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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 36235-0-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II**

STATE OF WASHINGTON,

Respondent,

vs.

KYLE SCOTT VINSONHALER,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court's ruling allowing Dr. Sterling to testify to statements the complaining witness made to him violated RCW 9A.44.120.

2. The trial court denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it failed to grant a motion to sever defendants and thereby allowed the state to present inadmissible, unfairly prejudicial evidence against the defendant.

3. Trial counsel's failure to seek a limiting instruction when the state elicited unfairly prejudicial evidence impeaching the testimony of the co-defendant violated the defendant's right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

Issues Pertaining to Assignment of Error

1. Does a trial court's ruling allowing a physician to testify to statements the complaining witness made to him about claims of sexual abuse violate RCW 9A.44.120 when the state did not give notice that it would call the witness for this testimony and the defendant had no opportunity to prepare to rebut this evidence?

2. Does a trial court deny a defendant the right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if it fails to grant a motion to sever defendants and thereby allows the state to present inadmissible, unfairly prejudicial evidence against the defendant?

3. Does a trial counsel's failure to seek a limiting instruction when the state elicits unfairly prejudicial evidence impeaching the testimony of the co-defendant violate a defendant's right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment when that failure fell below the standard of a reasonably prudent attorney and caused prejudice to the defendant?

STATEMENT OF THE CASE

Factual History

Jennifer Stephens is a grandmother who lives in an apartment on N.E. 86th Street in Vancouver. RP 97-98.¹ During the summer of 2006, she had two of her grandchildren, CT and AT, staying with her. RP 97-98. They were seven and eight-years-old respectively. RP 119, 321, 369; CP 76. Both are the children of Ms Stephen's daughter Cami Stephens. 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 defendant Kyle Vinsonhaler, Kyle's brother Klinton, and a nine-year-old neighbor boy named LaRay. RP 98. At the time Kyle and Klinton Vinsonhaler were 19 and 17-years-old respectively. 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. RP 450, 469. After talking to Kyle and Klinton, Ms Stephens allowed CT and AT to go on the bike ride. RP 98, 468.

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 "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 I" and a one volume report held on January 2, 2007, referred to herein as "RP II."

A few hours later, everyone returned from the bike ride and came into Ms Stephens' house. RP 99, 390. After they did, CT asked Ms Stephens to peel an apple for her. 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. RP 99. Ms Stephens then peeled the apple for CT and gave it to her. 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. 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. RP 25-29. On one occasion during that month, some of the children began talking about touching each other in an inappropriate manner. RP 32. Upon hearing this information, Ms Owens sat all of the children down and talked to them about good touching and bad touching. 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. 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. 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." RP 35-36, 391-392. According to CT she refused and that ended the incident. 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. RP 37, 133, 394.

Once Cami Stephens came to pick up her children, Ms Owens told her what CT had said. 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. RP 132-133. After talking to her daughter, Cami Stephens called the police. 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. RP 276-280. During the interview with Detective Norton, CT repeated the statements she made to her mother and Angela Owens. 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. 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. RP 152-153, 286.

Detective Norton also interviewed the defendant and his brother Klinton. RP 291-292. According to Detective Norton, the defendant admitted being on the bike ride with his brother, CT, AT, and another young boy, and he remembered stopping to go to the bathroom. RP 294-295. However, he denied ever touching CT or asking to touch her. RP 294-295. According to Detective Norton, the defendant's brother 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. 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. RP 483-484.

About a month after the interview with Detective Norton, Cami Stephens took CT to Dr. John Sterling for a physical examination. RP 138. Dr. Sterling had been Ms Stephens' pediatrician. RP 138, 232. 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.” 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. RP 246-259.

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 the defendant’s brother Klinton with one count of first degree child molestation. *Id.* The state later amended the information to charge the first two counts against the defendant in the alternative. CP 13-14. Prior to trial, the defendant brought a motion to sever his case from that of his brother, arguing that his brother had made a number of statements contrary to the defendant’s interest that would be admissible in his brother’s trial but should not be admissible in the defendant’s trial. CP 16-18. The court denied this motion. RP I 185-193.

Prior to trial, the state twice gave the defense written notice under RCW 9A.44.130 that it intended to call four witnesses to testify concerning statements CT made to them concerning her claims of sexual abuse. SCP2 1, 7. The second notice listed the following witnesses: Cami Stephens, Detective Steve Norton, AT, and Angela Owens. Neither of these witness lists included Dr. Sterling. *Id.* As a result, on December 21, 2006, the court held a hearing under *State v. Ryan* to determine the admissibility of CT's statements to the listed witnesses. RP I 1-193. During this hearing the state called CT, who testified concerning her claims of abuse. RP I 74-127. The state also called Cami Stephens, Angela Owens, AT, and Detective Steven Norton in accordance with its written notice. RP 10-38, 38-74, 127-144, 144-168.

AT testified that he is CT's brother, and that he had heard his mother and Angela Owens talking about what CT told them, although CT made no direct statements to him. RP I 133-138. 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 I 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 I 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 I 138.

The case later came on for trial with the state calling seven witnesses who testified to the facts contained in the preceding *Factual History*. RP 28-436. One of the state's witnesses was Dr. John Sterling. 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. RP 12-17. The state responded that his testimony about the examination was relevant and that in addition, 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. RP 150-172. After this testimony, 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. RP 78-83. However, the court ruled that 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. RP 84-88.

Following the close of the state's case, Klinton Vinsonhaler then took the stand on his own behalf. 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. RP 458-463. At this point the defendant took the stand on his own behalf and denied all of the allegations of abuse and attempted abuse. RP 465-481.

After the close of the defendant's case, the state called Detective Norton in rebuttal of Kyle Vinsonhaler's testimony. RP 482-486. Once back on the witness stand, Detective Norton testified that Klinton Vinsonhaler had indeed 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. RP 183-184. This testimony proceeded as follows:

Q. And what did he say in regards to what happened after that?

A. He informed me that when the kids came back, then Klinton went down and went to the bathroom as they were coming up. I asked if the kids went to the bathroom, if they all stayed together, he advised me that they had split up; that the two boys went closer to the trail and Kyle and the girl went the other way. He informed me that he couldn't see the girl, but she was with Kyle.

. . . .

Q. Did you ask him if the little girl had acted differently when she came back from going to the bathroom?

A. I did.

Q. And what did he say?

A. He informed me that she appeared to act differently towards Kyle and she didn't want to be with him and stayed in front of him when they were riding their bikes.

RP 483-484.

The defendant's attorney failed to object to this testimony and failed to seek limiting instruction to tell the jury that this evidence could only be considered in rebuttal of Kyle Vinsonhaler's testimony and for no other purpose. *Id.*

After the state completed its rebuttal, the court instructed the jury with no objections or exceptions from the defense. RP 495-509. Counsel then presented closing argument and at 5:07 pm the jury retired for deliberation. CP 103. At 6:40 pm, the court sent the jury home for the night with instructions to recommence deliberations the next morning at 9:30 am. CP 576-578. The jury deliberated the next day from 9:30 am to 4:29 pm, and then returned verdicts against the defendant 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. CP 103-104, 108-110.

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 to serve within the standard range before consideration for release on parole. CP 138. The defendant thereafter filed timely notice of appeal. CP 151.

ARGUMENT

I. THE TRIAL COURT'S RULING ALLOWING DR. STERLING TO TESTIFY TO STATEMENTS THE COMPLAINING WITNESS MADE TO HIM VIOLATED RCW 9A.44.120.

Under RCW 9A.44.120, a witness may be allowed to testify to statements describing acts of sexual or physical abuse a child under 10-years-old made to the witness in spite of the hearsay rule if certain criteria are met.

This first portion of this statute states:

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if:

RCW 9A.44.120 (in part).

At this point, the statute sets two specific criteria that the state must prove in order for a statement to be admissible under RCW 9A.44.120.

These criteria are as follows:

(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness: PROVIDED, That when the child

is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

RCW 9A.44.120 (in part).

Finally, the statute creates a notice requirement as a condition precedent for admitting statements under this statute. This condition precedent states:

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his or her intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

RCW 9A.44.120 (in part).

Taken together, this statute creates seven requirements for the admissibility of testimony under RCW 9A.44.120. They are:

(1) The statement to which the witness testifies must be made by a child under age ten,

(2) The statement must be one “describing” an “act of sexual contact performed with or on the child” or “act of physical abuse on the child by another that results in substantial bodily harm,”

(3) The court must hold a hearing “outside the presence of the jury” on the admissibility of the statements,

(4) The court must find that the “time, content, and circumstances of the statement” provide “sufficient indicia of reliability” to admit the statement,

(5) The child must testify at the hearing, or if legally “unavailable,” there must be “corroborative evidence of the act,”

(6) The state must give the defense notice of both the “intention

to offer the statement” as well as notice of the “particulars of the statement,” and

(7) The state must give the defense the required notice “sufficiently in advance of the proceedings” to provide the defense with “a fair opportunity to prepare to meet the statement.”

RCW 9A.44.120.

Statements of abuse to a third party are not admissible under this statute unless the state complies with each and every one of these requirements. *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984). For example, in *State v. Hopkins*, 137 Wn.App. 441, 154 P.3d 250 (2007), the defendant appealed his conviction for first degree rape of a child, arguing that the trial court had improperly admitted statements of a non-testifying complaining witness without first holding a hearing to determine whether or not the witness was legally unavailable. The state responded that the defense could not raise this issue for the first time on appeal because at trial the defense had stipulated that the child was not competent to testify.

The court of appeals rejected the state’s argument and reversed, holding that (1) under the statute and the decision in *Ryan* the court had the duty to first hold a hearing concerning the competency of the complaining witness, even though the parties had stipulated to incompetency, (2) since the court had not held the required hearing, the witness had not been determined to be “unavailable” under RCW 9A.44.120, and (3) since the witness had not

testified and was not determined to be unavailable at a hearing, the court erred when it admitted statements under the statute. Thus, the court reversed.

Similarly, in *State v. Rohrich*, 132 Wn.2d 472, 939 P.2d 697 (1997), the defendant had appealed his conviction for two counts of first degree rape of a child and two counts of first degree child molestation against his nine-years-old step-daughter, arguing that the trial court had erred when it allowed testimony under RCW 9A.44.120 because the complaining witness did not testify concerning the alleged acts of sexual abuse. She did take the stand, but the state never asked her any questions about her claims of abuse. The court of appeals agreed with the defendant's argument, holding that in order for RCW 9A.44.120 to meet the minimum requirement of the confrontation clause, the term "testifies" means live, in-court testimony concerning the specific allegations of abuse. The Washington Supreme Court later affirmed this ruling, holding as follows:

The Confrontation Clause requires the term "testifies," as used in the child hearsay statute, RCW 9A.44.120(2)(a), to mean the child gives live, in-court testimony describing the acts of sexual contact to be offered as hearsay. Because the child here did not testify as required yet was available to do so, her hearsay statements were inadmissible under RCW 9A.44.120. We affirm the Court of Appeals' reversal of defendant's conviction and remand for further proceedings.

State v. Rohrich, 132 Wn.2d at 480 (footnote omitted).

Just what level of notice the state must give the defense in advance of

the admission of testimony under RCW 9A.44.120 has not been extensively reviewed by the courts. However, the decision in *State v. Lopez*, 95 Wn.App. 842, 980 P.2d 224 (1999), is instructive. The following examines this case.

In *Lopez*, the defendant was charged with two counts of first degree child molestation and three counts of first degree rape against three of his five children. Prior to trial, the state listed a social worker as one of its witnesses, giving notice that the witness had interviewed the children and would be testifying to their statements of abuse under the medical diagnosis exception to the hearsay rule. Given this notice, the defense had an opportunity to interview the witness prior to trial concerning her interviews with the children. At trial, the defense unsuccessfully argued that this exception to the hearsay rule did not apply. However, after the witness testified, the court held a *Ryan* hearing outside the presence of the jury and ruled that the testimony from the social worker was also admissible under RCW 9A.44.120.

Following conviction the defendant appealed, arguing that (1) the social worker's testimony was not admissible under the medical diagnosis exception to the hearsay rule because the children did not make their statements for the purpose of medical diagnosis, and (2) the statements were not admissible under RCW 9A.44.120 because the state had not given sufficient notice of its intent to use this hearsay exception. On appeal, the

court agreed with the defense on the first argument and ruled that since the children had not gone to the social worker for a medical diagnosis, this hearsay exception did not apply. However, the court disagreed with the defense on the second argument, holding as follows:

Under the unique circumstances of this case, we believe Mr. Lopez was afforded a sufficient opportunity to meet and contest the admission of N.L.'s statements to Ms. Winston. First, because the court had previously ruled that they were admissible under ER 803(a)(4), Mr. Lopez was prepared for the State's use of these statements. Second, there had been a Ryan hearing regarding statements made by E.L. to Ms. Winston. Consequently, Mr. Lopez was familiar with Ms. Winston, her interviewing techniques, and the circumstances under which the statements were taken. The trial court is in the best position to make the determination of reliability and made its decision regarding the Ryan hearing immediately after she testified. We conclude the trial court conducted a sufficient Ryan hearing before Ms. Winston testified regarding N.L.'s hearsay statements.

State v. Lopez, 95 Wn.App. at 851 (citation omitted).

The facts from *Lopez* stand in stark contrast to the facts in the case at bar. Specifically, in *Lopez* the state had given the defense advance notice that it intended to call the social worker to testify concerning the children's allegations of abuse. Although the state identified the wrong hearsay exception, the defense still had the opportunity to perform a pretrial interview with the witness concerning her claims as to what the children told her. Thus, the defense had the same opportunity to prepare as it would have had the state identified RCW 9A.44.120 as the hearsay exception. By contrast, in the case

at bar, the state never did given the defense notice that it would attempt to elicit CT's statements to Dr. Sterling under any exception to the hearsay rule. Rather, the state indicated that Dr. Sterling would testify concerning his physical examination of CT. Since the defense knew that his examination showed no evidence of abuse, the defense had no need to even perform an interview. It was not until the midst of the trial that the state gave notice that it would seek to introduce CT's statements to Dr. Sterling under the medical diagnosis exception to the hearsay rule and RCW 9A.44.120. Thus, the defense had no opportunity to prepare to meet this witness.

Under these circumstances, which are the polar opposite to those from *Lopez*, the trial court erred when it allowed Dr. Sterling to testify concerning CT's statements to him because the state did not meet the notice requirement under RCW 9A.44.130. This error also caused prejudice. Given Dr. Sterling's stature as a medical doctor with vast experience in interviewing the young victims of sexual abuse, the jury undoubtedly gave much greater weight to his testimony than it did to any other witness. Even with this testimony, the jury deliberated part of one evening and the entire following day before coming to verdicts that rejected two of the state's claims. Had this been a complicated case then the length of the deliberation would not be unusual. However, this case was exceedingly simple: the sole question for the jury was whether it believed CT or the defendant. Under these facts, the

length of the deliberation and the split verdicts strongly indicates that had Dr. Sterling not been allowed to testify to CT's statements, the jury would have acquitted on the final count. As a result, the defendant is entitled to a new trial.

II. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT FAILED TO GRANT A MOTION FOR SEVERANCE OF DEFENDANT'S AND THEREBY ALLOWED THE STATE TO PRESENT INADMISSIBLE, UNFAIRLY PREJUDICIAL EVIDENCE AGAINST THE DEFENDANT.

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial, untainted from prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). As part of this right to a fair trial, a defendant is entitled to a severance of defendants if joinder is "so manifestly prejudicial as to outweigh the concern for judicial economy." *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991). Under such circumstances in which the unfair prejudice outweighs the concern for judicial economy, the failure to grant a motion to sever requires reversal unless the state can prove that the error was harmless beyond a reasonable doubt. *State v. Mitchell*, 117 Wn.2d 521, 817 P.2d 898 (1991) (failure to grant severance held harmless beyond a

reasonable doubt).

Severance of defendants is controlled under CrR 4.4(c)(1)-(2), which states as follows:

(1) A defendant's motion for severance on the ground that an out-of-court statement of a co-defendant 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;

(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.

CrR 4.4(c)(1)-(2).

In order to support a claim that the trial court erred when it denied a motion for severance, the defendant has the burden of showing that the denial of the motion to sever defendants caused "specific prejudice." *State v. Wood*, 94 Wn.App. 636, 641, 972 P.2d 552 (1999). Specific prejudice may be demonstrated by showing the following:

(1) antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive; (2) a massive and complex quantity of evidence making it almost impossible for the jury to separate evidence as it related to each defendant when determining each defendant's innocence or guilt; (3) a co-defendant's statement inculcating the moving defendant; (4) or gross disparity in the weight of the evidence against the defendants.

State v. Canedo-Astorga, 79 Wn.App. 518, 528, 903 P.2d 500 (1995)
(footnote omitted).

In the case at bar, the defendant has met this burden because, as is shown in Argument III, the co-defendant Klinton Vinsonhale's statements admitted in rebuttal of his testimony, inculpated the defendant. In fact, these statements were the best evidence the state had against the defendant and were the strongest support for the claim CT made at trial. Consequently, the trial court erred when it denied the defendant's motion to sever, and thereby denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment.

III. TRIAL COUNSEL'S FAILURE TO SEEK A LIMITING INSTRUCTION WHEN THE STATE ELICITED UNFAIRLY PREJUDICIAL EVIDENCE IMPEACHING THE TESTIMONY OF THE CO-DEFENDANT VIOLATED THE DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for

judging claims of ineffective assistance of counsel under the Sixth Amendment is “whether counsel’s conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel’s assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel’s performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel’s conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is “whether there is a reasonable probability that, but for counsel’s errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel’s ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based

upon trial counsels failure to seek a limiting instruction when the state called Detective Norton to rebut the co-defendant's claim that he had never said that the defendant had been along with CT when she went to the bathroom and that CT did not want to be around the defendant after the incident. The following addresses this argument.

Under ER 802, hearsay "is not admissible except as provided by these rules, by other court rules, or by statute." Under ER 801(c) hearsay is defined as follows:

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

ER 801(c).

The phrase "other than one made by the declarant while testifying at the trial or hearing" includes an out of court statement made by an in court witness. *State v. Sua*, 115 Wn.App. 29, 60 P.3d 1234 (2003). This restriction arises from the "unwillingness to countenance the general use of prior prepared statements" as substantive evidence. *See* Advisory Committee's Note to Federal Rules of Evidence 801(d)(1).

Under ER 801(d)(2), statements by party opponents are specifically excepted from the definition of "hearsay." This section states:

(d) Statements Which Are Not Hearsay. A statement is not hearsay if –

. . . .

(2) Admission by Party-Opponent. The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

ER 801(d)(2).

In the case at bar, the state asked Klinton Vinsonhaler during cross-examination whether or not Kyle Vinsonhaler had gone with CT when she went to the bathroom in the bushes, and whether or not when they came back, CT no longer wanted to be around the defendant. Klinton Vinsonhaler denied that this had happened. The state then asked Klinton Vinsonhaler if he had ever made such a statement to Detective Norton. Any such prior statements would have been substantively admissible against Klinton Vinsonhaler in his trial under ER 801(d)(2) as an admission by a party opponent. Thus, there was no error in Klinton Vinsonhaler's trial when the state asked him if he had ever made such a statement to Detective Norton. However, in the defendant Kyle Vinsonhaler's trial, this question called for inadmissible hearsay because in the defendant Kyle Vinsonhaler's trial Klinton Vinsonhaler was not the "party-opponent." Thus, trial counsel for the defendant in this case could have posed a successful objection that the

state's question whether or not Klinton Vinsonhaler had ever made such statements to Detective Norton called for inadmissible hearsay in Kyle Vinsonhaler's trial. As it turned out, Klinton Vinsonhaler denied ever making such statements. Thus, trial counsel's failure to object at this point did not harm the defendant.

At the end of the defendants' evidence in the case at bar, the state called Detective Norton to rebut Klinton Vinsonhaler's claim that he had never told Detective Norton that the defendant had gone with CT when she went to the bathroom in the bushes, and that when they came back, CT no longer wanted to be around the defendant. This testimony went as follows:

Q. And what did he say in regards to what happened after that?

A. He informed me that when the kids came back, then Klinton went down and went to the bathroom as they were coming up. I asked if the kids went to the bathroom, if they all stayed together, he advised me that they had split up; that the two boys went closer to the trail and Kyle and the girl went the other way. He informed me that he couldn't see the girl, but she was with Kyle.

. . .

Q. Did you ask him if the little girl had acted differently when she came back from going to the bathroom?

A. I did.

Q. And what did he say?

A. He informed me that she appeared to act differently towards Kyle and she didn't want to be with him and stayed in front of him when they were riding their bikes.

RP 483-484.

As was previously mentioned, this evidence was substantively admissible against Klinton Vinsonhaler as an admission by party opponent under ER 801(d)(2). However, as was previously mentioned, it was not admissible under this exception in the defendant Kyle Vinsonhaler's trial. Rather, as to Kyle Vinsonhaler, this evidence was inadmissible hearsay and his trial counsel could have made a successful hearsay objection. However, in order to sustain a claim of ineffective assistance of counsel, the defendant must do more than merely prove that trial counsel "could" have posed a successful objection. Rather, defendant must prove that the failure to object fell below the standard of a reasonable prudent attorney, and that this failure caused prejudice. As the following explains, both of these conclusions apply in the case at bar.

In addressing the failure to object to this inadmissible hearsay, it should first be noted that there was no tactical reason for trial counsel to fail to object. The defendant gained no advantage by the failure to object. In fact, given the highly prejudicial effect of this evidence, there was a great tactical advantage to be obtained by making the objection. In fact, in this case, this evidence was one of the only pieces of circumstantial evidence to support CT's claims of abuse. Under these circumstances, any reasonable attorney would object. As a result, trial counsel's failure to object fell below the

standard of a reasonable prudent attorney. In addition, as was previously mentioned in Argument I, the jury's decision in this case boiled down to a credibility contest between CT and the defendant, a decision that the jury obviously had a hard time resolving given the paucity of other evidence and the time it took for the jury to make its decision. In such a case, the substantive admission of Klinton Vinsonhaler's statements was sufficient to turn what would have been a verdict of acquittal for the defendant into a verdict of guilt. Thus, counsel's failure to object in this case also caused the defendant prejudice and thereby denied him his right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

In this case, the state may argue that while Detective Norton's testimony concerning his claims about Klinton Vinsonhaler's statements was not admissible under ER 801(d)(2) in Kyle Vinsonhaler's trial, this evidence was admissible as a prior inconsistent statement by a witness under ER 613(2). This rule states:

(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. 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. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

ER 613(2).

While this argument is correct on its face, it ignores the fact that evidence admitted under ER 613 is admitted in rebuttal only, it was not substantive evidence. Rather, to be substantive evidence, the state would have had the burden of proving compliance with ER 801(d)(1), which states:

(d) Statements Which Are Not Hearsay. A statement is not hearsay if—

(1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (iii) one of identification of a person made after perceiving the person;

ER 801(d)(1).

The use of prior inconsistent statements as substantive evidence as opposed merely as rebuttal evidence has been examined extensively in domestic violence cases in the context of what have come to be known as "Smith Affidavits." In these cases one domestic partner (usually female) makes an assault complaint against another domestic partner (usually male), and then by the time of trial denies the prior claim of abuse, many times in the face of strong physical evidence of the prior claim of abuse. Since the state's impeachment of its own complaining witness with the prior inconsistent statements of abuse could only be admitted in rebuttal, the state

ended up with no substantive evidence to support the abuse charge.

In reply to this difficulty, police agencies began the practice of have the domestic party making the abuse claim fill out a written statement under oath concerning the claim of abuse in the anticipation of using this evidence substantively at trial if the complaining party recanted the claims of abuse. In *State v. Smith*, 97 Wn.2d 856, 651 P.2d 207 (1982), this is precisely what happened. In this case the state charged the defendant with second degree assault against his girlfriend, who told the police that the defendant had beaten her. At the time she made this oral claim, she also signed a written statement under oath in front of a notary repeating the claim. However, by the time the case came to trial she recanted her prior statements and claimed that another person had assaulted her.

When the complaining witness recanted her claims on the witness stand, the state rebutted her testimony with her prior oral and written statements to the police. The state also successfully moved to admit the written statement as substantive evidence. Following conviction, the defendant appealed, arguing that substantial evidence did not support his conviction because the only evidence proving that he was the perpetrator was the written statement, which should only have been admitted in rebuttal. The Washington Supreme Court disagreed, holding that since the written statement met the requirements under ER 801(d)(1), it was admissible as

substantive evidence.

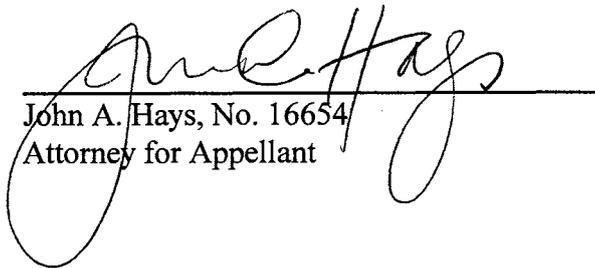
By contrast, in the case at bar Klinton Vinsonhaler's prior statement to Detective Norton was not given under oath and did not meet any of the requirements of ER 801(d)(1). Thus, to the extent it was admissible at all in Kyle Vinsonhaler's case, it was admissible in rebuttal only. However, in this case the court did not inform the jury of this fact because trial counsel did not request a limiting instruction during Detective Norton's testimony. Consequently, the jury undoubtedly used Detective Norton's testimony concerning Klinton Vinsonhaler's prior statements as substantive proof that (1) Kyle Vinsonhaler had gone with CT into the bushes when she went to the bathroom, and (2) that when they returned CT no longer wanted to be around Kyle. As with the failure to make the hearsay objection, this failure also fell below the standard of a reasonably prudent attorney and caused prejudice, thereby denying the defendant his right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

CONCLUSION

The trial court denied the defendant a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it allowed the state to elicit inadmissible, unfairly prejudicial evidence against the defendant. In addition, trial counsel's failure to properly object to this evidence denied the defendant his right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

DATED this 4th day of January, 2008.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

WASHINGTON CONSTITUTION ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

UNITED STATES CONSTITUTION, SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

RCW 9A.44.120

Admissibility of child's statement--Conditions

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if:

(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his or her intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

ER 613

(a) Examining Witness Concerning Prior Statement. In the examination of a witness concerning a prior statement made by the witness, whether written or not, the court may require that the statement be shown or its contents disclosed to the witness at that time, and on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. 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. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

ER 801

The following definitions apply under this article:

(a) Statement. A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A 'declarant' is a person who makes a statement.

(c) Hearsay. 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements Which Are Not Hearsay. A statement is not hearsay if--

(1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (iii) one of identification of a person made after perceiving the person; or

(2) Admission by Party-Opponent. The statement is offered

against a party and is (i) the party's own statement, in either an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

ER 802

Hearsay is not admissible except as provided by these rules, by other court rules, or by statute.

CrR 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;

(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.

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DATED this 4TH day of JANUARY, 2008.

Cathy Russell
CATHY RUSSELL

SUBSCRIBED AND SWORN to before me this 4th day of JANUARY, 2008.



Heather Chittock
NOTARY PUBLIC in and for the
State of Washington,
Residing at: LONGVIEW/KELSO
Commission expires: 11-04-2009