent statement is introduced, so long as the witness is still

available. State v. Horton, 116 Wn. App. 909, 914-16, 68 P.3d 1145 (2003).

Del Duca identifies two instances in which he was precluded from impeaching KS with a prior inconsistent statement because his lawyer failed to confront KS with the statement during her testimony.[4] First, KS testified on cross-examination that Del Duca never jumped in the lake, although he would go to the end of the dock and watch her while she swam. 10RP 55. This statement was inconsistent with a statement KS made to the defense investigator that she and CS "wanted to go outside and jump in the lake and stuff. But he [Del Duca] would jump in too, and he would like follow us wherever we went." CP 123. The trial court refused to admit extrinsic evidence of this statement. 10RP 88, 96.

Second, KS testified on direct that Del Duca had only touched her one time. 10RP 40-41. This was arguably inconsistent with two prior statements made by KS during the defense interview: one describing what she did "the first time it [the touching] happened," CP 117, implying that there was more than one time, and one asserting that Del Duca "just kept on doing it on a daily basis," without any clarification of what "it" was.

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[4] There was a third prior inconsistent statement also excluded by the court on the same basis. That statement related to the number of times that KS saw Del Duca touch her brother CS. Compare 10RP 54-55 with CP 29-30; 10RP 97-99. Del Duca does not discuss these inconsistent statements in his brief, so this brief will not address them further. Del Duca was acquitted with respect to the count involving CS. CP 162.

CP 126. The trial court excluded only the "daily basis" statement. 10RP 96, 99-100. The court ruled that the "first time" statement was admissible impeachment, but defense counsel elected not to offer it. 10RP 96, 99-100.

Although the court ruled that he could not admit extrinsic evidence of two of KS's prior inconsistent statements, Del Duca was not deprived of the effective assistance of counsel. He has failed to demonstrate either that counsel's performance was deficient or that he was prejudiced by counsel's errors, if any.

a. Counsel's Performance Was Not Deficient.

Looking first at the requirement of deficient performance, Del Duca has failed to show that his attorney's conduct at trial was unreasonable. Counsel chose to question KS gently and briefly. 10RP 50-57; CP 212. This was a reasonable strategy, given that KS had turned ten only two days before her testimony. 10RP 31. Further, he used his cross-examination of KS to establish some facts that Del Duca would later testify to, enhancing his client's credibility (10RP 53), to discredit CS's claim that he had witnessed Del Duca molest KS (10RP 53-54), and to show that CS had been present when KS reported to her father (10RP 54-55), which tended to support a defense argument that CS was merely copying his sister instead of accurately reporting abuse (11RP 51).

During cross-examination, counsel asked KS whether Del Duca had ever followed her into the lake; when she said he had never done so, he did not confront her with her prior inconsistent statement that he had. 10RP 55; CP 123. This was a reasonable strategic choice. As counsel himself explained, in dealing with a child witness, he had to tread lightly to avoid alienating the jury. 10RP 87. Further, he recognized that his impeachment with a transcript was likely to be even less successful than the prosecutor's strategy of refreshing the witness's recollection, because the prosecutor had a videotape of KS, while he only had a transcript of his interview.[5] 10RP 87. Indeed, he was concerned about his ability to confront KS with her prior inconsistent statement, because he didn't know her reading level,[6] whether she would understand what a transcript was, or whether she would recognize the transcript itself.[7] 10RP 87.

Additionally, once the court ruled that counsel could not admit the extrinsic evidence, counsel could have tried to recall KS in order to give her the opportunity to explain or deny the statement. Although KS had

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[5] The prosecutor's strategy was notably unsuccessful. E.g., 10RP 47-48.

[6] KS testified that she struggled with reading. 10RP 36-37.

[7] Later, counsel reflected on his method of cross-examining KS, and suggested that the court's exclusion of extrinsic evidence of KS's prior inconsistent statement meant that defense attorneys had to more aggressively confront child witnesses. 10RP 98. But post hoc reconsideration of the strategic choice about how to handle an adverse witness is not the lens through which counsel's performance is viewed in the context of an ineffective assistance of counsel claim. Grier, 171 Wn.2d at 34.

been excused, counsel was not asked whether he agreed that she could be released from her subpoena. 10RP 57. And, as KS had left the courtroom less than three hours prior (CP 212-13), there is no reason to believe that she could not have been brought back to court within a short period of time had counsel but asked. That he did not ask, when he was aware that a witness could be confronted with the prior inconsistent statement even after the statement had already been admitted (10RP 93-96), suggests that the choice was a tactical one. See 10RP 87 (noting that, in "dealing with child witnesses," defense "is hampered" and has to be concerned with "alienating the jury").

Moreover, even if KS had been confronted with her prior inconsistent statement about Del Duca following her into the lake, admitting extrinsic evidence to impeach KS's denial would have been improper. It is arguably collateral, and extrinsic evidence is not admissible as impeachment on a collateral matter. 5A KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 613.9, at 489 (4th ed. 1999); State v. Fankhouser, 133 Wn. App. 689, 693, 138 P.3d 140 (2006) ("An issue is collateral if it is not admissible independently of the impeachment purpose."). Additionally, counsel is not permitted to open a topic on which the witness has not testified to ask a witness whether she made a prior statement solely for the purpose of introducing the statement

"under the guise of impeachment." 5A TEGLAND, WASHINGTON PRACTICE § 613.4, at 483 ("Occasionally counsel has a potentially damaging statement at hand, but the witness has not yet given any testimony that is contrary to the statement. In this situation, the courts do not allow counsel to ask the witness whether the witness made the prior statement and then, upon denial, to introduce the statement into evidence under the guise of impeachment.").

With respect to the court's exclusion of extrinsic evidence that KS had discussed in her defense interview that Del Duca "just kept on doing it on a daily basis" (CP 126), counsel was likewise not deficient for failing to lay a proper foundation. Unlike the question with respect to whether Del Duca ever followed KS into the lake, counsel did not address the issue of how many times his client molested KS—or CS—at all. 10RP 26-29, 50-57. This can hardly be characterized as deficient performance. After all, eliciting testimony that Del Duca had sexual contact with a four-year-old and an eight-year-old on multiple occasions was unlikely to redound to his client's benefit. Indeed, the fact that counsel was permitted to elicit almost identical impeachment testimony—that KS had described "the first time" the touching happened, implying that there were additional times—

but chose not to do so, demonstrates the strategic nature of the choice.[8] See 10RP 99-100. And, as with the prior inconsistent statement regarding jumping in the lake, there is no showing that counsel could not have put KS back on the stand to allow her the opportunity to explain or deny the statement.

Del Duca's reliance on State v. Horton, supra, is misplaced. In that case, the Court of Appeals reversed convictions of Rape of a Child and Child Molestation for ineffective assistance of counsel, where extrinsic evidence of prior inconsistent statements was excluded because counsel failed to comply with ER 613(b) by offering the complaining witness an opportunity to explain or deny them. 116 Wn. App. 909. Although on its surface Horton appears to be similar to the case at bar, in fact it is easily distinguished.

Horton does not stand for the proposition that failure to comply with ER 613(b), by itself, constitutes deficient performance. To the contrary, the case itself explicitly states that whether failure to comply with the rule constitutes deficient performance "depends on the particular facts and circumstances of each case." Id. at 920 n.35. In Horton, the defense attorney sought to offer statements made by the complainant to

[8] Moreover, KS told the child interviewer that Del Duca had touched her two or three times. 9RP 86. It would have made little sense to highlight the allegation.

two others that she had engaged in sexual intercourse with a boy. Id. at 913-14. This evidence was critical, as it entirely explained away the only physical evidence in the case, a penetrating injury to the hymen of the thirteen-year-old complainant. Id. at 911. Further, there was nothing in the record that could explain the failure to confront the complainant on this issue as a tactical choice. Id. at 916-17.

Here, by contrast, Del Duca's lawyer discussed on the record the hazards of confronting a ten-year-old witness, and the reality of those hazards was made plain when the prosecutor attempted to impeach her. 10RP 47-48, 87. And, as discussed further below, the impeaching evidence at issue was not central to the case, as it was in Horton, and there was ample other impeachment evidence admitted and exploited by the defense. Horton should not control the outcome of this case.

In short, Del Duca's lawyer made reasonable strategic choices about how to defend him from allegations that he had sexually assaulted two young children. Looking at the record as a whole, as this Court must, it is evident that counsel made considered choices about how to cross-examine a sympathetic boy and girl in a way that advanced his client's cause without alienating the jury. That counsel was not completely successful does not render these choices either unreasonable or deficient. Del Duca's claim otherwise must be rejected.

b. Del Duca Was Not Prejudiced by His Attorney's Performance.

Not only has Del Duca failed to carry his burden of overcoming the strong presumption of reasonable performance on the part of his lawyer, but he has not met his burden of showing that he was prejudiced by any attorney missteps. First, as discussed above, in order to permit extrinsic evidence of KS's prior inconsistent statement, counsel had to give KS an opportunity to deny or explain that statement. Del Duca has not even attempted to demonstrate what would have occurred had he done so. Although the State does not argue that KS's statements at trial on the topics of Del Duca swimming in the lake and the number of times he had touched her were inconsistent with statements made in the defense interview, it would be pure guesswork to speculate about what KS may have said had she been given the opportunity to explain the inconsistencies. Indeed, given the way that she addressed similar issues raised on direct examination by the prosecutor, there is no evidence that such impeachment would have been to Del Duca's benefit. Compare 10RP 47-48.

Second, also as discussed above, Del Duca cannot possibly demonstrate that offering evidence—even for the limited purpose of impeachment—that he had molested the two children on multiple

occasions would have benefited him. To the contrary, its prejudicial value almost certainly would have substantially outweighed its marginal impeachment value.

Third, there was already significant evidence in the record impeaching KS's version of the events. For instance, KS's testimony and prior statements about how and when she reported the molestation to her parents were inconsistent with other evidence introduced at trial. Compare 9RP 95, 101 and 10RP 43 with 9RP 146-47, 159, 195 and 10RP 103-04. She told the child interviewer that CS had been right there when Del Duca touched her, and that CS had run away. 9RP 90, 93. At trial, she testified that CS was not there at all. 10RP 42, 51. KS told the child interviewer that she had been wearing flip flops, a tank top, and capris when the molestation occurred. 9RP 99. Her mother said she was wearing a bathing suit the whole day. 9RP 159. KS initially denied seeing Del Duca touch CS. 9RP 100. She later testified that she did. 10RP 54. And, KS claimed that Del Duca touched her one time and more than one time, allowing counsel to make any argument he wished about KS's credibility on this issue, even without the specific statement that he touched her "on a daily basis." 9RP 86, 94, 155; 10RP 40-41.

Additionally, counsel was able to show that KS had once claimed that Del Duca had jumped out of the bushes and covered her mouth with

his hands, although she did not recall that while testifying. Compare 10RP 103-04 with 10RP 55-56. The additional fact that KS had once said that Del Duca had followed her into the lake, in contrast to her statement at trial that he had followed her to the end of the dock and watched while she went into the lake, was of little moment in this context. CP 123; 10RP 55.

Fourth, to the extent that Del Duca wanted to admit KS's statement that he had jumped into the lake after her in order to argue that it was so bizarre that KS should not be believed at all, that detail was unlikely to make a difference. The child interview specialist, Carolyn Webster, testified that bizarre or fantastical elements were common in children's disclosures of abuse, even when children were telling the truth. 9RP 14. KS was impeached with a prior inconsistent statement in which she described a different bizarre and unlikely event, the claim that Del Duca had jumped out of the bushes, grabbed her, and covered her mouth with his hand. 10RP 103-04. And, she testified to another unlikely event on direct examination, explaining that Del Duca came onto the family property snooping around, and that her father had told her to hide on the floor while he got behind the refrigerator. 10RP 45. This testimony was not corroborated by either of KS's parents. Thus, defense counsel had ample evidence to advance such an argument in closing, as he did, but it was rejected by the jury. See 11RP 49-50. Del Duca cannot demonstrate

that an additional fact—admitted for impeachment, not as substantive evidence—would have so impacted the trial that its exclusion undermines confidence in the outcome of the trial.

In short, even if counsel's performance was deficient, Del Duca has not carried his burden of demonstrating prejudice. He cannot show what the evidence would have been had his attorney properly confronted KS with her prior inconsistent statements. There was ample impeachment evidence already in the record, and prior inconsistent statements that Del Duca had molested KS on more than one occasion were plainly more prejudicial to his cause than probative of KS's credibility. Del Duca's ineffective assistance of counsel claim must fail.

D. CONCLUSION

For all of the foregoing reasons, Del Duca's conviction should be affirmed.

DATED this 24th day of September, 2013.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jared B. Steed, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. JON DEL DUCA, Cause No. 69508-8-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 24th day of September, 2013

L Brame

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