

65147-1

65147.1

NO. 65147-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

EZEQUIEL APOLO-ALBINO,

Appellant.

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King County Prosecutor
Appellate Unit

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COURT OF APPEALS
JENNIFER M. WINKLER

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

The Honorable Jay White, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Ineffective assistance of counsel denied the appellant a fair trial.

2. Counsel violated the appellant's right to have the State prove each element of the crimes beyond a reasonable doubt by inappropriately conceding his client's guilt.

3. The trial court erred by denying the appellant's motion for a new trial based on ineffective assistance of counsel.

4. Replacement counsel, who represented the appellant on his motion for a new trial based on ineffective assistance, was ineffective for failing to present a proper record on the motion for a new trial.

5. Cumulative error denied the appellant a fair trial.

Issues Pertaining to Assignments of Error

1. Did defense counsel Michael Danko render constitutionally ineffective assistance where he:

(a) failed to research the relevant law, thereby finding himself unable to introduce evidence that the complaining witnesses' stories changed over time;

(b) failed to investigate and interview potential witnesses, including the complaining witnesses' family members, which would have revealed evidence of the complaining witnesses' motive to lie;

(c) failed to object to prejudicial, inadmissible hearsay that the appellant engaged in suspicious behavior, turning his chair away from the visitation supervisor before putting his children on his lap;

(d) failed to object to the details of the older complaining witness's disclosure, which were erroneously admitted under the "hue and cry" exception to the general rule against hearsay;

(e) failed to object to testimony that the foster mother found the appellant's behavior "creepy" despite the fact it was easily explainable;

(f) apparently failed to review the video recording of one complaining witness's interview, thereby permitting the jury to hear uncharged allegations that the appellant also molested the witness's two-year-old sister; and

(g) conceded in closing argument that the complaining witnesses had been molested

2. Was replacement counsel ineffective for failing to present a proper record on the motion for a new trial?

3. Even if this court finds that each instance of counsel's deficient performance did not alone amount to ineffective assistance, did their cumulative effect render the appellant's trial unfair?

B. STATEMENT OF THE CASE¹

1. The charges

The prosecutor charged Ezequiel Apolo Albino (Apolo)² with two counts of first degree child molestation. CP 1-5. The complaining witnesses were Apolo's daughters, B.G. (born 5/30/2000) and D.G. (born 2/4/1998). CP 1-5. The State alleged the crimes occurred in 2007 or 2008 while Apolo visited the girls in foster care. CP 1-2. Michael Danko represented Apolo at trial. A jury convicted Apolo as charged, and the court sentenced him to a standard range minimum sentence of 89 months. CP 26-27, 72-81; former RCW 9.94A.712 (2009).

2. Background to Danko's "pro bono" representation of Apolo³

Dr. Christian Harris, a psychiatrist and Apolo's longtime employer, worked with Danko in the past. Harris asked Danko to represent Apolo as a favor to Harris. Danko agreed. 11RP 13-14.

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – 10/12/09; 2RP – 10/13/09; 3RP – 10/14/09; 4RP – 10/19/09; 5RP – 10/20/09; 6RP – 10/21/09; 7RP – 10/22/09; 8RP – 12/11/09; 9RP – 12/18/09; 10RP – 1/22/10; 11RP – 3/12/10; and 12RP – 3/19/10.

² Apolo is a Spanish speaker and was assisted by interpreters at trial.

³ The facts related to the representation are taken from the record on Apolo's motion for new counsel and a new trial.

Harris eventually became concerned about Danko's inattention to Apolo's case. When Harris expressed his concerns, Danko was less than reassuring. 11RP 14-15. Fearing Danko was not investigating properly, Harris contacted Leigh Hearon, an experienced investigator, and persuaded her to assist Danko on a pro bono basis. 11RP 15; CP 57.

Hearon interviewed the complaining witnesses and their younger brother, M.G. She prepared charts comparing the girls' interviews, noting "significant" changes in their stories over time.⁴ CP 59. Hearon noted M.G. made bizarre allegations against Apolo, which she suspected led the prosecutor to drop charges related to that child. Hearon also noted one of the complaining witnesses claimed Apolo abused another child at the foster home and overheard her foster mother talking to her boyfriend about the case. CP 58.

Hearon told Danko that additional investigation was required, including interviewing the children's biological mother and siblings, but that she could not do the work without payment. CP 58-59. Hearon created a list of recommended investigative tasks for Danko to complete. CP 58. Danko assured Hearon he would "call in favors" from other investigators. CP 58.

⁴ Danko told Hearon he was not interested in attending the interviews. CP 59.

As the trial approached, Hearon periodically called Danko. Like Harris, she became concerned he was not prepared. CP 59. For example, Danko told Hearon he wanted her to testify about the charts. Hearon told Danko her testimony would be admitted solely to impeach the complaining witnesses' trial testimony, but Danko insisted the court would let Hearon testify to the girls' interview statements. CP 59.

With no advance notice, Danko telephoned Hearon on the day he wanted her to testify. Hearon, who lives on the Olympic Peninsula, was unable to attend but agreed to come to court the next day. CP 59.

The following day, Hearon again told Danko she doubted she would be able to testify about the charts. Hearon was present when Danko advised Apolo it was not necessary for him to testify because "expert witness" Hearon would be permitted to point out inconsistencies in the girls' stories. CP 59.

Hearon looked on as Danko unsuccessfully argued that Hearon should be permitted to testify that the girls' stories changed over time, despite the fact he had not cross-examined the girls about the inconsistencies or, for that matter, about anything at all. CP 60-61. Danko offered no legal support for his position. CP 61. Danko ultimately did not call Hearon to testify. CP 60-61; 11RP 16. Because Danko failed

to lay the proper foundation to show the girls' stories changed over time, Apolo was forced to testify. CP 61.

Court-appointed attorney Al Kitching represented Apolo in parental rights termination proceedings involving the complaining witnesses and three other children. CP 52-53. Kitching contacted Danko, hoping to obtain information helpful to his case and to share information relevant to the criminal case that he had learned through investigation. CP 53-54.

Danko initially said he would share notes and transcripts of defense interviews of the complaining witnesses, but Kitching never received the information. Eventually, Danko told Kitching that Apolo said he did not want Kitching to have that information. When Kitching pressed further, Danko hung up on him. CP 53.

Meanwhile, Kitching had learned an older brother and sister of the complaining witnesses believed the girls were untruthful and that the timing of the allegations coincided with D.G.'s desire to be adopted by "Jeff," because the girls considered Apolo – who was nearly 60 – too old and strict. CP 53-54.

Kitching emailed the information to Danko and offered to assist in setting up interviews with the girls' siblings, but Danko never replied. CP 56. Kitching sent the information via mail to the address on Danko's

notice of appearance, but the mail was returned as undeliverable. CP 54. Apolo later confirmed he never prohibited Danko from talking to Kitching. CP 51-52, 54.

3. Pretrial hearings

Danko made no pretrial motions except to request a competency hearing for the complaining witnesses. 2RP 4-6. The prosecutor acknowledged that D.G.'s out-of-court statements were inadmissible under the child hearsay exception because she was more than 10 years old⁵ but said he would seek to introduce various statements under the "hue and cry" hearsay exception for sex crimes. 2RP 12.

The court held a child hearsay hearing as to B.G.'s statements to her foster mother and the child interview specialist in light of the Ryan⁶ factors. 2RP 30. Danko told the court there was "no basis for challenging

⁵ RCW 9A.44.120 permits admission of otherwise inadmissible hearsay statements made by a child under the age of 10.

⁶ State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984) identified the following factors for assessing the reliability of child hearsay statements: (1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; and (5) the timing of the declaration and the relationship between the declarant and the witness; (6) the statement contains no express assertion about past fact; (7) cross-examination could not show the declarant's lack of knowledge; (8) the possibility of the declarant's faulty recollection is remote; and (9) the circumstances surrounding the statement are such that there is no reason to suppose the declarant misrepresented defendant's involvement.

the testimony.” 3RP 30. As to the first factor, the court found B.G. had no motive to lie. 3RP 39. The court also found the statements admissible under the other factors. 3RP 39-43.

4. Trial proceedings

a. Foster parents’ testimony

Several foster parents in Enumclaw, including Sarah Anderson, Sharon Cormier, and Jeff Ivey, formed a cooperative group that shared various childcare responsibilities and ensured sibling groups and other foster children maintained contact with one another. 3RP 74; 5RP 41, 43.

After they were removed from their mother in May 2007, complaining witness B.G. and her brother M.G. were placed with Anderson, while complaining witness D.G. and older sister Raquel G. were placed with Cormier. 3RP 78; 5RP 52. The youngest sibling, N.G., a two-year-old girl, was placed with Anderson a few months after the others. 3RP 78. The children displayed some unusual behaviors. M.G. and B.G. were reluctant to change clothes in front of others and N.G. refused to bathe. 3RP 81. D.G. locked the door when showering or changing her clothes. 5RP 58.

In the fall of 2007, Apolo began visiting the children at Cormier’s home. 3RP 84. Anderson found the parent-child interaction odd: The children ate the food Apolo provided but ran off as soon as they were done

eating. 3RP 84, 86. Cormier testified that Raquel G. and M.G. would stay near Apolo, but D.G. in particular was quick to leave the room. 5RP 56. Apolo often ordered the children to sit near him or sit on his lap. 3RP 84-85; 5RP 57.

Anderson's initial impression was that the children were simply unused to Apolo. She became concerned, however, when her husband and Jeff Ivey monitored a visit. Anderson's husband told her that Apolo turned his chair so that he faced away and had the children sit on his lap. 3RP 85. Danko did not object to Anderson's testimony.

Visits were eventually moved to the local elementary school gym, where Cormier taught a martial arts class. 3RP 86; 5RP 39-40. Anderson testified the move was prompted by Apolo's pattern of was arriving early at Cormier's home. 3RP 86. Anderson found Apolo's early arrival "kind of creepy." 3RP 87. At the school, Apolo generally sat on stairs and gave the children food during class breaks. 3RP 88; 5RP 61. Apolo continued to address the children sternly, directing them to sit near him or on his lap. 3RP 89.

Anderson was a student in Cormier's class and did not closely monitor Apolo's interaction with his children. 3RP 88. She did recall two incidents, however. In the first, she observed the two-year-old N.G. scream and cry when Cormier tried to put her on Apolo's lap. 3RP 98-99.

On the second occasion, a crying D.G. screamed “no,” swatted her arm at Apolo, and ran across the gym. 3RP 100. D.G. explained she felt trapped when her father put his arms around her. 3RP 100.

Cormier found it odd that, despite enjoying the class, D.G. occasionally made excuses and stayed home. 5RP 67, 69-70. One day in June,⁷ Cormier told D.G. that Apolo wanted visits on Sundays. 5RP 70. D.G. told Cormier she did not want to go to those visits and tearfully alleged that Apolo had sexually abused her. 5RP 70.

Anderson testified that Cormier called her over to hear what D.G. had to say. Anderson provided more detail regarding D.G.’s disclosure, but Danko did not object. According to Anderson, D.G. claimed that during visits, Apolo forced her to sit on his lap and rubbed her back, chest, and vaginal area. 3RP 103. Anderson opined D.G. was “scared” to reveal this information. 3RP 104.

After D.G.’s disclosure, the women asked B.G. how Apolo treated her at visits. B.G. said Apolo made her sit on his lap and put his hands between her legs. 3RP 105; 5RP 71-72. Anderson asked what areas he touched, and she pointed to her vagina and chest. 3RP 105.

⁷ Anderson testified it was about a week after D.G.’s gymnasium outburst. 3RP 101.

The girls had improved socially and academically since ceasing contact with Apolo. 3RP 114. They were currently living with Jeff Ivey, who planned to adopt them once Apolo and the mother's parental rights were terminated. 3RP 112; 5RP 29.

b. Social worker's testimony

Sharol Donoso was the Department of Social and Health Services (Department) social worker assigned to the family. The Department removed D.G., B.G., and some of their siblings based on allegations of neglect by the mother, Artemia, who had nine children, including four with Apolo. 5RP 25; 7RP 64.

A few months after the children's removal, Apolo came forward to request custody of his children. 5RP 26-27. Donoso arranged visitation monitored by the foster parents. 5RP 29-30. After the abuse allegations, Donoso filed a petition to terminate parental rights. 5RP 29.

c. Video recording and inadmissible allegation regarding complaining witnesses' two-year-old sister

The State played a video recording of B.G.'s interview with the prosecutor's child interview specialist. 5RP 124-25. In the video, B.G. said (1) Apolo put her on his lap and rubbed her genitals and chest outside her clothing during class; (2) told her not to tell Cormier; and (3) Cormier

and Anderson probably did not see Apolo touch her because they were focused on the class. Ex. 6; Ex. 7 at 11-14, 16-18, 27.

B.G. also said that when she was “little” Apolo “touched her everywhere.” Ex. 7 at 12, 19. This occurred in her room at her “real house” in Seattle when she was only one year old.⁸ Ex. 7 at 21, 23. When asked how she could remember if she was only one year old at the time, B.G. claimed, “I never forget.” Ex. 7 at 23.

B.G. said Apolo also touched D.G. and “Amy” (B.G.’s two-year-old sister, N.G.).⁹ B.G. knew Apolo touched D.G. because D.G. told her. She knew about N.G. because “when I hear my . . . little sister [N.G.] screaming . . . I know . . . he’s doing that.” Ex. 7 at 24-25.

After the video presentation ended and the jury was excused, the court expressed concern that B.G. made allegations regarding a third child, which was disallowed under the child hearsay statute and State v. Harris.¹⁰ The court asked what remedy would be appropriate. 5RP 127-28. Danko

⁸ The girls’ mother lived in Algona at the time of removal. Ex. 7 at 26.

⁹ The prosecutor acknowledged “Amy” was actually N.G. 5RP 128; see also 6RP 67 (B.G.’s testimony).

¹⁰ 48 Wn. App. 279, 284, 738 P.2d 1059 (1987) (child hearsay statute does not apply to statement by child describing act of sexual contact performed on different child).

told the court he would review the law and “[i]f I do have a position, I will address the court tomorrow morning.” 5RP 129.

The next day, the court asked Danko if he had decided on a remedy. 6RP 9. Danko did not know what the court was talking about. After the court reminded Danko, he said, “Oh. Can I think about that?” 6RP 9. The court then summarized the disclosure, identified its location in the interview transcript, and reminded Danko that it appeared to fall outside the child hearsay exception. 6RP 9. The court asked Danko if he wanted a curative instruction. When Danko did not respond, the court told Danko it would ask again later. 6RP 10. The prosecutor, on the other hand, agreed a curative instruction might be appropriate and volunteered to help Danko draft one. 6RP 11-12. The court provided Danko a copy of Harris and told him to decide if he wanted the prosecutor to help him draft the instruction. 6RP 12.

d. Complaining witnesses’ testimony

D.G. testified that at the time of trial, she and B.G. lived with their foster father, Jeff. 6RP 34-35. D.G. had four sisters, including two older sisters, Raquel G. and Rebecca G., and two younger sisters, B.G. and N.G. She also had four brothers, including younger brother, M.G. 6RP 36-37.

D.G. said Apolo ordered her to sit next to him on the gymnasium stairs during class and forcefully rubbed her genital area outside her

clothing. 6RP 49. This occurred on more than five occasions. 6RP 48-49. The other students did not notice because they were busy practicing. 6RP 49. D.G. denied Apolo touched her chest. 6RP 50.

Before foster placement, D.G. lived with Artemia and her siblings in a house in Algona. 6RP 37. Apolo visited the Algona house about once a week. 6RP 40. He came into her room and watched her change, which “freak[ed her] out. 6RP 41. In addition, when D.G. was between four and six years old, he touched her in her “lower private” area. 6RP 52. D.G. also saw Apolo touch B.G. 6RP 52-53. D.G. and B.G. tried to hide from Apolo. 6RP 51.

B.G. testified that on more than one occasion, Apolo touched her “lower privates” while she sat on his lap during class. 6RP 76.

When B.G. lived with her mother, Apolo stared at her while she dressed and followed her around the house. 6RP 79-80. He also rubbed her private area while she watched television. 6RP 79-80.

e. Proposed testimony by investigator Hearon, more discussion about video, and defense presentation

After the State rested, Danko told the court that Apolo had decided not to testify. 6RP 90-91. Danko said he planned to call investigator Hearon that afternoon, but inclement weather was keeping her on her farm on Bainbridge Island. 6RP 83. The court expressed confusion that the

weather on Bainbridge Island was different than at the Regional Justice Center but reluctantly agreed she could testify the next morning. 6RP 86.

Apolo's adult daughter, Maria Juarez, testified she and her father worked together and after work she drove him to the weekly visits in Enumclaw. 6RP 94-95. Apolo and Juarez watched the girls practice martial arts. CP 99, 109. Juarez was present most of the time the girls were near Apolo. She noticed nothing out of the ordinary. 6RP 110.

Before court recessed that afternoon, Danko reiterated that Apolo did not plan to testify. 6RP 113-14. The court again asked if Danko wanted a curative instruction as to B.G.'s allegations regarding N.G. 6RP 119. Danko said he would decide the next morning. 6RP 119.

The next morning, the prosecutor confirmed he and Danko had prepared a limiting instruction. 7RP 4-6, 11. Danko claimed he didn't immediately raise the issue because he did not want to draw undue attention. 7RP 7-8. The court told Danko an instruction was appropriate because the jury would probably want to watch the video during deliberations. 7RP 1; CP 28-29 (jury request to watch video again).¹¹

¹¹ The court instructed the jury as follows:

The Jury may recall that during the video interview between [the child interview specialist] and [B.G.], [B.G.] made reference to possible touching by the Defendant of her little sister [N.G.], whom she referred to as Amy.

Although Danko never objected, the prosecutor asked the court to find that the uncharged allegations by the complaining witnesses were admissible under ER 404(b) and RCW 10.58.090. The court noted there was no timely objection to the testimony but, in any event, ruled the evidence was admissible. 7RP 13-16, 117.

The prosecutor next objected to Hearon's anticipated testimony and argued she should be limited to impeaching only what the jury heard rather than anything girls said outside the courtroom. 7RP 16-17, 20-21. The prosecutor correctly noted that Danko had not confronted the girls with any inconsistencies as the evidence rules required.¹² 7RP 25. Moreover, the interviews did not qualify as prior inconsistent statements under ER 801(d)(1)(i) because the interviews were not under oath. 7RP 26.

Danko insisted Hearon could testify about the comparison chart and the inconsistencies between defense interviews and the State's interviews regardless of whether such information was before the jury.

You are instructed that you are not to consider any testimony or reference to alleged abuse of any other child. You should only consider the allegations of abuse of [B.G.] and [D.G.].

7RP 44 (instruction read to jurors immediately before Apolo's testimony).

¹² See ER 613 (requiring the witness to be confronted with prior statement).

7RP 18, 22-24, 26. He claimed the jury needed to know the girls had changed their stories. 7RP 23. At the same time, he asserted it would have been “improper” to ask the girls about their changing stories because of the sensitive nature of the case. 7RP 23. Danko pleaded with the court that he had been counting on Hearon’s testimony to make his case. 7RP 27. He acknowledged he had no legal support for his argument. But he claimed there was no authority that defeated his position. 7RP 28.

The court ruled that even though Danko failed to confront the complaining witnesses, Hearon would be permitted to point out differences between the defense interviews and statements made at trial and in the DVD. 7RP 29-30, 32-33, 35-36.

Danko nevertheless did not call Hearon to testify.¹³ Instead, he called Apolo. 7RP 42.

Apolo was the father of a son and daughter, Maria, by his first wife, and four children by Artemia, including the two complaining witnesses and M.G. and N.G.¹⁴ He acknowledged he had only sporadic contact with the children, but he tried to provide for them by giving Artemia money. 7RP 65.

¹³ Hearon suspected Danko was unable to use her testimony on the limited basis the court did allow because he was not sure what, precisely, the girls’ testimony had been. CP 61.

¹⁴ Apolo testified Raquel G. is not his biological daughter. 7RP 64.

After learning of the dependency, Apolo contacted caseworker Donoso to obtain visitation. 7RP 50. Apolo did not have a driver's license because could not pass the written test. His daughter drove him to the visits, which were eventually moved to the martial arts class. 7RP 50. The girls spent most of the time participating in class but joined Apolo to eat. 7RP 54-55. Apolo denied the children tried to avoid him and opined that the visits went well. 7RP 68.

Apolo denied sexual contact with his daughters. 7RP 47-48, 62-63. He acknowledged D.G.'s tearful outburst. 7RP 55. He speculated, however, that D.G. was sad because she fought with other children in the class, her mother missed visits, or she was just feeling sad. 7RP 55, 62-63, 70. He also denied ever placing the girls on his lap and asserted any statement to the contrary was a lie. 7RP 70.

f. Closing arguments

The State argued the case had become easier to decide thanks to Apolo's testimony; "independent witnesses" Anderson and Cormier flatly contradicted, among other things, Apolo's impression the visits went well and his denial the girls sat on his lap. 7RP 78-79.

Danko's closing was brief. He argued there were "serious weaknesses" in the State's case but did not identify what they were. 7RP 98. He continued, "[T]here is no question in any of our minds that these

two children have been seriously harmed, no question But the question is, is it their father?" 7RP 101.

5. Motion for new trial based on Danko's ineffective assistance

After the jury's verdict but before sentencing,¹⁵ Apolo (with Kitching's assistance) moved for new counsel to file a motion for a new trial based on ineffective assistance. CP 30-3; 8RP 3-4.

At a December 2009 hearing, the court asked Danko what he thought about the motion. Danko noted (incorrectly) that Kitching was previously appointed on the criminal case¹⁶ and Danko warned Kitching not to interfere after taking over. 8RP 5. Danko was outraged by Kitching's "inappropriate behavior." 8RP 6.

Apolo told the court he wanted Danko to withdraw. 8RP 8. The parties agreed to continue the case a week so Danko could confer with Apolo. 8RP 8. Danko also announced that in any event he would soon resign from the bar. 8RP 10.

¹⁵ Meanwhile, Danko filed a presentence statement advocating for low-end minimum sentence, but misidentified the standard range (98-130 months) as higher than the true standard range (67-89 months). CP 37-38.

¹⁶ Two other attorneys from Kitching's firm, Society of Counsel Representing Accused Persons, were in fact assigned to the case. Supp. CP __ (sub nos. 5 (Notice of Appearance) and 12 (Notice of Withdrawal and Substitution)).

At the next hearing, Danko said he met with Apolo, and Apolo agreed Danko should stay on the case, but changed his mind the next day. 9RP 3-4. Apolo sent a letter to the court stating he tried to complain about Danko at the previous hearing but Danko grabbed his hand and told him to sit down. 9RP 3-4. The letter also described bizarre behavior by Danko: during their meeting, Danko became irate, left the interview claiming he would be right back, and never returned. 9RP 10

Danko denied the meeting went as Apolo said. He again complained about Kitching, explaining he advised his client not to speak with Kitching. 9RP 11-12. Danko nevertheless agreed withdrawal might be appropriate because Kitching “poisoned” the attorney-client relationship. 9RP 13-14. The court ordered Danko to withdraw and new counsel be appointed to bring Apolo’s motion. 9RP 17.

After the hearing, Danko filed a motion to withdraw. In the motion, he erroneously claimed Kitching represented Apolo on a “child support” case. CP 39-40.

The court appointed attorney Brian Todd. Todd moved for a new trial under CrR 7.5(a)(8), arguing that “substantial justice” was not done because Danko was ineffective. CP 46. Specifically, he argued Danko failed to investigate the case (including following up with Kitching) and failed to object to prior acts of molestation against the complaining

witnesses. In particular, Todd argued Danko called no witnesses to rebut the girls' claims. Todd relied on affidavits from Apolo, Kitching, and Hearon, as well as Dr. Harris's testimony, but he did not order trial transcripts and seemed unfamiliar with what occurred at trial. 12RP 2-6, 16-17; CP 48-49.

The court, noting it did not have the benefit of a trial transcript, denied Apolo's motion. CP 71; 12RP 35. It found Danko in fact called a witness, Maria Juarez, who provided "logical and credible" testimony. The court "refused to speculate" whether Hearon's evidence, if properly presented, would have made a difference at trial. The court was under the impression that Apolo always planned to testify, but would decide after the State rested. 12RP 34. The court ruled the girls' testimony about earlier instances of abuse would have been admitted over defense objection, which distinguished Apolo's case from the only case Todd relied on.¹⁷ 12RP 31-33. The court found Danko's decision not to cross-examine witnesses could be considered "strategic." 12RP 33-34.

¹⁷ State v. Dawkins, 71 Wn. App. 902, 863 P.2d 124 (1993) (upholding, under abuse of discretion standard, trial court's ruling that failure to object constituted ineffective assistance because court would have sustained objection to "lustful disposition" evidence based on unfair prejudice); CP 46-47. In fact, contrary to Todd's argument, the court *had* ruled the evidence was admissible, a fact the court appeared to have forgotten.

C. ARGUMENT

1. COUNSEL'S PERVASIVELY INEFFECTIVE ASSISTANCE DENIED MR. APOLO A FAIR TRIAL.

As the above facts demonstrate, Danko was unprepared for trial, resulting in serious, prejudicial deficiencies that undermined Apolo's right to a fair trial. Then, to make matters worse, substitute counsel Todd brought only some of Danko's deficiencies to light, denying Apolo an opportunity for relief at that early stage.

Nonetheless, Danko's conduct at trial, as well as conduct brought to light as part of the motion for new trial, warrant a new trial for Apolo with effective representation.

Overview of applicable law

The federal and state constitutions guarantee the right to effective representation. U.S. Const. amend. 6; Const. art. 1, § 22 (amend. 10); Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). An accused receives ineffective assistance when (1) counsel's performance is deficient, and (2) there is a reasonable probability the deficient representation prejudiced him. Strickland, 466 U.S. at 687; State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Thomas,

109 Wn.2d at 226 (quoting Strickland, 466 U.S. at 693-94). This is a separate question from whether there was sufficient evidence to convict. State v. Jury, 19 Wn. App. 256, 268, 576 P.2d 1302, review denied, 90 Wn.2d 1006 (1978).

A claim of ineffective assistance of counsel presents a mixed question of fact and law that is reviewed de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). Under CrR 7.5(a)(8), a trial court may grant a new trial when “substantial justice has not been done.” When ineffective assistance of counsel is a basis for a new trial motion, this Court reviews the trial court's decision for an abuse of discretion. State v. Dawkins, 71 Wn. App. 902, 906, 863 P.2d 124 (1993). A court abuses its discretion if it bases its ruling on an erroneous view of the law. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P. 2d 1362 (1997).

This Court should review most of Apolo's claims de novo because they were not addressed by the trial court. As for the others, the trial court abused its discretion by applying the law incorrectly or by basing its ruling on facts not supported by the evidence. Finally, this court should find that in certain circumstances, replacement counsel was ineffective for

presenting the court with incomplete and inaccurate information in moving for a new trial.

- a. Danko's baseless insistence he would be permitted to make his case based on improper impeachment techniques was ineffective assistance.

Danko's defense theory depended on Hearon's hearsay statements to tell jurors how D.G. and B.G. changed their allegations of sexual abuse over time. But Danko failed to lay a proper foundation for this evidence by failing to cross-examine the girls. Although Danko offered a reason for failing to cross-examine the complaining witnesses, his justification collided with his own expressed theory of the case.

The defense counsel's performance is presumed reasonable, but only when supported by legitimate tactics. State v Kyлло, 166 Wn.2d 856, 863, 215 P.3d 177 (2009); State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); Wiggins v. Smith, 539 U.S. 510, 526, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). Moreover, reasonable attorney conduct includes researching relevant law. Kyлло, 166 Wn.2d at 862 (citing Strickland, 466 U.S. at 690-91); State v. Woods, 138 Wn. App. 191, 156 P.3d 309, 312 (2007).

Danko repeatedly said he thought the trial court would permit Hearon to demonstrate the girls' allegations changed over time by testifying about her comparison chart. This was an incorrect view of the

law and thus an unreasonable tactic. Kyllo, 166 Wn.2d at 862. Any testimony by Hearon about the girls' interview statements was inadmissible hearsay. ER 801(c); ER 802. This is true even though the statements were inconsistent with the girl's trial testimony. Prior inconsistent statements are admissible as substantive evidence only if "given under oath subject to the penalty of perjury" ER 801(d)(1)(i). The girls' interview statements were not given subject to the penalty of perjury and were thus inadmissible substantively. And if Danko wished to introduce evidence to impeach the girls, he was required to confront them with those interview statements. ER 613.

Danko apparently did not know that; i.e., he failed to research the law applicable to his core defense theory. This was bad enough, but Danko went on to acknowledge there was no support for his strategy. In other words, Danko showed he *did* know the law and instead chose to rely on his persuasive skills to subvert it. Such a gamble is not only unreasonable, it borders on nonsensical. See Kyllo, 166 Wn.2d at 863 (only legitimate trial strategy or tactics constitute reasonable performance). In the face of evidence to the contrary, the trial court's oral finding that Danko's decision not to cross-examine witnesses could be considered "strategic" is contrary to the law and therefore an abuse of

discretion. 12RP 33-34; Quismundo, 164 Wn.2d at 504; Littlefield, 133 Wn.2d at 47.

Danko's actions likely prejudiced Apolo, especially when considered in combination with the other instances of ineffective assistance. Hearon informed Danko the girls changed their stories "significant[ly]." CP 59. Moreover, contrary to the findings of the judge, who did not have the benefit of trial transcripts, the record shows Apolo would not have testified had Danko succeeded in presenting the evidence through Hearon. 6RP 90-91, 113-14; CP 61. When Hearon did not testify, it appears, Apolo decided he had to testify to salvage whatever was left of his gutted defense.

But as the prosecutor emphasized in closing argument, Apolo's awkward testimony was easily discredited by pointing out the contrasting testimony of "neutral" witnesses. This devastated Apolo's case. Although Danko called Maria Juarez, she had to admit she did not monitor her father and sisters at all times.

Danko's failure to make any effort to lay a foundation that would have permitted Hearon to testify was not "strategy." Instead, it was ineptitude, and likely robbed Apolo of a fair trial. See Blackburn v. Foltz, 828 F.2d 1177, 1184 (6th Cir. 1987) (failure to obtain transcript of first trial to impeach key witness in second trial was deficient performance).

Replacement counsel too was ineffective because failure to obtain the transcripts facilitated the trial court's erroneous findings.

- b. Danko's refusal to investigate evidence that the complaining witnesses wanted to be adopted by foster parent "Jeff" was ineffective assistance.

"[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 690-91. Unless counsel can make a "reasoned professional judgment" that investigation is unnecessary, failure to investigate constitutes deficient performance. English v. Romanowski, 602 F.3d 714, 728 (6th Cir. 2010).

Here, Danko refused to communicate with Kitching, who could have provided helpful information and misrepresented to Kitching that Apolo prohibited him from communicating with Kitching. Danko's bizarre behavior was not reasonable but was deficient performance that likely prejudiced Apolo.

Whether to call a witness is generally a matter of trial tactics and does not support a claim of ineffective assistance. State v. Maurice, 79 Wn. App. 544, 552, 903 P.2d 514 (1995) (citing State v. Byrd, 30 Wn. App. 794, 799, 638 P.2d 601 (1981)). An accused can overcome the

presumption of effectiveness by demonstrating counsel failed to conduct appropriate investigation, be they factual or legal, to determine what matters of defense were available. State v. Crawford, 159 Wn.2d 86, 98, 147 P.3d 1288 (2006); Dorsey v. King County, 51 Wn. App. 664, 674, 754 P.2d 1255 (citing State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978)), review denied, 111 Wn.2d 1022 (1988). Courts have also held a failure to investigate or call a potential witness constitutes ineffective assistance where the witness is crucial to the defense presentation. See, e.g., Thomas, 109 Wn.2d at 232 (counsel's failure to investigate the defense expert's lack of qualifications was ineffective assistance because it left client without viable defense).

In Jury, for example, counsel's performance was found deficient because he failed to investigate facts leading to the defendant's arrest, did not adequately interview and failed to subpoena witnesses, and failed to inform the court of the substance of their testimony at either a motion for a continuance or for a new trial. Jury, 19 Wn. App. at 264.

In Byrd, the accused, who was charged with rape, said he gave defense counsel the name of the key witness on the consent issue and counsel failed to interview and present the witness at trial. The court remanded for a hearing to determine whether the petitioner's allegations were true. Id. at 799-800; see also Maurice, 79 Wn. App. 544 (failure to

investigate claim that mechanical failure caused Maurice to lose control of vehicle was deficient performance; case remanded for determination of prejudice).

In Blackburn, 828 F.2d at 1183, the court found ineffective assistance where defense counsel failed to investigate an alibi witness and did not make a reasoned professional judgment that investigation was unnecessary.

As in those cases, Danko failed to conduct a proper investigation, an omission that was unreasonable. But Kitching's affidavit showed investigation would have revealed information indicating the complaining witnesses were biased and therefore had reason to fabricate their accusations.

Evidence of this bias would likely have been admissible and would have benefited the defense, both during the child hearsay hearing and at trial. A defendant's right to impeach a prosecution witness with evidence of bias is a constitutionally protected right of cross-examination. Davis v. Alaska, 415 U.S. 308, 316-17, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). This includes the right to establish a bias by an independent witness. State v. Spencer, 111 Wn. App. 401, 408, 45 P.3d 209 (2002). Extrinsic evidence of bias is admissible where it is relevant to a witness's credibility. State v. Lubers, 81 Wn. App. 614, 623, 915 P.2d 1157 (1996) (citing State

v. Whyde, 30 Wn. App. 162, 632 P.2d 913 (1981) (exclusion of evidence of victim's intent to sue landlord after rape allegation against tenant was relevant to victim's bias and constituted reversible error)).

In deciding whether to admit a child's out-of-court statements, the court must consider whether there was a motive to fabricate. State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984). Despite not pursuing the possibility of bias here, Danko represented to the court there was "no basis for challenging the testimony." 3RP 30. Not surprisingly, the trial judge relied on Danko's assertion to find B.G. had no motive to lie. 3RP 39.

At trial, evidence of the girls' bias would likely have helped to explain the inexplicable, that is, why the girls would falsely accuse their own father of molesting them.

Through Kitching's efforts, the record shows evidence of bias that Danko chose to ignore. In denying Apolo's claim on this ground, the trial court appeared to rely on the fact that Danko presented some semblance of a case. This does not overcome a claim of ineffective assistance based on failure to properly investigate. English, 602 F.3d at 728.

The court also complained it was did not know which prospective witnesses Kitching identified and, despite reference at trial to a number of different children, speculated Kitching might have been referring to Apolo's daughter, Maria. Yet even if Maria had that information, Danko

would not have known about it because he unilaterally refused to communicate with Kitching.¹⁸ Significantly, the court did not find Kitching's declaration or any of the others lacked credibility.¹⁹ Instead, the court somehow resolved the case by labeling Danko's decisions "strategic." 12RP 31-35. This was error. Littlefield, 133 Wn.2d at 47; Jury, 19 Wn. App. at 263.

Danko's dereliction of duty makes this a classic case of ineffective assistance of counsel based on failure to investigate. As a matter of law, therefore, the trial court abused its discretion in denying the motion for a new trial by ignoring a plethora of case law establishing that failure to conduct appropriate investigation constitutes ineffective assistance.

- c. Danko's failure to object to hearsay testimony that Apolo intentionally hid suspicious conduct from the view of the visitation supervisor was ineffective assistance.

Failing to object constitutes ineffective assistance where (1) the failure was not a legitimate strategic decision; (2) an objection to the evidence would likely have been sustained; and (3) the jury verdict would

¹⁸ Danko went so far as to blatantly misrepresent his refusal to communicate with Kitching as Apolo's decision despite later acknowledging on the record that *he* told Apolo not to talk to Kitching about the case. CP 31-34; 9RP 11-12.

¹⁹ Cf. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999) (in applying the prejudice prong of the Strickland test, trial court may evaluate the credibility of the evidence offered by the defendant).

have been different had the evidence not been admitted. In re Personal Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004); State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

As Danko stood mute, Anderson testified her husband told her that Apolo turned his chair away before having the children sit on his lap during a visit. 3RP 85. This was inadmissible hearsay. ER 801(c); ER 802. Had Danko timely objected, the court would have likely excluded this obvious hearsay.

The evidence also prejudiced Apolo. No witness directly corroborated the girls' claims of molestation. Only with the benefit of hindsight did Cormier and Anderson testify they had seen "red flags," yet did nothing to limit Apolo's visits until the girls disclosed abuse. Counsel's inattention permitted the introduction of non-cumulative information that Apolo had engaged in highly suspicious behavior during a visit.

- d. Danko's failure to object to detailed testimony regarding D.G.'s initial disclosure, which far exceeded the bounds of the "hue and cry" exception, was ineffective assistance.

Unlike B.G., D.G.'s out-of-court statements were not admissible as child hearsay because she was over age 10. In criminal trials involving sex offenses, however, the State may present evidence that the victim

complained to someone after the assault, even where the defense does not explicitly challenge the timeliness of the complaint. State v. Alexander, 64 Wn. App. 147, 151, 822 P.2d 1250 (1992). This narrow exception, however, is limited to allow only the fact the complaint. Details of the complaint, including the offender's identity and the specifics of the act, are not admissible. Id. (citing State v. Ferguson, 100 Wn.2d 131, 135-36, 667 P.2d 68 (1983)).

While mere erroneous reference to identity may constitute harmless error, Ferguson, 100 Wn.2d at 136, much more was disclosed in Apolo's case. Because the testimony was inadmissible, the court likely would have sustained a proper objection. But once again, Danko's inaction exposed the jury to details of the alleged abuse that were more specific than even D.G.'s trial testimony. 3RP 103-04. In addition, the testimony included a detailed description of D.G.'s facial expression and demeanor, further improperly bolstering her credibility. Even assuming his hearsay testimony alone would not have changed the trial outcome, this Court should consider it in determining whether the accumulation of errors denied Apolo a fair trial.

- e. Danko's failure to object to inflammatory, prejudicial opinion testimony that Apolo's behavior in showing up early for visits was "creepy" was ineffective assistance.

Evidence is relevant and admissible if it has a tendency to make the existence of any fact of consequence more or less probable than it would be without the evidence. ER 401. Even relevant evidence is inadmissible if its probative value is substantially outweighed by unfair prejudice. ER 403; State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). Evidence is inadmissible when it serves only to provoke the jurors' emotional response. State v. Rice, 48 Wn. App. 7, 13, 737 P.2d 726 (1987).

Here, visits were eventually moved because Apolo was arriving early at Cormier's home. Absent objection, Anderson characterized Apolo's early arrivals as "kind of creepy." 3RP 87. Anderson's opinion that it was "creepy" was irrelevant, prejudicial, and likely would have been stricken had Danko objected. Saunders, 91 Wn. App. at 578.

Apolo's tendency to arrive early could be explained. He had to travel a long distance to attend visits and his arrival time would necessarily vary depending on traffic and other factors. It is reasonable a single woman like Cormier would be uneasy with an unfamiliar man waiting outside her house. But the implication Apolo's very presence was

sinister went too far and was capable of provoking an emotional response, thereby swaying opinion against Apolo.

- f. Danko's failure to move for a mistrial after the jury heard uncharged allegations that Apolo abused his two-year-old daughter was ineffective assistance.

"The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined." State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). To that end, ER 404(b) bars admission of evidence of other crimes, wrongs, or acts to show bad character and limits its use to show other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Even where deemed relevant, the evidence is inadmissible if its probative value is substantially outweighed by unfair prejudice. ER 403; Fisher, 165 Wn.2d at 745.

In determining whether evidence is admissible under ER 404(b), the trial court must (1) find the alleged misconduct occurred by a preponderance of the evidence; (2) identify the purpose for admission; (3) determine whether the evidence is relevant to prove an element of the crime charged; and (4) weigh the probative value against its prejudicial effect. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

RCW 10.58.090 states that in sex cases evidence of other bad acts is admissible notwithstanding the limitations of ER 404(b). The statute

does not, however, alter the court's ER 403 analysis and requires a finding the misconduct occurred by a preponderance of the evidence. RCW 10.58.090(1); State v. Scherner, 153 Wn. App. 621, 639, 655, 225 P.3d 248 (2009), review granted, 168 Wn.2d 1036 (2010). The statute also prohibits the admission of such other acts evidence unless the State gives 15 days notice of its intent to seek admission.

Trial courts must grant a mistrial where an irregularity may have affected the outcome of the trial, thereby denying the defendant his right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). Courts examine (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether a curative instruction was given that was capable of curing the irregularity. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994).

Under this authority, Danko was ineffective for failing to move for a mistrial after the jury heard B.G.'s statements that she suspected Apolo of abusing her two-year-old sister. The trial judge was plainly startled by the evidence, yet Danko did nothing. There was no valid tactical reason for failing to move for a mistrial. Given the court's reaction, as well as supporting law, such a motion would likely have been granted. Apolo can therefore demonstrate Danko's inaction was unreasonable. Apolo suffered

prejudice because there is a "reasonable probability" that without Danko's error, the result of the trial would have been different.

B.G.'s allegation (which Danko seemed not to have initially noticed) was serious; it suggested Apolo had sexual contact with a two-year-old. While any molestation allegation is likely to produce a horrified reaction, Apolo's alleged victims were older and thus markedly different from a defenseless, inarticulate two-year-old. Because it alleged a different degree of molestation, the irregularity cannot be considered merely cumulative.²⁰ And while the court gamely gave a curative instruction (after essentially begging Danko to request one), the problem remained. Some testimony cannot be erased by telling jurors to ignore it. State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996). B.G.'s inflammatory disclosure was this type of evidence. Making matters worse, the accusation appeared during a video recording that was shown to the jury twice, including during deliberations. CP 28-29.

Admission of this testimony was prejudicial. Reasonably competent counsel faced with such evidence would have moved for a

²⁰ Cormier testified that tried to put two-year-old N.G. on Apolo's lap and the child reacted by screaming and crying. 3RP 98-99. This was prejudicial and irrelevant, but, naturally, Danko did not object. Nonetheless, two-year-olds are notoriously volatile and this testimony was a far cry from B.G.'s allegation her father abused N.G.

mistrial which, under after proper analysis, would likely have been granted.

But even if this Court disagrees that Danko's failure was deficient but not prejudicial, this Court should consider the fact that his apparent inattention permitted the jury to hear incredibly prejudicial, inadmissible evidence in determining whether cumulative error denied Apolo a fair trial.

- g. Danko's concession in closing that the girls had been abused, which under the circumstances conceded Apolo's guilt, was ineffective assistance and violated Apolo's right to have the State prove each element of the crimes beyond a reasonable doubt.

Defense counsel was ineffective for acknowledging the girls had been abused but offering no alternative culprit. While Apolo anticipates the State will argue Danko's argument was tactical, this argument necessarily fails because under the circumstances it was not a reasonable tactic. Aho, 137 Wn.2d at 745. Danko's closing also infringed on Apolo's rights to a fair trial and to have the State prove each element of the crimes beyond a reasonable doubt.

By entering a "not guilty" plea, a defendant preserves both his right to a fair trial as well as his right to hold the State to its burden of proof. State v. Silva, 106 Wn. App. 586, 596, 24 P.3d 477 (2001) (citing

Wiley v. Sowders, 647 F.2d 642, 650 (6th Cir.), cert. denied, 454 U.S. 1091 (1981)). Counsel cannot make a defendant plead guilty against his wishes. Silva, 106 Wn. App. at 596 (quoting Underwood v. Clark, 939 F.2d 473, 474 (7th Cir.1991)). Instead, the decision to plead guilty pertains solely to the accused. Silva, 106 Wn. App. at 596 (quoting Wiley, 647 F.2d at 648-49).

In closing, however, argument that, on a particular count, the evidence of guilt is overwhelming may be permissible under certain circumstances. Silva, 106 Wn. App. at 596 (quoting Underwood, 939 F.2d at 474). Such acknowledgment can be a sound tactic when (1) the evidence is indeed overwhelming and there is no reason to suppose that any juror doubts this and (2) the count in question is a lesser count, so that there is an advantage to be gained by winning the confidence of the jury. Silva, 106 Wn. App. at 596 (quoting Underwood, 939 F.2d at 474).

Danko's argument met neither of these criteria and instead violated Apolo's rights to right to a fair trial and to have the State meet its burden on each element.

During closing argument, Danko said the girls had been "harmed" and that the only question was the identity of the perpetrator. Danko therefore implied the State failed to prove beyond a reasonable doubt that

Apolo was the assailant. He did nothing, however, to suggest it was even possible there could have been another culprit.

Perhaps Danko felt this was his only recourse in a desperate, losing effort. But it is important to remember that Apolo was in such dire straits only because Danko's only strategy — to show the girls changed their stories — necessarily failed due to his own ineptitude. Danko also failed to discover the complaining witnesses' bias, which would have obviated the need for such desperate grasping.

Danko's closing argument violated Apolo's right to a fair trial by denying him effective assistance and by essentially obviating the need for the State to prove each element beyond a reasonable doubt. See, e.g., Wiley, 647 F.2d at 642 (holding counsel's concession of guilt on all charges without any apparent strategic purpose was the equivalent of an unauthorized guilty plea). This Court should remand for a new trial.

2. THE CUMULATIVE EFFECT OF DANKO'S INEFFECTIVE ASSISTANCE DENIED APOLO A FAIR TRIAL.

Under Article 1, section 3 and the Fifth and Fourteenth Amendments, a criminal defendant has the due process right to a fair trial. State v. Boyd, 160 Wn.2d 424, 434, 158 P.3d 54 (2007); State v. Braun, 82 Wn.2d 157, 166, 509 P.2d 742 (1973). This Court may reverse a conviction when the combined effect of trial errors effectively denies the

defendant his right to a fair trial, even if each error standing alone may not itself warrant a new trial. State v. Venegas, 155 Wn. App. 507, 520, 228 P.3d 813 (2010); Alexander, 64 Wn. App. at 158. Once the appellant establishes actual error, a reviewing court may then measure the errors' cumulative effect. State v. Clark, 143 Wn.2d 731, 771-72, 24 P.3d 1006 (2001).

In this case, each among the litany of errors individually requires reversal of Apolo's convictions. Should this Court determine, however, that these issues do not individually require reversal, in combination they do. Again, the following errors occurred:

Danko failed to research the relevant law and did not point out that the complaining witnesses' stories significantly changed over time. Danko failed to contact the complaining witnesses' family members, which, as demonstrated by Kitching's affidavit, would have revealed evidence of the complaining witnesses' bias. Danko failed to object to prejudicial, inadmissible hearsay that Apolo placed his children on his lap while trying to conceal his actions. Danko failed to object to the inadmissible details of D.G.'s disclosure that far exceeded the bounds of the "hue and cry" exception. Danko failed to object to testimony that a foster parent found Apolo's early arrivals to visitation "creepy," although it was otherwise easily explainable. Danko apparently failed to review, or

forgot the contents of, the video recording of B.G.'s interview, thereby exposing the jury to uncharged allegations of molestation against her two-year-old sister. Finally, Danko appeared to concede his client was guilty by acknowledging the girls had been molested, yet failing to offer anything to suggest someone other than Apolo was the molester. Taken together, Danko's unreasonable acts and failures to act denied Apolo a fair trial. See Blackburn, 828 F.2d at 1186 (reasonable probability that absent multiple instances of ineffective assistance, jury would have a reasonable doubt as to guilt).

D. CONCLUSION

This Court should reverse Apolo's convictions because counsel's pervasively ineffective assistance denied him a fair trial.

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Respectfully submitted,

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