SUPREME COURT NO. 90438-3

NO. 69508-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JON DEL DUCA,

Petitioner.

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

The Honorable Mary Roberts, Judge
The Honorable Lori K. Smith, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, Jon Del Duca, the appellant below, asks this Court to review the decision referred to in Section B.

B. COURT OF APPEALS DECISION

Del Duca requests review of the Court of Appeal's unpublished decision in State v. Del Duca, No. 69508-8-I entered on April 21, 2014.[1]

C. ISSUE PRESENTED FOR REVIEW

Del Duca sought to impeach a complaining witness with extrinsic evidence of his actions before the alleged incident. The trial court denied Del Duca's request to present impeachment evidence, finding that a proper foundation had not be laid on cross-examination. Defense counsel did not request the witness be recalled so a 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 extrinsic impeachment evidence, thereby losing a critical opportunity to challenge the complaining witness' credibility?

[1] The decision is attached as an appendix.

D. GROUNDS FOR REVIEW

Review should be granted under RAP 13.4(b)(2) because the Court of Appeals opinion conflicts with State v. Horton, 116 Wn. App. 909, 916, 68 P.3d 1145 (2003), and under RAP 13.4(b)(3), because whether Del Duca received ineffective assistance of counsel is a significant question of law under the Washington and United States constitutions.

E. RELEVANT FACTS[2]

The state charged Del Duca with first-degree child molestation based upon an alleged incident involving K.S.[3] CP 1-6. K.S. told her parents that Del Duca had touched her "potty" over her clothing. 9RP[4] 145, 159, 181, 184; 10RP 43-45.

K.S. later explained to a child interview specialist that Del Duca touched her in the "wrong spot." 9RP 85. She alleged Del Duca touched her two or three times outside of her clothing on the same day. 9RP 86-87, 90-91, 94. The incidents happened at the fence separating her yard from a neighbor. 9RP 87, 90. K.S. explained the touching started on her

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[2] Del Duca presented a more detailed statement of facts in his Brief of Appellant (BOA), at pages 1-14, which he incorporates herein by reference.

[3] The State also charged Del Duca with one count of first degree child molestation for an alleged incident involving K.S.'s brother, C.S. A jury found Del Duca not guilty of that count. CP 1-6, 161-62; 12RP 5-7.

[4] The index to the citations to the record is found in the BOA at 2, n.1.

chin, moved downward over her breast, and ended at her "potty." 9RP 87, 90. K.S. denied anyone had seen Del Duca touch her. 9RP 100. At trial, K.S. testified Del Duca touched her "vagina and my boobs" outside of her clothing. 10RP 42-43. Del Duca denied ever touching K.S. 10RP 119.

Before trial, a defense investigator interviewed K.S. regarding the alleged incidents with Del Duca. CP 84-134; 10RP 101-03. K.S. made several statements during the interview that were inconsistent with her trial testimony and interview with the child interview specialist. In particular, K.S. said Del Duca had touched her several times on different days. CP 117-18, 131.

During one incident, K.S. alleged Del Duca touched her after jumping out of a bush near her yard: "[T]hen Jon [Del Duca] pops out of the bush and then he started like touching me and [C.S.], and I just about screamed for my dad, and then he almost covered my mouth so where the point I couldn't breathe." CP 125. K.S. also told the defense investigator, when she went swimming in the lake, Del Duca would "jump in too" and "follow us wherever we went." CP 123.

During cross-examination at trial, defense counsel probed K.S.'s version of events:

> Counsel: Um, you remember when we met a – a while ago to talk about this?

K.S.: Yeah.

Counsel: And, um, did – did Jon [Del Duca] ever – you said sometimes you jump in the lake. Would he ever follow you, jump in the lake – follow you?

K.S.: No. He would never – he wouldn't jump in the lake, but he would get at the end of the dock and just watch me.

Counsel: Um, what about the bush? Did he ever jump out of a bush and put his hand over your mouth? Did – do you remember telling us that?

K.S.: No. I don't.

10RP 55-56.

The trial court excused K.S. after defense counsel finished his cross-examination. 10RP 57. After hearing testimony from a detective, the court took its lunch recess. When the parties returned from recess, defense counsel noted he intended to call the defense investigator as a witness for purposes of impeaching portions of K.S.'s trial testimony with inconsistent statements she made to the investigator. The prosecutor objected, arguing certain testimony from K.S. was not inconsistent, and "other portions the appropriate foundation has not been laid under ER 613(b)." 10RP 81-82.

Specifically, defense counsel sought to introduce K.S.'s statement about Del Duca jumping into the lake and "follow[ing] us wherever we

went," as inconsistent with K.S.'s trial testimony. 10RP 85-86. The prosecutor objected, arguing the statement was not inconsistent and that K.S. was never "actually confronted, um, with having made that statement in her defense interview." 10RP 85-87.

In response to the prosecutor's objections, defense counsel maintained he was permitted to impeach K.S.'s trial testimony with her inconsistent statement to the defense investigator. 10RP 87. Counsel noted K.S. was a child a witness, he was not certain as to K.S.'s reading level for purposes of showing her the earlier statements she made, and risked alienating the jury if he was too harsh with K.S. on cross-examination. 10RP 87. The prosecutor responded that ER 613(b) did not have a child witness exception. 10RP 87. The prosecutor further argued neither K.S.'s age, nor reading level, hampered defense counsel from asking her whether she remembered making specific statements to the investigator as opposed to showing K.S. specific statements. 10RP 88.

Counsel asked that K.S.'s cross-examination testimony be replayed in open court. 10RP 90. After playback, defense counsel maintained he laid a proper foundation during cross-examination to impeach K.S. with her inconsistent statement. 10RP 92-93.

The trial court noted there was no dispute that some of K.S.'s statements were inconsistent. 10RP 93. Rather, the issue was, "whether

under 613 you are required to ask the witness about the statement in order to be able to use the impeachment." 10RP 93. The court concluded a proper foundation had not been established to allow in K.S.'s statement about the jumping in the lake. 10RP 99-100. The court explained its ruling as follows:

> You didn't say to [K.S.] 'do you remember telling me that he jumped in the lake?' That's confronting [K.S.] with her prior inconsistent statement. Like you did whenever you asked [K.S.] about [Del Duca] hiding in the bush and covering her mouth. You asked her specifically, 'do you remember telling me that Jon hid in the bush and covered your mouth?' And [K.S.] said 'no.' That's confronting her with the fact that she said that statement, which is different than asking her if it happened.

10RP 97. The court likewise noted counsel did not lay a proper foundation for admission of K.S.'s inconsistent statement "simply as child hearsay." 10RP 96.

Summarizing its ruling, the trial court concluded the defense investigator could testify only as to K.S.'s inconsistent statements about Del Duca appearing from the bush, and her statement about "[T]he first time it happened." 10RP 99. Defense counsel said, "[T]he jumping out the bush statement I plan on going into. But, uh, the other one it's just, uh, um – I don't plan on asking." 10RP 100.

The defense investigator testified as to K.S.'s interview statement about Del Duca appearing from the bush and grabbing her. 10RP 103-04.

Defense counsel never requested that K.S. be recalled as a witness so a proper foundation could be laid for impeachment purposes as to the lake jumping statement.

On appeal, Del Duca argued defense counsel was ineffective for failing to properly question K.S. so as to allow the introduction of extrinsic impeachment evidence, thereby losing a critical opportunity to challenge K.S.'s credibility. BOA at 14-22. Relying on State v. Horton, 116 Wn. App. 909, 916, 68 P.3d 1145 (2003), Del Duca argued there was no legitimate reason for defense counsel not to properly question K.S. so as to allow introduction of her inconsistent statements. Rather, Del Duca argued counsel simply neglected to lay the proper foundation as required by ER 613(b). BOA at 14-22.

The State maintained defense counsel made reasonable strategic choices about how to question K.S. Brief of Respondent (BOR) at 4-13. The State further argued that Horton did not control and Del Duca was not prejudiced because other evidence impeached K.S.'s testimony and failure to question K.S. about the alleged lake incident did not affect the outcome of trial. BOR at 14-17.

The Court of Appeals concluded "it is clear" defense counsel wanted to impeach K.S. with her inconsistent statement about Del Duca following her into the lake but failed to lay the proper foundation for

doing so under ER 613(b). Appendix at 7. Nonetheless, the court concluded Del Duca was not prejudiced because the impeaching evidence did not directly undermine any critical evidence and was therefore unlike the circumstances in Horton. Appendix at 7-8.

F. ARGUMENT IN SUPPORT OF REVIEW

REVIEW SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS OPINION CONFLICTS WITH STATE V. HORTON AND BECAUSE WHETHER DEL DUCA RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IS A SIGNIFICANT QUESTION OF LAW UNDER THE WASHINGTON AND UNITED STATES CONSTITUTIONS.

The federal and Washington constitutions guarantee the right to effective assistance of counsel. U.S. Const. amend 6; Const. art. 1 § 22. A defendant is denied the right and is entitled to reversal of his convictions when his attorney's conduct (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a reasonable probability that the outcome would be different but for the attorney's conduct. State v. Doogan, 82 Wn. App. 185, 188-89, 917 P.2d 155 (1996) (citing Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The defendant "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 of the case. Strickland, 466 U.S. at 694.

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 an 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 an inconsistent statement is to ask the witness whether she made the 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 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 statement, extrinsic evidence 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. Horton, 116 Wn. App. at 916 (citing State v. Johnson, 90 Wn. App. 54, 70, 950 P.2d 981 (1998)). In order for counsel to admit extrinsic evidence of an 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.

Here, defense counsel wanted to impeach K.S.'s trial testimony regarding whether Del Duca followed her into the lake. Counsel intended to have his investigator testify that before trial K.S. alleged Del Duca would jump in the lake to follow K.S. wherever she went. Before counsel could do that, he had to give K.S. an opportunity to explain or deny those statements by calling them to K.S.'s attention while she was on the stand, or by arranging for K.S. to remain in attendance after testifying. Counsel did neither. Nor did he request that K.S. be recalled as a witness after the

trial court concluded he had not established a proper foundation for impeachment on cross-examination.

Counsel's failure to lay a proper foundation to impeach K.S. with the inconsistent statement fell below the standard expected for effective representation. Horton is on point and the Court of Appeals erred in concluding otherwise. Appendix at 7.

Horton was charged with child rape and molestation for incidents that occurred with S.S. over a three year period. Horton, 116 Wn. App. at 911. Before trial, S.S. disclosed to an investigator that she had been having intercourse with a boy. A defense investigator then interviewed S.S.'s friend who acknowledged S.S. had bragged about being sexually active with a former boyfriend two years earlier. S.S. described in detail to the friend the sexual activity she engaged in with the former boyfriend. Horton, 116 Wn. App. at 913.

A medical examination of S.S. revealed penetrating trauma to her hymen, which a doctor concluded was consistent with sexual abuse. S.S. told the doctor she had not been sexually active with anyone except Horton. Horton, 116 Wn. App. at 911.

During direct examination, S.S. denied she engaged in intercourse with anyone other than Horton. Defense counsel then asked S.S., "You told the prosecutor this morning that you had not engaged in sexual

intercourse with anyone other than Mr. Horton; correct?" After an intervening objection, S.S. answered: "No." Defense counsel did not ask S.S. to explain or deny her pretrial statements to the investigators, nor did she ask the court to have S.S. remain in attendance after testifying. Horton, 116 Wn. App. at 913.

Later, defense counsel attempted to call both investigators to relate S.S.'s statements about sexual activity with the former boyfriend. The State moved to exclude such testimony. The trial court denied defense counsel's request, finding she had not complied with ER 613(b). Horton, 116 Wn. App. at 914. Although Horton denied any sexual activity with S.S., a jury found him guilty as charged. Horton, 116 Wn. App. at 911-12.

On appeal, Horton argued his attorney was ineffective in failing to comply with ER 613(b). Horton, 116 Wn. App. at 910. The Court of Appeals noted that before counsel could impeach S.S. with her pretrial statements, counsel had to give S.S. an opportunity to explain or deny them by calling the statements to her attention while S.S. was testifying, or by arranging for S.S. to remain in attendance after testifying. Horton, 116 Wn. App. at 916.

The Court found 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 that counsel's non-compliance could not have been

a strategy or tactic designed to further his interests. Concluding an objectively reasonable attorney would have complied with ER 613(b) under the circumstances, the Court found defense counsel's performance fell below an objective standard of reasonableness. Horton, 116 Wn. App. at 916-17.

Like Horton, here counsel's failure to lay a proper impeachment foundation as required by ER 613(b) denied Del Duca effective representation. There was no legitimate reason for defense counsel not to properly question K.S. so as to allow introduction of her inconsistent statement. Counsel was aware of K.S.'s inconsistent statement and what was required to introduce that statement as evidenced by his ability to effectively impeach her with other inconsistent statements she made. Moreover, as evidenced by his original motion, counsel recognized the importance of impeaching K.S. with her inconsistent statement. Counsel simply neglected to lay the proper foundation as required by ER 613(b). See State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law); State v. Carter, 56 Wn. App. 217, 224, 783 P.2d 589 (1989) (counsel is presumed to know court rules). Such neglect constitutes deficient performance. Horton, 116 Wn. App. at 917.

Counsel's failure to lay a proper foundation was also prejudicial. The opportunity to challenge a witness's credibility is particularly critical

in two circumstances: (1) where a case rests essentially on the trier of fact believing or disbelieving the 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). The first circumstance needs no explanation. The reasoning behind the second was discussed in, State v. Peterson, 2 Wn. App. 464, 469 P.2d 980 (1970). For sex crimes, the opportunity to challenge credibility is particularly important because "owing to natural instincts and laudable sentiments on the part of the [trier of fact], the usual circumstances of isolation of the parties involved . . . and the understandable lack of objective corroborative evidence the defendant is often disproportionately at the mercy of the complaining witness' testimony." Peterson, 2 Wn. App. at 466-467.

The credibility of K.S. was the central issue in the case. K.S. and her brother were the only witnesses to the alleged incidents. There was no physical evidence of sexual contact. Del Duca denied any sexual contact with either child. Because of "natural instincts and laudable sentiments," the isolation of the parties, and the absence of determinative physical evidence, Del Duca was "at the mercy of the complaining witness' testimony." Peterson, 2 Wn. App. at 467. Therefore, it was particularly

critical that Del Duca be provided an opportunity to challenge K.S.'s credibility and her version of events.

In Horton, the court concluded there was a "reasonable probability" that the outcome would have been different absent defense counsel's errors. Horton, 116 Wn. App. at 922. The court noted S.S.'s denial of intercourse with anyone other than Horton necessarily implied Horton was the source of the "penetrating trauma" to her hymen. The Court noted defense counsel could have defused the implication by presenting evidence that S.S. had earlier made inconsistent statements to two people. When counsel failed to comply with ER 613(b), Horton lost that opportunity which was "extremely detrimental" to Horton's position at trial. Horton, 116 Wn. App. at 922-23 (citing Wright v. State, 581 N.E.2d 978 (Ind. App. 1991); Ellyson v. State, 603 N.E.2d 1369, (Ind. App. 1992)). Concluding Horton demonstrated both deficient performance and resulting prejudice, the Court found Horton was entitled to a new trial. Horton, 116 Wn. App. at 924.

Like Horton, the lost opportunity to impeach K.S. with her inconsistent statement was "extremely detrimental" to Del Duca's trial defense. The jury questioned the credibility of K.S.'s testimony that she saw Del Duca touch her brother, as evidenced by its not guilty verdict on the charge where he was the complaining witness. Thus, any evidence capable

of impeaching K.S.'s credibility and contradicting her version of events surrounding the alleged incident between her and Del Duca was of crucial importance. Had defense counsel laid proper foundation, the trial court would have permitted extrinsic evidence of K.S.'s inconsistent statement as it did with respect to other portions of her statements.

There is a reasonable probability the outcome would be different but for defense counsel's conduct. Del Duca's constitutional right to effective assistance counsel was violated. The constitutional error here was not harmless. The Court of Appeals decision to the contrary conflicts with Horton. RAP 13.4(b)(2). It also implicates a significant question of constitutional law. RAP 13.4(b)(3). This Court should accept review.

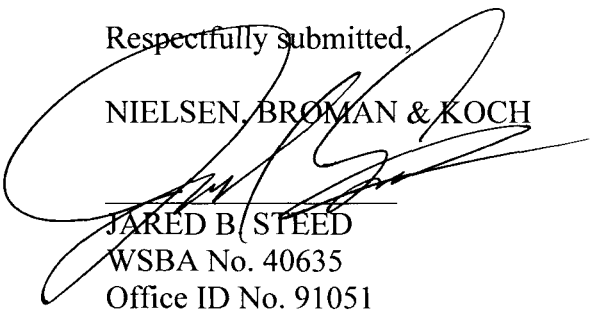
G. CONCLUSION

For the reasons stated above, appellant respectfully asks this Court to grant review.

DATED this 19th day of May, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JON A. DELDUCA,[1] Appellant.	No. 69508-8-I DIVISION ONE UNPUBLISHED OPINION FILED: April 21, 2014

BECKER, J. — Defending against a charge of child molestation, Jon Del Duca's trial counsel decided not to introduce evidence of the victim's prior statement suggesting several instances of sexual contact which was inconsistent with her trial testimony describing a single incident. This was neither deficient nor prejudicial. Counsel did intend to impeach the victim with a prior inconsistent statement about a different matter but failed to lay a proper foundation to allow admission of extrinsic evidence of the statement. Nevertheless, the record does not demonstrate that Del Duca was prejudiced. We affirm the conviction.

FACTS

For several days in August 2010, Jon Del Duca was working on Daniel Andrews's lakefront property helping to repair a concrete dock. Andrews lived

[1] We use the spelling of Del Duca's name adopted by the parties in the briefing and consistent with his signature.

next door to a couple and their two children, seven-year-old K and four-year-old C. Curious about the work Del Duca and Andrews were doing, K and C would occasionally stand by the waist-high fence separating the properties to watch.

When K's mother was helping her get ready for soccer practice one evening during this time, K told her mother that Del Duca had touched her. She demonstrated how Del Duca had reached over the fence, tickled her under her chin, reached for her armpit, then moved his hand over her clothing across her chest, abdomen, and finally between her legs. K's mother encouraged her to tell her father what had happened. The following day, K did so.

K's father talked to the neighbor, who in turn told Del Duca he could no longer work there. Del Duca approached K's parents to discuss the matter, and K's father confronted him. Del Duca denied touching the children and left the premises.

Approximately two months later, in October 2010, K's father encountered Del Duca at a neighborhood store. When Del Duca drove away from the store in his motorhome, K's father followed him and simultaneously called the police. Del Duca was eventually able to elude K's father, but the State later arrested and charged him with first degree child molestation based on the alleged sexual contact with K.[2]

[2] The State also charged Del Duca based on alleged similar sexual contact with K's brother C. The jury acquitted him on that count. We therefore refer to facts involving that count only insofar as they are relevant to the charge involving K.

Before trial, both a child interview specialist and defense counsel interviewed K. During her interview with the child interview specialist, K initially said Del Duca touched her "two or three times." Report of Proceedings at 86. But after describing the touching in detail, she said it only happened "that one time." Report of Proceedings at 94.

At trial, K described a single touching incident. In addition to K's testimony, the court admitted evidence of her disclosures to her parents and her statements to the child interview specialist.

Del Duca testified on his own behalf. He said he observed the children watching him work, reported briefly socializing with them several times during the course of the project, but denied touching them.

The jury convicted Del Duca of molesting K. The court imposed an indeterminate sentence with a minimum term of 68 months and a maximum term of life imprisonment. He appeals.

INEFFECTIVE ASSISTANCE OF COUNSEL

When defense counsel cross-examined K, he did not ask about the number of incidents that occurred nor about any inconsistent statements she had made about the number of times Del Duca touched her. However, during the presentation of its case, the defense sought to present the testimony of the defense investigator who could testify about K's statements during her interview with defense counsel. Specifically, the defense wanted to admit two statements about the number of times K was touched by Del Duca. The first was K's

statement to defense counsel that the "first time it happened" she told her parents, suggesting there were additional later occasions. Clerk's Papers at 117. The second was K's statement that the touching happened on a "daily basis." Clerk's Papers at 126.

The defense also sought to admit two prior statements about conduct K described only during the interview with defense counsel. During the interview, K said that when Del Duca was working next door, she and her brother "wanted to go outside and jump in the lake and stuff. But [Del Duca] would jump in too, and he would like follow us wherever we went." Clerk's Papers at 123. K also said that one time, Del Duca "pop[ped] out of the bush and then he started like touching me and [C], and I just about screamed for my dad, and then he almost like covered my mouth so where the point I couldn't breathe." Clerk's Papers at 125.

During cross-examination, defense counsel asked K whether she remembered talking to him before trial. Then, counsel asked K whether there was ever an occasion when Del Duca jumped in the lake and followed her when she was swimming. She said no. Counsel also asked K whether Del Duca ever jumped out of a bush and tried to cover her mouth, and whether she remembered saying that he did that. K also denied this.[3]

[3] K also said in the defense interview that her brother told her that Del Duca touched him about five or six times. Clerk's Papers at 133. But because K did not indicate at trial or in her interview with the child interview specialist any specific number of times she believed Del Duca touched her brother, there was no inconsistency.

The court ruled that only two of K's prior statements were admissible: her statement about the "first time it happened," and her statement about Del Duca jumping out from a bush. The out-of-court statements were otherwise inadmissible because K had not been confronted with them or given an opportunity to explain or deny making the inconsistent statements. In accordance with this ruling, the defense submitted, through its investigator's testimony, K's prior statement describing the bush incident. Counsel expressly declined to submit the evidence regarding K's statement about the "first time."[4]

Del Duca contends that he was deprived of effective representation of counsel. He points out that although counsel wanted to impeach K with evidence of several prior statements, he was largely unable to do so because he failed to follow the proper procedure under ER 613(b) to admit the evidence. Del Duca argues that counsel thereby lost a critical opportunity to challenge K's credibility.

To establish ineffective assistance of counsel, a defendant must show deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L .Ed. 2d 674 (1984). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705-06, 940 P.2d 1239

[4] It appears that the trial court determined that this statement was inconsistent with K's testimony that the touching happened once but did not actually rule that a proper foundation was laid to admit the statement under ER 613. Nevertheless, at the end of the colloquy when restating the court's ruling, the prosecutor twice stated that K's statement about the "first time" was admissible. The court did not correct the State's interpretation of the ruling. Defense counsel expressly informed the court that despite the determination of admissibility, he would not ask about K's reference to the "first time."

(1997), cert. denied, 523 U.S. 1008 (1998). Prejudice occurs if, but for the deficient performance, there is a reasonable probability the outcome of the proceedings would have been different. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). There is a strong presumption of effective assistance, and Del Duca bears the burden of demonstrating the absence in the record of a strategic basis for the challenged conduct. McFarland, 127 Wn.2d at 335-36.

To impeach a witness with a prior inconsistent statement under ER 613(b), the witness must be given an opportunity to admit or deny the statement and to explain it.[5] This can be done either before or after the extrinsic evidence is introduced. State v. Horton, 116 Wn. App. 909, 916, 68 P.3d 1145 (2003). If the witness is not asked about the statement during direct or cross-examination, impeachment may still be accomplished at a later point so long as arrangements are made for the witness to be recalled. Horton, 116 Wn. App. at 915-16.

With respect to the prior inconsistent statements about the number of times sexual contact occurred, counsel was permitted to introduce some evidence but declined to do so. Although K's prior statements about the number of incidents demonstrated inconsistency and could have impacted the jury's assessment of credibility, there was also a significant risk that the jury could have believed that Del Duca touched K in a sexual manner multiple times although K

[5] 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."

was able to specifically recall and testify about only one incident. We infer that counsel's decision was strategic and there were legitimate tactical reasons not to introduce the evidence. We can see no reason why counsel would have made a different decision with respect to K's statement about touching on a "daily basis" had the court ruled that statement was admissible. Performance is not deficient if counsel's conduct can be characterized as a legitimate trial strategy. State v. Kyllo, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). Del Duca cannot demonstrate that counsel's performance was deficient or that he suffered prejudice.

In contrast, it is clear from the record that counsel wanted to impeach K with her prior statement about Del Duca following her into the lake. It is also clear that counsel believed he had properly laid the foundation under ER 613(b) by asking K if this actually happened. He did not, however, directly refer to the prior statement nor provide K with an opportunity to explain or deny it, as required by the rule. Nor did counsel reserve the right to recall K to preserve the opportunity to lay the foundation at a later point.

Nevertheless, even assuming for the sake of argument that it was deficient performance for counsel to fail to ask the appropriate question in order to properly lay the foundation to admit K's prior statement in furtherance of this impeachment strategy, Del Duca was not prejudiced. The circumstances here are unlike those present in Horton, where counsel's failure to follow the procedural requirements of ER 613(b) was clearly detrimental to the defendant's case. Horton, 116 Wn. App. at 916. In Horton, the victim had testified both on

direct and in cross-examination that prior to her medical examination, she had not engaged in sexual intercourse with any person other than the defendant. This evidence tended to show that the medical finding of "penetrating trauma to the hymen" must have been caused by the abuse allegedly perpetrated by the defendant. Horton, 116 Wn. App. at 911.

But the victim had previously admitted to two people that she had been sexually active with former boyfriends. Neither counsel asked the victim about those prior statements. Therefore, the defense was not permitted to call the witnesses to testify about the statements. There was no reasonable strategic reason not to present evidence impeaching the victim on a critical evidentiary matter, and because the failure to offer the evidence was prejudicial, the Court of Appeals reversed Horton's conviction. Horton, 116 Wn. App. at 922.

The impeaching evidence in this case did not directly undermine any critical piece of evidence. There was also a significant amount of evidence before the jury that had bearing on K's credibility by showing her inconsistency regarding various details about the incident. We are not convinced that the introduction of extrinsic evidence of any of the prior statements at issue would have actually benefitted Del Duca. Certainly the record does not demonstrate that, but for counsel's alleged deficiency, the outcome of the trial would have been different.

STATEMENT OF ADDITIONAL GROUNDS

Del Duca raises numerous issues in a pro se statement of additional grounds. He claims that his constitutional rights were violated because he was not indicted by a grand jury. But under Washington Constitution article I, section 25, the State may prosecute an individual for offenses by either information or indictment. Contrary to Del Duca's argument, this provision of the Washington Constitution is not at odds with the Fifth Amendment to the United States Constitution. State v. Nordstrom, 7 Wash. 506, 508, 35 P. 382 (1893), aff'd, 164 U.S. 705, 17 S. Ct. 997, 41 L. Ed. 1183 (1896). Washington courts have also determined that a grand jury indictment is not required to assure due process of the law. See State v. Ng, 104 Wn.2d 763, 774-75, 713 P.2d 63 (1985).

Del Duca also argues that he cannot be required to serve more than the minimum term of 68 months because his judgment and sentence includes a provision stating that the "total" confinement imposed is 68 months. Clerk's Papers at 196. However, because Del Duca was convicted of child molestation in the first degree, the court imposed an indeterminate sentence under RCW 9.94A.507. Thus, the court had to impose a maximum term and a minimum term. RCW 9.94A.507(3)(a). The minimum term had to be "within the standard sentence range for the offense," which was in this case 51 to 68 months' confinement. RCW 9.94A.507(3)(c)(i), .510. The maximum term had to be "the statutory maximum sentence for the offense," which was life imprisonment. RCW 9.94A.507(3)(b); RCW 9A.20.021(1)(a); RCW 9A.44.083.

Before the end of the Del Duca's minimum term, the Indeterminate Sentence Review Board will hold a hearing to determine whether to release him into community custody for the time left under the maximum term or impose a second minimum term of incarceration. RCW 9.95.420(3)(a); In re Postsentence Review of Hudgens, 156 Wn. App. 411, 421-22, 233 P.3d 566 (2010). Such reviews have the potential to extend imprisonment to the maximum sentence. See State v. Brundage, 126 Wn. App. 55, 63, 107 P.3d 742 (2005) (discussing indeterminate sentencing as previously codified under former RCW 9.94A.712), review denied, 157 Wn.2d 1017 (2006). The reference to "total" confinement in this context refers only to the initial minimum term imposed in the judgment and sentence.

Del Duca raises a number of other procedural and evidentiary issues. But his arguments are conclusory and are based on inaccurate and self-serving interpretations of the facts in the record. State v. Bugai, 30 Wn. App. 156, 158, 632 P.2d 917, review denied, 96 Wn.2d 1023 (1981); State v. King, 24 Wn. App. 495, 505, 601 P.2d 982 (1979). He makes other arguments that fail to adequately inform the court of the nature and occurrence of the alleged errors. See RAP 10.10(c); State v. Alvarado, 164 Wn.2d 556, 569, 192 P.3d 345 (2008). None of these arguments merit further review. In addition, to the extent that Del Duca's allegations of ineffective assistance of counsel, prosecutorial misconduct, and claims related to his arrest appear to involve matters outside the trial court

record, the claims of error are not reviewable on direct review. See McFarland, 127 Wn.2d at 335.

Affirmed.

Becker, J.

WE CONCUR:

Dwyer, J.

Grau, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
	)	
Appellant,	)	
	)	SUPREME COURT NO. _____
vs.	)	COA NO. 69508-8-I
	)	
JON DEL DUCA,	)	
	)	
Petitioner.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 19TH DAY OF MAY, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JON DEL DUCA
NO. 211011685
KING COUNTY JAIL
500 5TH AVENUE
SEATTLE, WA 98104

SIGNED IN SEATTLE WASHINGTON, THIS 19TH DAY OF MAY, 2014.

X Patrick Mayovsky