

NO. 39720-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

DARREN LUTHER IPOCK,

Appellant.

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RECEIVED  
COURT OF APPEALS  
DIVISION II  
JAN 11 2010  
KLS

BRIEF OF APPELLANT

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ORIGINAL

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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. Trial counsel's failure to object when the state elicited impeachment on a collateral issue constituted ineffective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

2. Trial counsel's failure to cross-examine the complaining witness on critical prior inconsistent statements constituted ineffective 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 counsel's failure to object when the state elicits impeachment on a collateral issue constitute ineffective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment when the admission of that impeachment evidence is so prejudicial that it denied the defendant a fair trial and resulted in a conviction instead of an acquittal?

2. Does a trial counsel's failure to cross-examine the complaining witness on critical prior inconsistent statements constitute ineffective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when that failure falls below the standard of a reasonably prudent attorney and but for that failure, the jury more likely than not would have returned a verdict of acquittal?

## STATEMENT OF THE CASE

### *Factual History*

The defendant Darren Ipock is a 24-year-old member of the Washington National Guard who grew up in the small community of Kalama, Washington, and graduated from its single high school. RP 199-204. One of his friends growing up was Aaron Denton, with whom the defendant played sports. RP 115-117. They were one year apart in school and lived on the same block in Kalama while growing up. *Id.* Both the defendant and Aaron Denton have a number of friends in common from growing up in Kalama and socialize with them on a fairly regular basis. RP 115-117, 119-204. Aaron Denton has two younger sisters: Jenna, who is 18-years-old and Chelsea, who is 16-years-old. RP 12-13.

On August 15, 2008, a number of mutual friends gathered for a party at Alex Hausserman's home in Kalama. RP 14-16. Alex is a friend of Chelsea Denton. *Id.* Chelsea was one of many people present as was the defendant. *Id.* At one point a number of people were sitting around a table playing a card game, including Chelsea and the defendant, who were both "texting" each other on their respective telephones. RP 36-39. Chelsea later described the substances of the "texting" with the defendant as "flirting" on her part. *Id.* In fact, after Chelsea left the party with a few of her friends and went home, she spent a couple of hours continuing to "text" with the

defendant. RP 230.

Two days after the party at the Hausserman home, a number of the same mutual friends decided to gather at Brandon Jackson's house in Kalama for a party. RP 46-49. Chelsea decided not to go as she had to get up early the next day. *Id.* However, her friends Blair and Kara, who were at Chelsea's house, did go to the party. *Id.* Once they left, the defendant "texted" her and asked if she was going to Brandon's party. *Id.* As a result of this message, she called her friends Blair and Kara to come back and get her as she had changed her mind. *Id.* Based upon this request, Chelsea's two friends walked back to Chelsea's house and accompanied her to Brandon Jackson's house. *Id.* The defendant was waiting just down the hill from Chelsea's house and accompanied the three girls to the party. *Id.*

Once at Brandon Jackson's house, Chelsea's two friends went into a back room to watch a movie. RP 50-55. Chelsea and the defendant stayed in the living room and sat on the couch. *id.* According to Chelsea, once they sat down, she and the defendant began kissing and "making out." *Id.* After a few minutes of this, the defendant then got up and left the room, telling Chelsea he would be "back in a minute." *Id.* At this point, Chelsea went into the back room where her friends had gone to watch a movie. *Id.* However, within a couple of minutes the defendant entered and "guided" her by the arm into a dark, empty bedroom. *Id.*

Once in the bedroom, Chelsea and the defendant sat on the bed and resumed “making out.” RP 50-55. While doing this, the defendant reached underneath her shirt, put his hand on her stomach, laid her on the bed, and asked her if she wanted to have sex with him. *Id.* She responded that she did not because she was a virgin. *Id.* The defendant then pulled her pants off and put his fingers into her vagina. RP 56-57. He also pulled his pants off, and when he did, she put her hand on his penis. RP 58-64. Following this, the defendant put his mouth on her vagina, and at some point she put her mouth on his penis. *Id.* The defendant then got on top of her and twice tried to have intercourse with her, but stopped each time when Chelsea told him that it hurt. *Id.* After this, Chelsea told the defendant that she had to go home. RP 64-65. The defendant then pulled Chelsea’s pants back on, and he and Chelsea left the house after Chelsea spoke with her friends in the other room. RP 66-67. Once back at Chelsea’s house, the two of them kissed, the defendant left, and Chelsea went into her house. *Id.* According to Chelsea, the defendant did not force her to do anything, and all of their sexual contact was consensual. RP 88-91.

The defendant’s version of what happened at Brandon Jackson’s house was similar in the description of where they were, but completely different in the description of what happened. RP 199-253. According to the defendant, once they arrived at Brandon Jackson’s house, Chelsea’s two

friends went into a back room and he and Chelsea sat on the couch to watch the television. RP 209-210. Unbidden, Chelsea leaned her head on his shoulder. RP 211-214. When he asked why she had done that, she said that she was tired. *Id.* A few minutes later, someone in the kitchen started smoking marijuana, so he went to look for another room in which to sit and talk. RP 220-222. After finding one, he went into the back room where Chelsea's friends were watching a movie and got her. *Id.* The two then went into a back bedroom to talk. *Id.* According to the defendant, the lights were on, and another person was in the room for at least part of the time. *Id.* After talking for a while, Chelsea told him that she had to go, so he took her home. *Id.* According to the defendant, he did not kiss Chelsea, "make out" with her, or have any type of sexual contact with her. RP 209-222.

Within a few days after the party at Brandon Jackson's house, Chelsea had told a number of people what she claimed she and the defendant had done. RP 68-74. She first told her sister Jenna, her friend, her brother Aaron, her mother and father, a police officer after her father reported the incident to the police, and eventually a nurse who performed a physical examination on her. *Id.* According to Chelsea's sister, Chelsea's brother, Chelsea's father, and an adult friend of the Denton family, they each confronted the defendant about Chelsea's accusations, and in each instance the defendant gave some type of admission that he had sexual contact with Chelsea. RP 95,

120-122, 133-135, 194-196. The defendant denied making any of these admissions. RP 211-214, 220-222.

### ***Procedural History***

By information filed October 15, 2009, the Cowlitz County Prosecutor charged the defendant with one count of third degree rape of a child. CP 1-2. The case eventually came on for trial before a jury, during which the state called 11 witnesses in its case-in-chief, including Chelsea, her sister, her brother, her father, four of her friends, an adult friend of Chelsea's family, and the nurse who examined her. RP 10, 91, 104, 115, 125, 138, 152, 164, 173. These witnesses testified to the facts contained in the preceding factual history. *See* Factual History. The nurse testified that she did not find any evidence of forced sexual contact, although given Chelsea's claims, she did not expect to see any such evidence. RP 104-114.

During its case-in-chief, the state also called a friend of the defendant by the name of Brian Schneider. RP 180. According to Mr. Schneider, in the middle of August of 2008, the defendant had picked him up in the morning and the two of them had spent the day going to various garage sales. RP 182-185. During the day, the defendant mentioned that he had been at a party the night previous with Aaron Denton's sister, that they had kissed, and that he did not want Aaron to find out because he would be mad. *Id.* During direct examination, the prosecutor repeatedly asked Mr. Schneider if he had told

Officer Jeff Skie that the defendant had told him that he didn't "go all the way" with Aaron's sister "because she was a virgin." *Id.* Mr. Schneider denied making any such statements to the officer. *Id.*

Following the close of the state's case, the defendant took the stand on his own behalf and denied having any sexual contact with Chelsea and denied ever making an admission that he had. RP 199-253. The defense then proposed to call Officer Skie to testify that Chelsea had claimed that she had made a true and complete statement to him about her claims of sexual contact between her and the defendant, and that she had never made a claim to him that there had been any oral-genital contact. RP 247. The state did not deny that the defendant's factual claims were incorrect. *Id.* Rather, the state objected that the impeachment was improper because the defense had never confronted Chelsea with the substance of her statements to Officer Skie. *Id.* The court sustained the objection and refused to allow the defense to call the witness. *Id.*

After the defense rested its case, the state called Officer Skie to testify in rebuttal. RP 255-262. Without any objection from the defense, Officer Skie testified that he had interviewed Mr. Schneider, and that during this interview, Mr. Schneider told him that the defendant had told Mr. Schneider that the night previous he had sexual contact with Aaron Denton's sister, that he had not gone "all the way" with her "because she was a virgin," and that

he didn't want Aaron to find out. *Id.*

After the state presented its rebuttal evidence, the court instructed the jury without objection from either party. RP 262-268, 268-279. The parties then presented closing argument, after which the jury retired for deliberation. RP 279 to 305. The jury later returned a verdict of "guilty." CP 36. Following a pre-sentence investigation report by the Department of Corrections, the court sentenced the defendant within the standard range. CP 38-52. The defendant thereafter filed timely notice of appeal. CP 56.

## ARGUMENT

### TRIAL COUNSEL'S FAILURE TO OBJECT WHEN THE STATE ELICITED IMPEACHMENT ON A COLLATERAL ISSUE, AND TRIAL COUNSEL'S FAILURE TO IMPEACH THE COMPLAINING WITNESS ABOUT PRIOR INCONSISTENT STATEMENTS 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 (1) trial counsel’s failure to object when the state called a witness to impeach a prior witness on a collateral issue, and (2) when it failed to cross-examine the complaining witness on prior inconsistent statements on a critical claim she made against the defendant. The following sets out these arguments.

***(1) Trial Counsel’s Failure to Object When the State Elicited Impeachment on a Collateral Issue Constituted Ineffective Assistance of Counsel.***

In the case at bar, the trial court allowed the state to elicit evidence from Officer Skie that when he interviewed Brian Schneider, who told him that when he and the defendant were out together visiting garage sales, the defendant told him that he had sexual contact with Chelsea Denton. The defendant anticipates that the state will argue that Officer Skie’s testimony

was admissible as a prior inconsistent statement by Brian Schneider under ER 801(d)(1)(i), since on cross-examination, Brian Schneider had denied ever making such a statement of Officer Skie. However, as the following explains, any such argument would be in error because the evidence constituted impeachment on a collateral issue.

Under ER 801(d)(1)(i), a prior inconsistent statement by a witness who testifies at trial is not hearsay, and may be elicited to rebut the witness's testimony, if (1) the witness denies having made the prior statement, and (2) the prior statement is contrary to the evidence given at trial. *State v. Wilder*, 4 Wn.App. 850, 486 P.2d 319 (1971). However, a party may not present extrinsic evidence of a prior inconsistent statement if that extrinsic evidence constitutes impeachment on a collateral matter. *State v. Oswald*, 62 Wn.2d 118, 121, 381 P.2d 617 (1963). A matter is "collateral" for the purposes of impeachment if the fact as to which error is predicated, could not have been shown in evidence for any purpose independent of the contradiction. *State v. Rosborough*, 62 Wn.App. 341, 814 P.2d 679 (1991). See generally 5A K. Tegland, *Washington Practice, Evidence* § 227 (3d Ed.1989).

Under these rules, Officer Skie's testimony concerning what Brian Schneider told him the defendant said was not admissible at trial independent of the state's claim that it was inconsistent with Brian Schneider's testimony of what the defendant told him. Thus, Officer Skie's testimony concerning

Brian Schneider's prior statement about what the defendant told him was collateral evidence, and as such was not admissible. As a result, the trial court erred when it allowed Officer Skie to testify concerning Brian Schneider's alleged prior inconsistent statements.

This evidence was highly prejudicial to the defense because it went to the heart of the defendant's claim that he did not have any sexual contact with Chelsea. Brian Schneider was a friend of the defendant and had no motive to lie in order to support Chelsea's claims of sexual contact. Thus, while the jury might well have looked with a jaundiced eye at the claims of Chelsea's family that the defendant had confessed, it had no reason to doubt such a claim from the defendant's friend, who had no motive to lie. As a result, by failing to object to the admission of this improper evidence, trial counsel fell below the standard of a reasonably prudent attorney, and that failure caused prejudice. As a result, the defendant is entitled to a new trial.

***(2) Trial Counsel's Failure to Cross-examine the Complaining Witness on Critical Prior Inconsistent Statements Constituted Ineffective Assistance of Counsel.***

In the case at bar, Chelsea took the stand and told the jury that on one occasion, the defendant had digitally penetrated her, that he had performed oral sex upon her, and that he had then twice attempted penile penetration. She further testified that she had later told her sister, her brother, her friend, her mother, her father, a police officer, and a nurse what had happened.

Although she stated that she had not been very detailed with her father, she never claimed that she had ever spoken untruthfully to anyone about what had happened in any of the statements she made. These claims by Chelsea were critical in this case because there were no witnesses to the alleged sexual contact and there was no physical evidence to support the claims made. Although the latter is not unusual in cases charging similar offenses as was pointed out by the state's expert, this lack of witnesses and corroborating physical evidence illustrates the critical nature that credibility played in this case.

In spite of the fact that the verdict in this case turned on the credibility balance between the claims of the complaining witness and the denials of the defendant, trial counsel in this case failed to cross-examine the complaining witness on a key piece of evidence that would have seriously eroded her credibility in the eyes of the jury. This key piece of evidence was the fact that in her interview with the police officer, she failed to make any claims that the defendant had ever had oral-genital contact with her. This was no meaningless or insignificant part of her story of abuse. Rather, this was one of the facts that, standing alone, would constitute the commission of the offense alleged. Thus, it was obviously a key point for cross-examination - one that no reasonable defense attorney would fail to explore.

Apparently, defense counsel in the case at bar had intended to ask the

complaining witness concerning this important inconsistency because at the end of trial, he attempted to call Officer Skie to testify that the complaining witness had never made a claim of oral-genital contact to the officer in spite of the fact that she had already given an account of what had happened to four or five different people prior to talking to him. Upon hearing of the defense intent to call Officer Skie for this purpose, the state objected on the basis that under ER 801(d)(1)(i), this prior inconsistent statement could not be elicited in rebuttal because the defense had never called upon the complaining witness to admit or deny the inconsistency in her statement to the officer. This objection was well taken and the court sustained it.

As was previously mentioned, no reasonable defense attorney would fail to cross-examine the complaining witness on so critical a point as her prior inconsistent account of the alleged abuse. Thus, counsel's failure fell below the standard of a reasonable prudent attorney. In addition, this failure caused prejudice. This prejudice arose from the fact that, as already mentioned, the jury's decision in this case turned on the issue of credibility between the defendant and the complaining witness. While it is true that a number of family members of the complaining witness claimed that the defendant had admitted the sexual contact to them, they each had an obvious bias in the eyes of the jury. Thus, had defense counsel properly cross-examined the complaining witness, it would more likely than not have been

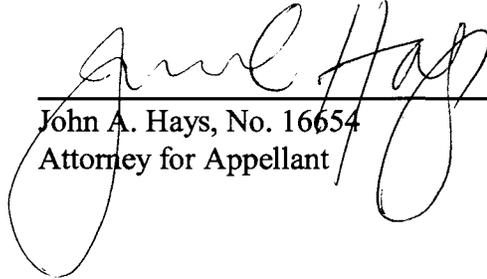
sufficient to raise a reasonable doubt in the eyes of the jury. As a result, trial counsel's failure denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

**CONCLUSION**

The defendant was denied effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, and is entitled to a new trial.

DATED this 21<sup>st</sup> day of January, 2010.

Respectfully submitted,



John A. Hays, No. 16654  
Attorney for Appellant

## **APPENDIX**

### **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.

BY: [Signature]
STATE OF WASHINGTON
JAN 21 2010
COURT OF APPEALS

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

STATE OF WASHINGTON,
Respondent

vs.

DARREN LUTHER IPOCK,
Appellant

NO. 08-1-01159-1
COURT OF APPEALS NO:
39720-0-II

AFFIRMATION OF SERVICE

STATE OF WASHINGTON )
County of Cowlitz ) : ss.

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On January 21st, 2010, I personally placed in the mail the following documents

- 1. BRIEF OF APPELLANT
2. AFFIRMATION OF SERVICE

to the following:

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Dated this 21st day of JANUARY, 2010 at LONGVIEW, Washington.

[Signature: Cathy Russell]
CATHY RUSSELL
LEGAL ASSISTANT TO JOHN A. HAYS