

Original

NO. 36235-0-II
Clark County No. 06-1-00625-9

STATE OF WASHINGTON,

Respondent,

vs.

KLINTON VINSONHALER

Appellant.

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

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II. THE EVIDENCE IS INSUFFICIENT TO SUPPORT MR. VINSONHALER'S CONVICTION.

C. STATEMENT OF THE CASE

I. FACTUAL HISTORY

Jennifer Stephens is a grandmother who lives in an apartment on N.E. 86th Street in Vancouver. Trial RP 97-98.¹ During the summer of 2006, she had two of her grandchildren, CT and AT, staying with her. Trial RP 97-98. They were seven and eight-years-old respectively. Trial

¹The record in this case includes four volumes of continuously numbered verbatim reports for the trial that was held on January 8, 9, 10, and 11, 2007. Since they are continuously numbered, they are referred to herein as "Trial RP". The record also includes a one volume report for combined *Ryan* and CrR 3.5 hearing held on December 21, 2006, referred to herein as "RP (12-21-06)" and a one volume report held on January 2, 2007, referred to herein as "RP (1-2-07)."

RP 119, 321, 369. Both are the children of Ms Stephen's daughter Cami Stephens. Trial RP 199. According to Ms Stephens, she remembered that on a particularly hot day during the summer, CT and AT had come to her and asked for permission to go on a bike ride with the defendants Kyle Vinsonhaler and Klinton Vinsonhaler, and a nine-year-old neighbor boy named LaRay. Trial RP 98. At the time Kyle and Klinton Vinsonhaler were 19 and 17-years-old respectively. Trial RP 449, 465; CP 1-2. They lived a few apartments over with some of their family members, and occasionally ran errands for Jennifer Stephens. Trial RP 450, 469. After talking to Kyle and Klinton, Ms Stephens allowed CT and AT to go on the bike ride. Trial RP 98, 468.

A few hours later, everyone returned from the bike ride and came into Ms Stephens' house. Trial RP 99, 390. After they did, CT asked Ms Stephens to peel an apple for her. Trial RP 99, 391. When Ms Stephens suggested that CT have Klinton do it for her, CT threw the apple down and "stormed" out of the room. Trial RP 99. Ms Stephens then peeled the apple for CT and gave it to her. Trial RP 99. Later, Ms Stephens stated that she might have suggested that CT have Kyle instead of Klinton peel the apple; she could not remember which. Trial RP 100-101.

In February of the next year, CT, AT, and their younger sibling MS were staying each day with a person by the name of Angela Owens,

who ran a daycare in her home with a number of other children in it. Trial RP 25-29. On one occasion during that month, some of the children began talking about touching each other in an inappropriate manner. Trial RP 32. Upon hearing this information, Ms Owens sat all of the children down and talked to them about good touching and bad touching. Trial RP 32-34. When she did, CT made a claim that sometime during last summer while she was at her grandmother's house, she had been on a bike ride with her brother and a couple of older boys, one of whom had touched her inappropriately. Trial RP 35-36.

Specifically, CT stated that during the bike ride she had stopped to go to the bathroom in the bushes, and when she did one of the boys walked up to her, said "can I feel you to see if you are wet," and then put his finger inside her vagina. Trial RP 36, 382-386. She went on to say that after returning to her grandmother's house, she asked this same boy to peel an apple for her, to which he replied "only if you let me touch you." Trial RP 35-36, 391-392. According to CT she refused and that ended the incident. Trial RP 36, 392. During this statement to Ms Owens, CT did not claim that anyone else had touched her, and she stated that she had not told her mother about the incident because she was afraid her mother would slap her. Trial RP 37, 133, 394.

Once Cami Stephens came to pick up her children, Ms. Owens told

her what CT had said. Trial RP 38, 132-133. Cami Stephens then sat down and talked to CT, who claimed that during a bike ride with her brother and two older boys at her grandmother's house last summer she had stopped to go to the bathroom in the bushes, that when she did the older boy asked if he could see if she was dry, that he had then put his finger in her vagina, and that later at her grandmother's house this same boy said he would peel an apple for her if she would let him touch her again. Trial RP 132-133. After talking to her daughter, Cami Stephens called the police. Trial RP 38, 134.

Apart from Angela Owens and her mother, CT repeated her claims of abuse to Vancouver Police Detective Steven Norton during an interview on March 8, 2006. Trial RP 276-280. During the interview with Detective Norton, CT repeated the statements she made to her mother and Angela Owens. Trial RP 280-285. However, she added a claim that after the older of the two boys put his finger in her vagina, his younger brother walked up and also touched her but didn't put his finger inside her. Trial RP 283. When Detective Norton asked her why she had never told anyone about the second boy, CT replied that she didn't mention what the second boy did because the first boy had done worse things to her. Trial RP 152-153, 286.

Detective Norton also interviewed both Kyle and Klinton

Vinsonhaler. Trial RP 291-292. According to Detective Norton, Kyle admitted being on the bike ride with his brother, CT, AT, and another young boy, and he remembered stopping to go to the bathroom. Trial RP 294-295. However, he denied ever touching CT or asking to touch her. Trial RP 294-295. According to Detective Norton, Klinton also admitted being on the bike ride and stopping to go to the bathroom in the bushes, but he stated that he did not touch or see the young girl when she went to the bathroom. Trial RP 291. According to Detective Norton, Klinton did claim that the defendant went with the girl when she went to the bathroom, and that when they walked back up the path, the girl acted differently and did not want to be near the defendant. Trial RP 483-484.

About a month after the interview with Detective Norton, Cami Stephens took CT to Dr. John Sterling for a physical examination. Trial RP 138. During this examination, CT told Dr. Sterling that she had been on a bike ride with some other children and two older boys, that at some point she stopped to go to the bathroom in the bushes, and that the older of the two boys had asked if he could “check to see if she was dry.” Trial RP 240. CT then told Dr. Sterling that (1) the older boy had put his finger in her vagina, which hurt, and (2) the older boy repeatedly asked her during the ride home to allow him to touch her again. *Id.* According to Dr. Sterling, his physical examination of CT did not uncover any signs of

abuse, although he would not have expected to find any given the child's allegations. Trial RP 246-259.

II. PROCEDURAL HISTORY

By information filed March 30, 2006, the Clark County Prosecutor charged the defendant Kyle Vinsonhaler with one count of first degree rape of a child, one count of first degree child molestation, and one count of attempted first degree child molestation. CP 1-2. The information also charged Klinton Vinsonhaler with one count of first degree child molestation. *Id.* The state later amended the information to charge the first two counts against Kyle in the alternative. CP 13-14. Prior to trial, Mr. Wear, counsel for Kyle Vinsonhaler, made a motion to sever Kyle's trial from Klinton's. RP (12-21-06), p. 185. Ms. Clark, counsel for Klinton Vinsonhaler, declined to join in the severance motion. RP (12-21-06), p. 187. The court denied the motion insofar as it related to Bruton issues, upon the State's promise to redact portions of Klinton's statement to Detective Norton of the CAIC. RP (12-21-06), p. 192.

On December 21, 2006, the court held a hearing under *State v. Ryan* to determine the admissibility of CT's statements to the certain witnesses. RP (12-21-06) 1-193. During this hearing the state called CT, who testified concerning her claims of abuse. RP (12-21-06) 74-127. The state also called Cami Stephens, Angela Owens, AT, and Detective Steven

Norton in accordance with its written notice. RP (12-21-06), p. 10-38, 38-74, 127-144, 144-168.

Cami Stephens, Angela Owens, and Detective Norton each testified concerning the claims CT made to them as is set out in the preceding *Factual History*. RP (12-21-06) 10-38, 38-74, 144-168. Following this testimony the court ruled that (1) CT was competent to testify and had testified and been subject to cross-examination, and (2) there was sufficient indicia of reliability to allow Cami Stephens, Angela Owens, and Detective Norton to testify concerning CT's statements to them about her allegations of sexual abuse. RP (12-21-06), p. 171-184. The court did not rule on the admissibility of AT's testimony as the state had previously conceded that his testimony was not admissible under RCW 9A.44.120. RP (12-21-06), p. 138.

Also at the 9A.44 hearing, C.T. was asked if the boy who did this to her was in the courtroom, she testified that she didn't remember which one it was. RP (12-21-06), p. 86. She testified that another guy, whom she believed was his brother, was there at that time and that he then touched her on the outside of her vagina. RP (12-21-06), p. 87. She, again, could not identify this person in the courtroom. RP (12-21-06), p. 88. When the prosecutor stood behind several different people in the courtroom, asking, after each one, if he was the person who touched her,

she said “no.” (Although these people were never identified for the record, they presumably included both of the defendants or else there would have been no point to the exercise). RP (12-21-06), p. 88-89.

C.T. claimed that she told Angie that two boys touched her. RP (12-21-06), p. 97. She also claimed that she told her mother that two boys touched her. RP (12-21-06), p. 97. However, Angie Owens and Cami Stephens testified, at both trial and the 9A.44 hearing, that C.T. did not tell them about the second boy (Klinton). Trial RP 25-67, 119-201. In fact, Detective Norton confronted C.T. about why she failed to implicate the second boy until his interview with her and she said it was because Kyle was the one who did the “worse stuff to her.” Trial RP, p. 286. C.T. was adamant, at the 9A.44 hearing, that she did not remember which of the boys touched her first, and did not remember which of the boys put his finger in her vagina. RP (12-21-06), p. 97. Later in the hearing, C.T. stated that she had lied in her earlier testimony and that she could identify both defendants and that knew which one stuck his finger inside her (Kyle) and which one touched her on the outside (Klinton). RP (12-21-06), p. 122-25.

The case later came on for trial with the state calling seven witnesses who testified to the facts contained in the preceding *Factual History*. Trial RP 28-436. One of the state’s witnesses was Dr. John

Sterling. Trial RP 150-173, 217-275. Prior to his testimony, the defense moved to exclude him as a witness on the basis that all he could testify to was his physical examination of CT, which failed to substantiate any claims of abuse. Trial RP 12-17. The state responded that his testimony about the examination was relevant because when a claim of sexual abuse such as this is made (i.e. penetration into the vagina), jurors expect to hear a medical explanation about why no injury is present. Trial RP 12-17. In addition, the State argued Dr. Sterling should be allowed to testify to CT's statements to him under RCW 9A.44.120 and the medical diagnosis hearsay exception to the hearsay rule. *Id.* Without the jury present, the court allowed the state to call Dr. Sterling as part of a state's offer of proof. Trial RP 150-172. The court ruled that the state had failed to meet the factual requirements for admissibility under the medical diagnosis exception to the hearsay rule in that the state had failed to show that CT made her statements for the purpose of medical diagnosis. Trial RP 12-17, 84-85. The court reserved, at that time, on the question of whether Dr. Sterling could still testify to these statements under RCW 9A.44.120 in spite of the defendant's arguments that it had no prior notice and had not been given time to prepare for this claim. Trial RP 84-88.

Following an offer of proof, the court ruled that Dr. Stirling would in fact be permitted to testify about his physical examination of C.T.

(along with all of the testimony about his credentials, which necessarily precedes his testimony about the exam), and would be permitted to testify, pursuant to 9A.44.120, about the statements C.T. made to him only as they pertained to Kyle Vinsonhaler. Trial RP, p. 211. Because C.T. only made one statement about Klinton and it was in response to a question by Stirling, the court ruled that Stirling would not be able to testify about the statement she made about Klinton touching her. Trial RP 212.

Dr. Stirling testified about his voluminous credentials and about his examination of C.T. which revealed absolutely nothing of evidentiary value. Trial RP 217-246. He further testified that due to the passage of time, he would not expect to see any physical sign of digital penetration. Id. He then testified about CT's statements about be touched by Kyle Vinsonhaler. Trial RP 240-41. The State relied on Stirling's testimony during closing argument and, the State argued, repetition of the sexual abuse allegation made it more likely true than untrue. Trial RP, p. 521, 568.

When CT testified, her testimony differed from her 9A.44 testimony in many respects. Trial RP 369-435. First, she identified both defendants without difficulty. Trial RP, p. 379. Second, she said that the bike she rode was hers, and that her brother had to borrow one from a friend. Trial RP, p. 381. At the 9A.44 hearing, she testified that she did

not have a bike and used her friend's bike to go on the ride. RP (12-21-06), p. 83. Third, she conceded that she, in fact, did not tell either her mother Cami Stephens or Angie Owens that she had been touched by two boys. Trial RP, p. 415. She also claimed initially at trial, in her direct testimony, that she told her mother about both boys. Trial RP, p. 399. Counsel for Mr. Vinsonhaler did not impeach C.T. on any of these inconsistencies, or on her prior lie under oath about the identification of the defendants. Trial RP, p. 404-416.

Following the close of the state's case, Klinton Vinsonhaler took the stand on his own behalf. Trial RP 465-481. He denied abusing CT or seeing his brother abuse CT. *Id.* On cross-examination, he denied that he had ever told Detective Norton that the defendant had walked off with CT or that when they came back CT was upset and no longer wanted to be around the defendant. Trial RP 458-463. At this point Kyle Vinsonhaler took the stand on his own behalf and denied all of the allegations of abuse and attempted abuse. Trial RP 465-481.

After the close of the defendant's case, the state called Detective Norton in rebuttal of Klinton Vinsonhaler's testimony. Trial RP 482-486. Once back on the witness stand, Detective Norton testified that Klinton Vinsonhaler had told him that his brother had walked out of his sight with CT to go to the bathroom, and that when they returned CT no longer

wanted to be around the defendant. Trial RP 183-184.

After the state completed its rebuttal, the court instructed the jury with no objections or exceptions from the defense. Trial RP 495-509. The returned verdicts against Kyle Vinsonhaler of “not guilty” to first degree rape of a child, “guilty” to the alternative charge of first degree child molestation, and “not guilty” to attempted child molestation. Trial RP 582. The jury returned a verdict of guilty against Klinton Vinsonhaler on the sole count he was charged with, Child Molestation in the First Degree. CP 46, Trial RP, pg. 583.

The sole evidence against Klinton Vinsonhaler, at the time the State rested its case, was C.T.’s testimony that Klinton touched her on the outside of her vagina; Detective Norton’s testimony about C.T.’s claim, made for the first time to him several months after the alleged incident and after having been questioned by both Angie Owens and Cami Stephens, that Klinton touched her on the outside of her vagina; and Klinton Vinsonhaler’s denial of the crime, offered through Detective Norton. Trial RP, p. 291. Also, A.T. testified that although he saw Kyle go down with C.T. to go to the bathroom, he did not see where Klinton went and couldn’t say if he went down the hill. Trial RP, p. 329, 348. During closing argument, the State grossly mischaracterized A.T.’s testimony and said that A.T. saw Klinton go down to the same area as C.T. Trial RP, p.

522. Deputy Prosecutor Kim Farr repeated this false statement twice without objection from Klinton Vinsonhaler's counsel. Id. Counsel for Klinton Vinsonhaler did not make a motion to dismiss at the close of the State's case. Trial RP, p. 443.

Following a pre-sentence investigation report by the department of corrections, the court sentenced the defendant under RCW 9.94A.712 to life in prison with a minimum mandatory time of 80 months to serve within the standard range before consideration for release on parole. CP 64. The defendant filed timely notice of appeal. CP 77.

D. ARGUMENT

I. MR. VINSONHALER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO MOVE FOR SEVERANCE, FAILED TO REQUEST A LIMITING INSTRUCTION, FAILED TO CONDUCT IMPEACHMENT AND FAILED TO OBJECT TO AN IMPROPER ARGUMENT BY THE STATE.

Klinton Vinsonhaler was denied effective assistance of counsel when his attorney failed to move to sever his case from Kyle Vinsonhaler's; failed to request a limiting instruction instructing the jury to that it could consider Dr. Stirling's testimony only in its consideration of the case against Kyle Vinsonhaler, not Klinton; failed to impeach C.T.; and failed to object to the State's closing argument where it grossly mischaracterized testimony used to convict Klinton Vinsonhaler.

Criminal defendants are guaranteed reasonably effective representation by counsel at all critical stages of a case. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 186 (1995). To obtain relief based on a claim of ineffective assistance of counsel, a defendant must establish that (1) his counsel's performance was deficient; and (2) the deficient performance was prejudicial. *Strickland* at 687; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251(1995). A legitimate tactical decision will not be found deficient. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

a. FAILURE TO MOVE TO SEVER

Klinton's trial counsel should have moved to sever his case from Kyle's because the evidence against Kyle was substantially stronger than the evidence against Klinton, and the testimony of Dr. Stirling would have been inadmissible against Klinton alone.

The evidence against Klinton was unbelievably weak. C.T. did not make her allegation of abuse against Klinton Vinsonhaler until after she had been subjected to two interviews by untrained lay persons who asked leading questions. She made her allegation against Klinton for the first time during her interview with Steve Norton. The allegation was unsupported by the evidence as the only other person who was on the bike

ride and in a position to corroborate C.T.'s testimony, A.T., stated he did not know where Klinton went and did not see him go down to the area where Kyle had gone with C.T.

Further, Klinton suffered from the strength of the case against Kyle, and from Kyle's ludicrous testimony in which he denied facts that were substantially corroborated (such as the fact that he went back to Jennifer Stephens' house after the bike ride).

Perhaps most significant, in a severed trial the testimony of Dr. Stirling would have been irrelevant and inadmissible. The testimony of Dr. Stirling was proffered by the State for two reasons: So he could testify about his physical examination of C.T. and so he could repeat her statements for the jury. Regarding Stirling's proposed repetition of C.T.'s statements, the court correctly ruled that Dr. Stirling could not repeat C.T.'s statement about Klinton because it was not properly obtained. The only remaining purpose of his testimony would be about his physical examination of C.T., which was irrelevant in the case against Klinton.

The State argued that Dr. Stirling should be allowed to testify because in cases where vaginal penetration is alleged, a jury expects to hear medical testimony about whether there was an observable injury and if not, why. The nature of the allegation against Klinton (touching the outside of the vagina) was such that no person, lay or medical, would

expect to see a physical injury. Thus, the lack of an injury required no explanation, nor would any reasonable juror have expected one. As such, the testimony of Dr. Stirling was only arguably relevant in the case against Kyle.

Counsel should have moved to sever Klinton's case from Kyle's because Dr. Stirling's testimony was extremely prejudicial to him. The true reason the State wanted Dr. Stirling to testify, as Mr. Wear astutely noted, was to add medical legitimacy to the accusations against Kyle and Klinton. The appearance of a medical doctor taking C.T.'s "side" necessarily lent weight to her claims.

CrR 4.4 governs motions for severance of defendants and offenses. Under the plain language of the rule, failure to bring such a motion and to renew it during trial (assuming it was denied) renders the issue waived. However, this issue can be raised and considered in a claim for ineffective assistance of counsel. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 101 P.3d 1 (2004). A defendant bears the burden of showing the court would have granted the motion. *Id.* Here, the motion would likely have been granted because the court was very concerned about the potential for abuse regarding the proposed testimony of Dr. Stirling. The court, seeing through the State's transparent attempt to bolster its case by calling a doctor to testify on C.T.'s behalf, refused to allow Stirling to testify under

ER 803. The court took great care to craft limits to Stirling's testimony and appeared very cognizant of the potential danger of allowing him to testify when he had nothing of evidentiary value to offer. Had such a motion been properly raised it would likely have been granted.

b. LIMITING INSTRUCTION

In the absence of a motion to sever, which Appellant argues was necessary, counsel should have at least requested a limiting instruction instructing the jury that Dr. Stirling's testimony should be given no weight as it pertained to Clinton Vinsonhaler. For the reasons outlined above, Stirling's testimony was totally irrelevant in the case against Clinton. Although Appellant maintains severance was the proper remedy, in the very least a limiting instruction might have blunted the impact of Stirling's testimony. Counsel's failure to take any steps to shield Clinton from the prejudicial effects of Stirling's testimony constituted ineffective assistance of counsel which prejudiced Clinton. Again, the case against Clinton was remarkably weak. And it is clear the jury struggled with C.T.'s credibility, as evidenced by the two not guilty convictions rendered in Kyle's favor. Without Stirling appearing on her "side," it is very likely the result of the trial would have been different for Clinton.

c. FAILURE TO IMPEACH

During her cross examination of C.T. at trial, Clinton's counsel

failed to impeach her in any meaningful fashion. She did not impeach C.T. on her refusal/failure to initially identify either defendant at the *Ryan/9A.44* hearing, she did not question C.T. about having lied under oath at that hearing, and she did not question C.T. about any of the inconsistencies in her testimony between the *Ryan* hearing the trial.

As C.T.'s belated accusation against Klinton constituted the *only* substantive evidence against him, her credibility and the reliability of her memory were the crucial factors in the case against him. There is no conceivable reason why counsel would possess impeachment material against C.T. and not use it. There is no legitimate tactical reason, in a case where there is no evidence but the accusation of the complaining witness, to fail to conduct impeachment of that witness.

Counsel's performance clearly fell below an objective standard of reasonableness. In *State v. Horton*, 116 Wn.App. 909, 916-17, 68 P.3d 1145 (2003), where the defendant was convicted of rape of a thirteen year old child, it was held that counsel's failure to lay a proper foundation for impeachment of the alleged victim constituted ineffective assistance of counsel because there was no legitimate trial strategy to be found in such failure and non-compliance with ER 613 was entirely to the defendant's detriment. Similarly, here, the failure to conduct any meaningful impeachment at all, where the complaining witness' credibility and

reliability of memory were the sole issues before the jury, cannot be said to have been born of legitimate trial strategy.

d. FAILURE TO OBJECT TO THE STATE'S ARGUMENT

During closing argument, the State, in an attempt to bolster the case against Klinton, mischaracterized A.T.'s testimony to suggest that A.T. saw Klinton go down to the area where Kyle had gone with C.T. If true, this would have been a powerful piece of evidence against Klinton in that it would have been the only available corroboration of C.T.'s claim and would have repudiated the testimony of Klinton. The problem is that it was not true, and counsel should have objected to this argument. Instead, counsel offered a weak rebuttal in which she stated she thought A.T. had not, in fact, testified as such. This response was likely too little and too late.

The cumulative effect of counsel's errors was the denial of effective assistance of counsel to Mr. Vinsonhaler and he should be granted a new trial.

II. THE EVIDENCE IS INSUFFICIENT TO SUPPORT MR. VINSONHALER'S CONVICTION.

For the reasons stated in Section I, part "a" above, the evidence is insufficient to sustain Klinton Vinsonhaler's conviction. Constitutional due process requires that in any criminal prosecution, every fact necessary

to constitute the crime charged must be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368 (1970). On appeal, a reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, viewing the evidence in the light most favorable to the State, could find that all the elements of the crime charged were proven beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 220-2, 616 P.2d 628 (1980). When sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

Although credibility determinations are left to the trier of fact, no reasonable juror could have concluded the State proved the case against Klinton Vinsonhaler beyond a reasonable doubt. The sole evidence against Klinton was the claim made by C.T., which was made after two interviews which were conducted unprofessionally, and was added almost as an afterthought in her interview with Steve Norton. It would be an injustice to allow the conviction against Klinton Vinsonhaler to stand

based upon the evidence presented against him in this case. Mr. Vinsonhaler's conviction should be reversed and dismissed.

E. CONCLUSION

Mr. Vinsonhaler was denied effective assistance of counsel. The evidence is insufficient to sustain his conviction and it should be reversed and dismissed.

RESPECTFULLY SUBMITTED this 4th day of January, 2008.



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APPENDIX

1. Rule 4.4. Severance of offenses and defendants

(a) *Timeliness of motion -- Waiver*

(1) A defendant's motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require. Severance is waived if the motion is not made at the appropriate time.

(2) If a defendant's pretrial motion for severance was overruled he may renew the motion on the same ground before or at the close of all the evidence. Severance is waived by failure to renew the motion.

(b) *Severance of offenses* The court, on application of the prosecuting attorney, or on application of the defendant other than under section (a), shall grant a severance of offenses whenever before trial or during trial with consent of the defendant, the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense.

(c) *Severance of defendants*

(1) A defendant's motion for severance on the ground that an out-of-court statement of a codefendant referring to him is inadmissible against him shall be granted unless:

(i) the prosecuting attorney elects not to offer the statement in the case in chief; or

(ii) deletion of all references to the moving defendant will eliminate any prejudice to him from the admission of the statement.

(2) The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (i), should grant a severance of defendants whenever:

(i) if before trial, it is deemed necessary to protect a defendant's rights to a speedy trial, or it is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant; or

(ii) if during trial upon consent of the severed defendant, it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant.

(3) When such information would assist the court in ruling on a

motion for severance of defendants, the court may order the prosecuting attorney to disclose any statements made by the defendants which he intends to introduce in evidence at the trial.

(4) The assignment of a separate cause number to each defendant of those named on a single charging document is not considered a severance. Should a defendant desire that the case be severed, the defendant must move for severance.

(d) *Failure to prove grounds for joinder of defendants* If, pursuant to section (a), a defendant moves to be severed at the conclusion of the prosecution's case or of all the evidence, and there is not sufficient evidence to support the grounds upon which the moving defendant was joined or previously denied severance, the court shall grant a severance if, in view of this lack of evidence, failure to sever prejudices the moving defendant.

(e) *Authority of court to act on own motion* The court may order a severance of offenses or defendants before trial if a severance could be obtained on motion of a defendant or the prosecution.

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

STATE OF WASHINGTON,) Court of Appeals No. 36235-0-II
Respondent,) Clark County No. 06-1-00625-9
vs.) AFFIDAVIT OF MAILING
KLINTON JAMES VINSONHALER,)
Appellant.)

ANNE M. CRUSER, being sworn on oath, states that on the 7th day of January
2008, affiant placed a properly stamped envelope in the mails of the United States
addressed to:

Arthur Curtis
Clark County Prosecuting Attorney
P.O. Box 5000
Vancouver, WA 98666-5000

AND

David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Anne M. Cruser
Attorney at Law
P.O. Box 1670
Kalama, WA 98625
Telephone (360) 673-4941
Facsimile (360) 673-4942
anne-cruser@kalama.com

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AND

Klinton Vinsonhaler
DOC#302373
Airway Heights Corrections Center
P.O. Box 1899
Airway Heights, WA 99001-1899

and that said envelope contained the following:

- (1) BRIEF OF APPELLANT
- (2) MOTION FOR EXTENSTION (TO MR. PONZOHA AND MR. CURTIS)
- (3) AFFIDAVIT OF MAILING
- (4) RAP 10.10 (TO MR. VINSONHALER)

Dated this 7th day of January 2008,


 ANNE M. CRUSER, WSBA #27944
 Attorney for Appellant

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

Date and Place: Jan. 7, 2008, Kalama, Washington

Signature: Anne M. Cruser