73703-1

NO. 73703-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

DERRICK KOLANOWSKI,

Appellant.

FILED
Apr 21, 2016
Court of Appeals
Division I
State of Washington

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

The Honorable Roger Rogoff, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied effective assistance of counsel when his attorney failed to authenticate extrinsic impeachment evidence.

2. Appellant was denied effective assistance of counsel when his attorney failed to move to exclude or object to inadmissible DNA "match" testimony by a State's expert.

Issues Pertaining to Assignments of Error

1. Was appellant denied effective assistance of counsel where his attorney inexplicably failed to secure a witness to authenticate extrinsic evidence intended to impeach the complaining witness?

2. Was appellant denied effective assistance of counsel where his attorney failed to move to exclude or object to inadmissible testimony by a State's expert that blood found on appellant's sweatshirt "matched" his DNA, without providing the requisite probability estimate that the same DNA profile would appear in the United States population?

B. STATEMENT OF THE CASE

On February 13, 2014, the State charged Derrick Kolanowski with one count of second degree rape. CP 1. The State alleged that on February 8, 2014, Kolanowski engaged in sexual intercourse with S.W.-H. by forcible compulsion. CP 1. On May 4, 2015, the State amended the information to

add the charge of unlawful imprisonment, alleging Kolanowski knowingly restricted S.W.-H.'s movements without her consent. CP 19.

1. State's Case

S.W.-H. lives with Timothy Powell in a fifth wheel trailer in the Paradise Mobile Home Park in Kent, Washington. RP 169-73. They do not have a romantic relationship. RP 173. Powell knew Kolanowski because Powell did contract work for Kolanowski's employer and they frequented the same nearby bar, the Blinker Tavern. RP 174-76, 590-91. S.W.-H. did not know Kolanowski. RP 760. S.W.-H.'s nickname is Shorty. RP 195.

Powell testified that on the evening of February 7, 2014, he saw Kolanowski at the Blinker Tavern. RP 176-78. Powell recalled Kolanowski wanted to buy some marijuana. RP 177-78. Powell told Kolanowski he had some, but not with him, and told Kolanowski to call him later that night. RP 177-78. Powell testified Kolanowski was wearing his glasses, a green army fatigue jacket, and camouflage pants. RP 196-99. Powell said Kolanowski was wearing a blue checkered flannel shirt later in the evening. RP 196, 210-11. Powell remembered Kolanowski was drinking Fireball cinnamon whiskey that night. RP 199.

Kolanowski's neighbor Shane Mills also saw Kolanowski at the Blinker Tavern on February 7. RP 871-72. He recalled Kolanowski was wearing a "greenish" jacket. RP 886. Mills gave Kolanowski a ride home

around 10:30 p.m. and then had a beer at Kolanowski's home until 11:30 p.m. RP 875-76.

Powell did not return home that night, instead staying in Tacoma with his ex-wife. RP 177-78. He testified Kolanowski called him later in the evening when he was not home, so he told Kolanowski to get the marijuana from his roommate, S.W.-H. RP 178. Powell said he received a call from S.W.-H. around 11:30 p.m. that a man was at their trailer door. RP 178-79. S.W.-H. described the man to Powell, who claimed he told her, "That's Derrick. Go ahead and let him in and give him some weed -- and let him go." RP 179.

S.W.-H.'s friend Patrick Barnacascel briefly stopped by S.W.-H.'s trailer around 10:30 or 11:00 p.m. on February 7. RP 385. Barnacascel said nothing stood out about the trailer and S.W.-H. did not have any injuries. RP 389-89. S.W.-H. explained that about 20 or 30 minutes after Barnacascel left, Powell called her to say "Derrick was coming over to get some weed." RP 763-64. S.W.-H. said the man arrived around 10:30 or 11:00 p.m. and came inside. RP 764-65. The man did not identify himself and S.W.-H. had never met him before, but she "believe[d] he said his name was Dale." RP 766, 772.

S.W.-H. said she gave the man marijuana "and then he was supposed to leave and he didn't leave." RP 765. She testified he sat at the kitchen

table while he rolled and smoked a joint. RP 768-69. The man then offered S.W.-H. money in exchange for sex, which she testified she declined. RP 769. S.W.-H. said that for approximately an hour, the man kept asking her to have sex with him and she kept asking him to leave. RP 770-71.

S.W.-H. testified the man finally got up to leave and said he did not know how to open the trailer door. RP 772. S.W.-H. walked to the door to let him out and "that's when he put me in a chokehold." RP 772. S.W.-H. fought back and the man pushed her to the floor, repeatedly punching her in the face. RP 774-75. She testified she screamed, kicked the man in the groin, and scratched his face. RP 775-76. S.W.-H. said the man put his hands around her neck, choked her, and told her to shut up. RP 776-79. S.W.-H. testified she eventually stopped screaming because she was scared and did not want to get hit anymore. RP 778-79. S.W.-H. said they broke a full length mirror during this struggle. RP 778.

S.W.-H. testified the man then ripped off her clothes and forced her to perform oral sex on him. RP 779-80. S.W.-H. said the man tried to put his penis in her vagina and anus, penetrating "[a] little bit, but not very far," because he was not erect. RP 781-83. S.W.-H. said the man repeated this several times: having her perform oral sex and then attempting to penetrate her vagina and anus with his penis. RP 781-84. S.W.-H. did not believe the man ever obtained an erection. RP 781. S.W.-H. said that while this was

going on, the man "kept trying to get me to remember his name was Dale." RP 782. S.W.-H. claimed the man held her down the entire time, so she did not have access to her phone and could not get to the door. RP 807-09.

S.W.-H. testified that around 8:00 a.m., the man said, "I have got to go . . . It's not working," and left. RP 786-87. S.W.-H. threw her clothes in the bathtub. RP 789. She then called Barnacascel and his significant other, Lisa Morgan. RP 792-94. S.W.-H. said Barnacascel answered the phone right away, but Barnacascel testified they received a dozen or more unanswered calls from S.W.-H. RP 392-93, 792. When Barnacascel finally answered, S.W.-H. "sounded kind of odd," so he asked her what was wrong and "she started crying and said she had been raped." RP 394.

Barnacascel went with their dog to S.W.-H.'s trailer to make sure the man had left, and did not find anyone. RP 396-97. Morgan arrived shortly after and went inside the trailer. RP 399. Both Barnacascel and Morgan testified S.W.-H. was upset and her face bruised. RP 400-01, 554-55. The inside of the trailer was in disarray. RP 400-01, 562-63. Morgan testified she straightened up a bit and cleaned up glass from a broken mirror. 5RP 562-63. Morgan said S.W.-H. did not want to talk about what happened and refused to call the police. RP 554-56.

Morgan called Powell, who returned from Tacoma around 11:00 or 11:30 a.m. RP 182, 570-71. Powell testified S.W.-H. was "all beat up" and

her clothes "all bloody." RP 183-84. Powell then changed his story and said S.W.-H. "was actually out of her bloody clothes already." RP 222. Powell also claimed the trailer was a mess when he returned home, but later told the defense investigator the trailer was already picked up. RP 187-90, 224. Powell testified S.W.-H. said the man's name was Dale, but Powell told her his name was Derrick, even though he never saw the man. RP 223.

After several hours, S.W.-H. agreed to go to the hospital with Morgan. RP 558, 796-96. Morgan testified that on the way, S.W.-H. said she was beat up, raped, and held hostage all night long. RP 560. Morgan claimed S.W.-H. never told her who did it. RP 561. Morgan also denied telling Barnacascel who did it. RP 572. But Barnacascel testified Morgan told him "it was some friend of Tim's." RP 411. He then elaborated, explaining Morgan told him someone with a name that started with an M did it, "like Marty or Martin or something like that." RP 430.

Dr. Stephen Anderson saw S.W.-H. at the hospital. RP 637. Inconsistent with her trial testimony, S.W.-H. told Anderson "she awoke this morning to find an acquaintance of her roommate in her room." RP 654. She said the man repeatedly hit her face, head, and chest, and penetrated her orally, vaginally, and anally. RP 640. Anderson observed bruising on S.W.-H.'s face, around her ear, as well as her breast and back. RP 640. She did

not have any broken bones. RP 645. Nor was there any bleeding in her vaginal or anal area. RP 657.

Detective Sergeant Jon Shipman was the first to arrive at the hospital. RP 262-64. Shipman testified S.W.-H. told him an acquaintance of her roommate came over unexpectedly the night before to buy marijuana. RP 268. S.W.-H. claimed she knew the acquaintance's name was Derrick, but did not know his last name. RP 268. She also said she knew he lived in a nearby trailer park, Circle K Mobile, but did not know any other details. RP 269. She described him as a white male around 5'9" or 5'10" tall, medium build, black or brown hair, no facial hair, wearing a hooded sweatshirt, black jeans or sweatpants, and a black beanie. RP 277, 320.

S.W.-H. then told Shipman details of the incident. RP 269-76. She said she scratched the man's cheek as she tried to fight him off. RP 277-79. S.W.-H. also said she was wearing gray sweatpants and a white shirt during the incident, which she threw in the bathtub afterwards because there was blood on them. RP 278-79.

Detective Eric Moore examined the trailer with Detective Sergeant Tim Lontz around 9:00 p.m. on February 8. RP 466-73, 532-33. They found several wet clothing items in the bathtub, which they collected. RP 482-83, 497-500. Moore noted one of these items was a gray long sleeve shirt with red substance around the collar. RP 497-99. Moore also took

several swab samples from items around the trailer, as well as the kitchen table and carpet, and sent them to the crime lab for testing. RP 485-510.

Powell gave the officers Kolanowski's number, from which they learned Kolanowski lived in a nearby mobile home park. RP 315-17, 929-31. They went to his home around 12:30 a.m. on February 9. RP 934. Kolanowski's mother and stepfather answered the door and said Kolanowski was staying in Tacoma with his cousin. RP 934-37.

Kelly Morris performed a sexual assault exam on S.W.-H. on February 10, approximately 61 hours after the alleged rape. RP 323-27, 367. Sexual assault exams can be performed up to 120 hours after the event before evidence deteriorates. RP 376. S.W.-H. had not washed her genitals or taken a shower since the incident. RP 344-45. Morris collected oral, perianal, anal, vulvar perineal, and vaginal swabs. RP 356. All the swabs were negative for semen. RP 727. Of the perianal and perineal swabs, one showed no male DNA and the other showed a "very, very low quantity of male DNA." RP 728. Given the low quantity, no DNA profile could be obtained. RP 728, 1135-37.

On February 10, police showed S.W.-H. a photomontage of six different people. RP 436-37. S.W.-H. thought three of the people, one of whom was Kolanowski, "kind of look[ed]" like the suspect. RP 443-48.

The same day, Detective Matthew Lorette and the other officers arrested Kolanowski at his workplace. RP 1006-09. Lorette took several photos of Kolanowski at the police station, showing a mark on Kolanowski's left cheek, some redness on his upper body and knees, marks on his forearms, and an abrasion on his right index finger. RP 1017-23. Kolanowski was wearing a black hooded sweatshirt, which Lorette collected and sent to the crime lab for testing. RP 1024-27. Lorette also testified he found a handwritten note in Kolanowski's wallet, which included Powell's phone numbers and "Shorty for my stuff." RP 1031-33.

Megan Inslee conducted DNA testing of the items collected from the trailer, as well as Kolanowski's sweatshirt. RP 661. She did not detect semen on any of the clothing. RP 714-16. The left sleeve cuff of Kolanowski's sweatshirt tested positive for blood. RP 698-700. S.W.-H. was excluded as a possible contributor. RP 700. Inslee testified, however, "The DNA typing profiles that I obtained from the sweatshirt, there were three separate DNA profiles and they were all mixtures. The major component of each of the mixtures matched the reference sample that I just referred to that was submitted from the suspect." RP 700.

The interior front neckline of a gray sweatshirt from S.W.-H.'s trailer tested positive for S.W.-H.'s blood. RP 707-09. The estimated probability of another person in the United States population having the same DNA was

one in 24 quadrillion. RP 709. Inslee also found a trace component of male DNA. RP 710-11. She sent this sample to another lab for YSTR testing, which isolates and amplifies the male Y-chromosome when there is a large amount of female DNA also present. RP 710-11.

Brad Dixon performed the YSTR testing and concluded the YSTR profile matched Kolanowski. RP 1140. This meant neither Kolanowski nor any of his paternal male relatives could be excluded as a donor of the male DNA on the gray sweatshirt. RP 1140-41. Dixon explained only 25 cells were recovered for YSTR testing. RP 1150-58. Ten cells is the absolute minimum needed to obtain a possible DNA profile. RP 1161. Dixon was not able to determine whether they were skin, saliva, semen, or blood cells. RP 1156. Dixon testified the particular YSTR profile was not expected to occur more frequently than one in 8600 male individuals in the U.S. population. RP 1142.

Lorette also interpreted several February 8 phone records at trial. He testified Powell received a 24-second call from Kolanowski's home number at 12:39 a.m. RP 988. A defense expert testified this call likely went to voicemail. RP 1358-60. The records showed S.W.-H. placed a 105-second call to Kolanowski's number at 12:41 a.m., thought S.W.-H. never testified she called Kolanowski. RP 996-97. S.W.-H. called Powell at 12:44 a.m. and the call lasted for 59 seconds. RP 996-97. S.W.-H. placed another 51-

second call to Powell at 12:45 a.m. RP 991. S.W.-H. called Barnacascel at 1:20 a.m. and they talked for 57 seconds, even though both testified they did not speak again that night after Barnacascel left S.W.-H.'s trailer. RP 391, 841-42, 998-99. S.W.-H. did not initiate any text messages after 1:24 a.m. and all the calls she received between 1:33 a.m. and 11:43 a.m. went to voicemail. RP 1005-06.

2. Defense Case

Kolanowski lives with mother, Lorena Calvery, and stepfather, Michael Calvery. RP 1212, 1232-33. Kolanowski worked for a company called Lock Right, doing manufacturing, warehousing, and spot welding. RP 578. Kolanowski's employer acknowledged injuries are common in manufacturing. RP 574-80.

The defense was identity. Michael testified that on the night of February 7, his wife went to bed around 9:30 p.m. and he stayed up watching television. RP 1233-35. Later that evening, Kolanowski knocked on the door with Mills. RP 1233-35. Michael testified they were loud and Kolanowski was "very intoxicated." RP 1239. Kolanowski was so drunk that Michael and Mills had to help him into bed. RP 1240-41. Michael saw Kolanowski the next morning around 7:00 a.m., when Kolanowski left to stay with his cousin for the weekend. RP 1244-46, 1260, 1287.

Lorena testified she got up to use the restroom in the early morning hours on February 8 and noticed Kolanowski's bedroom door was open.[1] RP 1217-18. She went to close his door and saw him in bed asleep. RP 1218. Lorena took Kolanowski's glasses off and covered him up with a blanket. RP 1218. Lorena explained Kolanowski has worn glasses for a couple of years and does not have contacts. RP 1218. She noticed Kolanowski "smelled strongly of alcohol and cinnamon." RP 1219. He opened his eyes slightly and "they were very, very bloodshot." RP 1219. Lorena explained she cleaned Kolanowski's room the next morning because he had thrown up in a trash can. RP 1221.

Kolanowski's cousin, Charles Frye, picked him up on the morning of February 8 to stay in Tacoma for the weekend. RP 1283-87. Frye explained that when he arrived, Kolanowski was in a towel, and Frye did not see any scratches on his legs. RP 1288-90. Nor did Frye notice any other injuries on Kolanowski that weekend. RP 1288-90.

The defense also emphasized the numerous inconsistencies in S.W.-H.'s description of the suspect. For instance, S.W.-H. testified the man was not wearing glasses, but the witnesses who knew Kolanowski testified he always wore glasses. RP 195-99, 814, 1217-18. Kolanowski is

[1] Lorena testified she got out of bed at 1:30 a.m. RP 1217-18. In an interview with the State, she said 3:00 a.m. RP 1230. Either way, she was "[a]bsolutely" sure she saw Kolanowski in bed after midnight on February 8. RP 1230-31.

circumcised, but S.W.-H. said in a defense interview the man was uncircumcised. RP 821-23, 1213. Kolanowski also has several prominent tattoos, including a "D" above his left nipple, a large 8 ball on his left shoulder, and large stars on both sides of his abdomen. RP 1085-87; Exs. 205-12. S.W.-H. did not recall seeing any tattoos on the man, even though the lights were on and his shirt was off. RP 821-23, 869, 1053-54.

S.W.-H. also told police and testified the man did not have any facial hair. RP 277, 320, 801-02, 1053-54. When Kolanowski was arrested on February 10, he had a mustache and beard. Exs. 4-5. S.W.-H.'s description of the man's hair color varied wildly, from black to brown to "really light." RP 320, 823-27, 1053-54. S.W.-H. also said she did not smell any alcohol on the man, though several witnesses testified Kolanowski was drinking pungent cinnamon whiskey that night. RP 199-200, 846, 1219-20.

At trial, S.W.-H. was asked if she could identify the man in the courtroom. RP 801. She said she "[v]aguely recognized" Kolanowski, explaining, "I'm not sure. He didn't look like that when he came to my house. He looks different." RP 801. On cross, S.W.-H. admitted, "I don't recall what he looked like back then." RP 826. Detective Lorette acknowledged S.W.-H. never told him Kolanowski's name, only Powell did, who never actually saw the man at the trailer on February 8. RP 1051.

Another key aspect of the defense case was a Facebook post S.W.-H. made at 2:49 a.m. on February 8, a time when she claimed she did not have access to her phone. RP 107-13. Pursuant to the State's motion, the trial court excluded the Facebook post because defense counsel presented no evidence authenticating or laying foundation for the timestamp. RP 114-18. The court asked, "does [the timestamp] correspond to when it gets downloaded to the server? Does it correspond to when it hits the Facebook server in California? Does it correspond to exactly when you type it in?" RP 114-15. The court explained the defense needed a witness to establish "this timestamp has some meaning and here is what the meaning is." RP 117. Without such information, the court concluded, the jury would be left to speculate. RP 114-15. The court emphasized, however, "Let's work on getting you the witness that you need from Facebook." RP 119.

The parties continued to discuss the admissibility of the Facebook post throughout trial. Defense counsel thought he needed a Facebook custodian of records to authenticate the post. RP 109-14. But on the first day of trial, May 6, 2015, the trial court ruled the Facebook post itself was authenticated because the Facebook account belonged to S.W.-H. and the defense investigator could testify to taking the screenshot. RP 159. As for authenticating the timestamp, the court told defense counsel, "Really all that I am looking for in order to address the issue of authentication or

relevance . . . is a witness who says, 'This is how the posting date time works, generally.'" RP 298.

On May 12, the court reiterated the authenticating witness only needed to have "some expertise in using Facebook and posting things to Facebook, and seeing how that post relates to the timing of it." RP 621. The court thought one of the detectives might be able to testify to that. RP 622. The court also noted there was a Facebook office in Seattle, but defense counsel admitted he had not subpoenaed anyone. RP 623.

During cross-examination, defense counsel asked S.W.-H. if she accessed her Facebook account at all during the incident. RP 857. She said no. RP 857. Cross-examination ended there. RP 857. The court excused S.W.-H. at the end of her testimony. RP 869. Defense counsel did not ask for her to remain in attendance. RP 869. The State rested its case on May 20. RP 1163. The defense rested on May 26. RP 1370. The defense did not put on a witness to authenticate the Facebook timestamp, so the post was never admitted.

The jury found Kolanowski guilty as charged. CP 34-35. The trial court determined Kolanowski had an offender score of zero, because the current offenses constituted same criminal conduct. CP 65; RP 1462. The court sentenced Kolanowski to 90 months on the rape and three months on

the unlawful imprisonment, to run concurrently. CP 68. Kolanowski filed a timely notice of appeal. CP 77.

C. ARGUMENT

1. KOLANOWSKI WAS DENIED EFFECTIVE OF ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY FAILED TO AUTHENTICATE EXTRINSIC IMPEACHMENT EVIDENCE.

Defense counsel wanted to impeach S.W.-H.'s credibility with a Facebook post that directly contradicted her testimony. However, he inexplicably failed to obtain a witness who could authenticate the Facebook timestamp, even though the trial court gave him multiple opportunities to do so. This amounted to ineffective assistance of counsel because it was entirely to Kolanowski's detriment. Reversal is required.

Every accused person enjoys the right to effective assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. 1, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) the attorney's performance was deficient and (2) the deficiency prejudiced the accused . Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Counsel's performance is deficient when it falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. If counsel's

conduct demonstrates a legitimate trial strategy or tactic, it cannot serve as a basis for an ineffective assistance claim. Strickland, 466 U.S. at 689; State v. Yarbrough, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009).

Prejudice occurs when there is a reasonable probability that but for counsel's deficiency, the result would have been different. Thomas, 109 Wn.2d at 226. The accused "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Strickland, 466 U.S. at 693. A reasonable probability is one sufficient to undermine confidence in the outcome. Thomas, 109 Wn.2d at 226.

"A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude." State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). Appellate courts review ineffective assistance claims de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003).

a. Defense counsel's failure to secure an authenticating witness constituted deficient performance.

Any party may attack a witness's credibility. ER 607. Evidence offered to impeach a witness is relevant if "(1) it tends to cast doubt on the credibility of the person being impeached, and (2) the credibility of the person being impeached is a fact of consequence to the action." State v. Allen S., 98 Wn. App. 452, 459-60, 989 P.2d 1222 (1999).

ER 613(b) allows witnesses to be impeached with extrinsic evidence of a prior inconsistent statement. The proper procedure is to first ask the witness whether she made the prior statement. State v. Babich, 68 Wn. App. 438, 443, 842 P.2d 1053 (1993). If the witness denies the prior statement, extrinsic evidence of the statement is admissible unless it concerns a collateral matter. Id. "[I]t is sufficient for the examiner to give the declarant an opportunity to explain or deny the statement, either on cross-examination or after the introduction of extrinsic evidence." State v. Horton, 116 Wn. App. 909, 916, 68 P.3d 1145 (2003) (quoting State v. Johnson, 90 Wn. App. 54, 70, 950 P.2d 981 (1998)).

Horton provides a useful analogy. There, Horton was accused of raping and molesting 13-year-old S.S. Horton, 116 Wn. App. at 911. A medical examination of S.S. revealed penetrating trauma to her hymen. Id. Before trial, S.S. told a child protective services (CPS) investigator she had been having sex with a boy. Id. at 913. Defense counsel also interviewed S.S.'s friend, who said S.S. bragged in detail about being sexually active with a boyfriend two years earlier. Id.

During cross-examination, S.S. denied having sex with anyone but Horton. Id. Defense counsel did not ask S.S. to explain or deny her inconsistent pretrial statements. Id. Nor did she ask for S.S. to remain in attendance after testifying. Id. Later, defense counsel attempted to call the

CPS investigator and S.S.'s friend to relate S.S.'s prior inconsistent statements about her sexual activity. Id. at 914. The court excluded this testimony because defense counsel failed to comply with ER 613(b). Id.

The appellate court held defense counsel's failure to comply with ER 613(b) amounted to ineffective assistance. Id. at 924. Counsel wanted to impeach S.S.'s trial testimony with extrinsic witnesses. Id. at 916. Before she could do that, though, ER 613(b) required her to give S.S. an opportunity to explain or deny her prior statements by calling them to S.S.'s attention on the stand, or by arranging for S.S. to remain in attendance after testifying. Id. Nothing in the record showed why counsel failed to do so. Id. Further:

> The record shows that non-compliance with ER 613(b) was entirely to Horton's detriment; that compliance with ER 613(b) would have been only to his benefit; and thus that counsel's non-compliance could not have been a strategy or tactic designed to further his interests.

Id. at 916-17 (emphasis in original). The court held defense counsel's performance fell below an objective standard of reasonableness. Id. at 917.

Counsel's deficient performance prejudiced Horton. Id. at 922. When S.S. testified she had never had sex with anyone but Horton, she necessarily implied Horton was the cause of the penetrating trauma to her hymen. Id. Defense counsel could have defused the implication, at least in part, by presenting evidence that S.S. made prior inconsistent statements to

two different people about her sexual history. Id. "[T]he resulting void was extremely detrimental to Horton's position at trial." Id.

In reaching this conclusion, the Horton court discussed two Indiana cases where the courts reached the same result on similar facts. Id. at 922-23 (citing Ellyson v. State, 603 N.E.2d 1369 (Ind. Ct. App. 1992); Wright v. State, 581 N.E.2d 978 (Ind. Ct. App. 1991)).

For instance, Ellyson was charged with raping his estranged wife and burglarizing her home. Ellyson, 603 N.E.2d at 1371-72. Defense counsel tried, but failed, to introduce the wife's prior inconsistent statements at trial, as well as a rape kit tending to show she did not have intercourse on the night of the alleged rape. Id. at 1372-74. The appellate court held counsel was ineffective because he failed to produce the witnesses necessary to authenticate the rape kit and failed to lay the proper foundation for the wife's prior inconsistent statements. Id. at 1373-74.

Likewise, in Wright, defense counsel "blundered" by failing to lay the proper foundation for testimony that would impeach the complaining witness. 581 N.E.2d at 980. The appellate court held this constituted ineffective assistance because it "resulted in relevant and probative evidence not being admitted." Id. This, in turn, "undermine[d] the confidence in the verdict." Id.

These cases demonstrate that defense counsel's performance falls below an objective standard of reasonableness when he or she seeks to admit relevant impeachment evidence but fails to take the necessary procedural steps for admission. This is precisely what happened here.

S.W.-H. testified she was not able to contact anyone or call for help "after he started doing what he was doing," because "I didn't have my phone. I wasn't close to my phone." RP 807. S.W.-H. further explained she could not escape the trailer because "[h]e had me held down and I couldn't." RP 809. The State introduced phone records corroborating S.W.-H.'s testimony: she did not initiate any text messages after 1:24 a.m. on February 8 and all the calls she received between 1:33 a.m. and 11:43 a.m. went to voicemail. RP 1005-06.

Contrary to all this evidence, though, defense counsel was in possession of a screenshot of a Facebook post S.W.-H. made at 2:49 a.m. on February 8, when she supposedly did not have access to her phone and could not escape the man's grasp. RP 107-13. Defense counsel wanted to impeach S.W.-H.'s testimony with this evidence because it directly contradicted several of her statements, casting doubt on her credibility. On cross, defense counsel asked S.W.-H.:

> And during this period when Dale, or the person that assaulted you came to your trailer, and when they left the following morning around 8 or 8:30 in the morning on

> Saturday, February 8, 2014, did you access your Facebook account at all?

RP 857. She responded, "No." RP 857. The Facebook post demonstrated this statement was false, making it admissible under ER 613(b).

However, defense counsel never produced a witness to authenticate the Facebook timestamp, and so S.W.-H.'s false statement was never contradicted. The bar for authentication is very low: "evidence sufficient to support a finding that the matter in question is what its proponent claims." ER 901(a). Indeed, the court made it exceptionally clear to defense counsel that the authenticating witness only needed to have "some expertise in using Facebook and posting things to Facebook, and seeing how that post relates to the timing of it." RP 621. This simply required explanation of "how the posting date time works, generally." RP 298. Virtually anyone who uses Facebook somewhat regularly could testify to this. The court noted one of the detectives might even be able to authenticate the timestamp. RP 622. Further, there is a Facebook office located in Seattle, but defense counsel never attempted to subpoena anyone from that office. RP 623.

Furthermore, defense counsel had plenty of time to secure a witness. The court initially excluded the Facebook post on May 4, 2015, for lack of authentication. RP 118. The court noted its willingness to help defense

counsel get the necessary authenticating witness. RP 119. The defense did not rest its case until May 26, over three weeks later. RP 1370.

Nothing in the record shows defense counsel's failure to call an authenticating witness was a strategic decision. "Generally, the decision to call a witness will not support a claim of ineffective assistance of counsel." Thomas, 109 Wn.2d at 230. But the presumption of competence does not apply when defense counsel clearly wanted to introduce certain evidence but blundered in doing so. See Horton, 116 Wn. App. at 916-17. For instance, in Thomas, counsel failed to conduct any investigation into a defense expert's complete lack of qualifications. 109 Wn.2d at 230. The trial court refused to allow the "expert" to testify and no other expert was called. Id. at 229. Given that an expert's testimony was important for establishing a voluntary intoxication defense, counsel's failure to investigate or call another witness constituted ineffective assistance. Id. at 230-32.

Similar to Thomas, defense counsel clearly wanted to introduce the Facebook post, discussing it time and again with the court. See, e.g., RP 151-60, 294-301, 379, 620-24, 853-54, 1098-1105, 1266-67. But he failed to take the necessary steps to ensure its admission. Towards the end of trial, the court noted if "somebody knew that they were going to try and present evidence from Facebook, perhaps there should have been a witness ready to go." RP 1267. Defense counsel did not seem to grasp that he should have

called an authenticating witness, asking, "And you say that witness should have been here, somebody from Facebook or --[?]" RP 1267. This demonstrates defense counsel did not make a strategic decision in failing to authenticate the Facebook post.

Defense counsel's failure to produce an authenticating witness was entirely to Kolanowski's detriment. The Facebook post directly contradicted S.W.-H.'s testimony and would have only benefited Kolanowski. Like in Horton, defense counsel's inexplicable failure to take the necessary procedural steps for admission "could not have been a strategy or tactic designed to further his interests." Horton, 116 Wn. App. at 916. Because defense counsel could have impeached S.W.-H.'s testimony had he produced an appropriate witness, his failure to do so constitutes deficient performance. See id. at 920.

b. Defense counsel's failure to introduce key impeachment evidence prejudiced Kolanowski.

Counsel's deficient performance prejudiced Kolanowski. The opportunity to challenge the credibility of an accuser "is of great importance," particularly when the charged crime is a sex offense. State v. Roberts, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980). "In the prosecution of sex crimes, the right of cross-examination often determines the outcome." Id. This is so because, "owing to natural instincts and laudable sentiments

on the part of the jury, the usual circumstances of isolation of the parties involved at the commission of the offense and the understandable lack of objective corroborative evidence, the defendant is often disproportionately at the mercy of the complaining witness'[s] testimony." State v. Peterson, 2 Wn. App. 464, 467, 469 P.2d 980 (1970).

S.W.-H. did not know Kolanowski. RP 760. She thought the man's name was Dale. RP 766, 772. Powell informed her it was Kolanowski, but Powell never saw the man at the trailer that night. RP 223. S.W.-H.'s own identification of the man was extremely inconsistent. She could not remember his hair color. RP 320, 823-27, 1053-54. She said the man who attacked her did not have any tattoos, facial hair, or glasses, but Kolanowski had all three. RP 277, 320, 801-02, 814, 1053-54, 1217-18. S.W.-H. said the man was uncircumcised, but Kolanowski is circumcised. RP 821-23, 1213. She could not pick Kolanowski out of the photomontage. RP 443-48. She was also not sure she recognized Kolanowski in the courtroom, admitting she did not remember what the man who allegedly attacked her looked like. RP 801, 826.

These facts demonstrated S.W.-H.'s inability to recall many details of the event. They also suggested S.W.-H. was mistaken about identity. The Facebook post, however, demonstrated S.W.-H. was lying. She claimed she did not have access to her phone during the attack, yet she posted on

Facebook at 2:49 a.m. This called into question S.W.-H.'s entire story. If S.W.-H. was lying about having access to her phone, what else was she lying about? The Facebook post further undermined the State's phone records, which provided seemingly infallible direct evidence.

This is not a case of overwhelming evidence. The circumstantial evidence was conflicting. Even the DNA evidence was weak. The DNA profile from S.W.-H.'s sweatshirt that supposedly matched Kolanowski was obtained from only 25 cells and could be found in one in 8600 people in the U.S. population. RP 1141-42. In 2014, the population of King County alone was 2,079,967 people. RP 1346; CP 28. The defense needed the opportunity to undermine S.W.-H.'s credibility by demonstrating she made a false statement on the stand about having access to her phone during the alleged attack. But this opportunity was lost because defense counsel failed to produce a witness to authenticate the Facebook timestamp. There is a significant probability the outcome of the trial would have been different had that evidence been admitted.

This Court should reverse and remand for a new trial because Kolanowski was denied effective assistance of counsel. Thomas, 109 Wn.2d at 232; Horton, 116 Wn. App. at 924.

2. KOLANOWSKI WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY FAILED TO OBJECT TO INADMISSIBLE DNA "MATCH" TESTIMONY.

It has been the law in Washington for over 20 years that in order for DNA match testimony to be admissible, "statistical evidence of genetic profile frequency probabilities must be presented to the jury." State v. Copeland, 130 Wn.2d 244, 264, 922 P.2d 1304 (1996); accord State v. Cauthron, 120 Wn.2d 879, 907, 846 P.2d 502 (1993), overruled in part by State v. Buckner, 133 Wn.2d 63, 941 P.2d 667 (1997).

One of the State's DNA experts, Megan Inslee, testified that blood found on Kolanowski's sweatshirt "matched" his DNA. She did not testify to the estimated probability that the same genetic profile would appear in the population. Nor does her crime lab report anywhere include this necessary information. Ex. 149. Without this corresponding statistical evidence, Inslee's opinion on the "match" was inadmissible. Defense counsel failed to object or move to exclude this prejudicial testimony. This constituted ineffective assistance of counsel, given clear and controlling case law that such testimony is inadmissible. Reversal is required.

a. DNA match testimony is inadmissible without a probability estimate.

For expert testimony about scientific evidence to be admissible, it must first pass the Frye[2] test. Cauthron, 120 Wn.2d at 886-87. Under Frye, the trial court must determine whether an expert's opinion is based on a theory generally accepted in the relevant scientific community. Id. at 886. If the Frye test is satisfied, the court must then determine whether expert testimony meets the two-part test under ER 702: (1) whether the witness is qualified as an expert and (2) whether the expert testimony is helpful to the trier of fact.[3] Copeland, 130 Wn.2d at 256. Expert testimony is "helpful" only if it concerns matters beyond the common knowledge of a layperson and does not mislead the jury. State v. Thomas, 123 Wn. App. 771, 778, 98 P.3d 1258 (2004).

Inslee is a forensic scientist with the DNA unit of the Washington State Patrol Crime Laboratory. RP 661. She performed DNA testing using a process known as polymerase chain reaction for short tandem repeats (PCR-STR). RP 667-78. This process allows forensic scientists to isolate and analyze DNA segments that vary from person to person. State v. Bander,

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[2] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

[3] ER 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

150 Wn. App. 690, 699, 208 P.3d 1242 (2009) (citing COMMITTEE ON DNA FORENSIC SCIENCE: AN UPDATE, NATIONAL RESEARCH COUNCIL, THE EVALUATION OF FORENSIC DNA EVIDENCE 60-63, 69-70 (1996)).

These genetic variants are known as alleles. Bander, 150 Wn. App. at 699. Scientists have identified certain polymorphic loci, or markers, along DNA strands where the alleles are highly variable and can be used for human identification. Id. At each locus, a person has a pair of alleles, one inherited from each parent. Id. The alleles at a given locus may be the same or may be different, and many people have alleles in common at a particular locus. Id.

However, the overall combination of alleles—one's DNA profile—is sufficiently different from person to person that it is widely accepted that no two people, except for identical twins, have the same DNA profile.[4] Id. With PCR-STR testing, DNA segments at specific loci are amplified and copied millions of times over so the analyst can determine which alleles are present.[5] Id. at 700. This method is useful for testing degraded DNA samples or samples with low levels of DNA. Id.; see also State v. Gregory, 158 Wn.2d 759, 832, 147 P.3d 1201 (2006) (noting STR testing is

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[4] For additional discussion about DNA and DNA typing, see Cauthron, 120 Wn.2d at 891-95, and Copeland, 130 Wn.2d at 261-62.

[5] Inslee explained PCR "refers to the concept of copying DNA to get it to a higher level," while STR "is the type of marker that we use." RP 676.

"particularly appropriate for forensic use"), overruled on other grounds by State v. W.R., Jr., 181 Wn.2d 757, 336 P.3d 1134 (2014).

In Cauthron, the Washington Supreme Court held that DNA typing using the restricted fragment length polymorphisms (RFLP) process was generally accepted in the scientific community and therefore met the Frye test. 120 Wn.2d at 899. However, the Cauthron court held DNA "matches" cannot be interpreted without knowledge of how often a match might be expected to occur in the general population. 120 Wn.2d at 900. This statistical calculation expresses the probability of a random match, which means "the probability that a random person has the same DNA profile as the evidence profile or, in other words, the probability that a random person is not excluded by the evidence."[6] Bander, 150 Wn. App. at 706. The probability estimate is derived from population databases that document the frequency with which particular alleles appear across a number of loci. Id.

A probability estimate is necessary to understand a DNA match in part because only a very small percentage of DNA is variable. Cauthron, 120 Wn.2d at 900. The rest is "monomorphic," or common to all humans. Id. at 901. If DNA testing "reflects only monomorphic sites, it imparts no

[6] Put another way, the probability estimate "can be 'regarded as an estimate of the answer to the question: What is the probability that a person other than the suspect, randomly selected from the population, will have this profile?'" Bander, 150 Wn. App. at 706 (quoting DNA TECHNOLOGY IN FORENSIC SCIENCE, supra, at 127).

information whatsoever about the defendant." Id. Put another way, "'[t]o say that two patterns match, without providing any scientifically valid estimate (or, at least, an upper bound) of the frequency with which such matches might occur by chance, is meaningless.'" Id. at 907 (quoting COMMITTEE ON DNA TECHNOLOGY IN FORENSIC SCIENCE, DNA TECHNOLOGY IN FORENSIC SCIENCE 74 (1992)). Instead the analyst must show the alleles tested are polymorphic. Id. at 901. Thus, "[w]hen a match is observed, the probability that the match could have arisen by chance in the population must be calculated." Id. at 905 (quoting Lorne T. Kirby, DNA FINGERPRINTING 172 (1990)).

The DNA experts in Cauthron did not provide probability estimates, instead testifying only that Cauthron's DNA "matched" semen samples taken from the victims. Id. at 906. The court held this testimony should not have been admitted because it did not satisfy Frye or ER 702: "Testimony of a match in DNA samples, without the statistical background or probability estimates, is neither based on a generally accepted scientific theory nor helpful to the trier of fact." Id. at 907. The court reversed and remanded for a new trial. Id. at 909.

The Washington Supreme Court subsequently confirmed the Cauthron rule, recognizing "statistical evidence of genetic profile frequency probabilities must be presented to the jury." Copeland, 130 Wn.2d at 264.

In Copeland, the court held the "product rule"—used to calculate genetic profile frequencies in human populations—was generally accepted in the scientific community.[7] Id. at 270; see also State v. Russell, 125 Wn.2d 24, 54, 882 P.2d 747 (1994) (holding PCR process met the Frye test); State v. Gore, 143 Wn.2d 288, 311, 21 P.3d 262 (2001), overruled on other grounds by State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005) (holding the product rule met the Frye test when used to calculate frequencies for PCR testing); Gregory, 158 Wn.2d at 833-34 (holding STR process and application of the product rule to STR testing met the Frye test).

In Buckner, the State's DNA expert testified the defendant's DNA profile would occur in only one Caucasian in 19.25 billion, a number that exceeds the earth's population. 133 Wn.2d at 66-67. Overruling part of its holding in Cauthron, the court concluded "there should be no bar to an expert giving his or her expert opinion that, based upon an exceedingly small probability of a defendant's DNA profile matching that of another in a random human population, the profile is unique." Id. (emphasis added). In other words, an expert may testify a DNA profile is unique, but only if there is an exceedingly small probability estimate.

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[7] Using the product rule, "the analyst will multiply the frequencies at which particular alleles appear at specific loci by each other to determine the frequency with which the overall genotype of the tested sample could be expected to appear in the population." Bander, 150 Wn. App. at 706.

Though the preferred method of DNA typing has changed from RFLP to PCR-STR since Cauthron, the bottom line of Cauthron has not: DNA match testimony without a probability estimate fails both the Frye test and ER 702. See, e.g., State v. King County Dist. Court W. Div., 175 Wn. App. 630, 641, 307 P.3d 765 (2013) (recognizing the vitality of the Cauthron holding). For instance, in Bander, this Court explained that "[o]nce crime-scene and known-source DNA samples have been typed and compared and the forensic analyst has determined that the samples are sufficiently similar such that they could have originated from the same source, the analyst must then determine the statistical significance of the profiles." 150 Wn. App. at 705 (emphasis added). Accordingly, an expert may not testify to a DNA "match" without calculating and providing a probability estimate.

b. There was no legitimate strategic reason for failing to object to inadmissible DNA "match" testimony.

Inslee testified as one of the State's two DNA experts at Kolanowski's trial. RP 661. She explained blood, semen, and saliva are the most common sources of DNA, but DNA can also be found in urine, hair, teeth, bone, tissue, and skin cells. RP 666. A number of different tests are available to identify whether a particular substance is blood, semen, or saliva. RP 684-86. Inslee also explained DNA comparisons are possible

when there is a mixed DNA profile, meaning the DNA on a piece of evidence came from more than one person. RP 669.

Inslee testified to several different DNA matches. First, DNA from the mouth of a beer can collected from S.W.-H.'s trailer matched S.W.-H.'s DNA profile. RP 693-97. Inslee testified the "estimated probability of selecting an unrelated individual at random from the [U.S.] population with the same profile . . . is one in 3.3 quintillion." RP 697. Inslee's lab report reflects this same number. Ex. 149. Inslee testified a red-brown stain on a gray sweatshirt collected from S.W.-H.'s bathtub tested positive for blood and "matched the DNA profile of [S.W.-H.]" RP 709. For this match, the "estimated probability of selecting an unrelated individual at random from the [U.S.] population with that same profile is one in 24 quadrillion." RP 709. This number is also stated in Inslee's lab report. Ex. 149.

Inslee also testified red-brown stains on the left sleeve cuff of the black sweatshirt Kolanowski was wearing at the time of arrest tested positive for blood. RP 698. Inslee explained she found three separate DNA profiles in this sample and they were all mixtures. RP 700. S.W.-H. was excluded as a possible contributor. RP 700. However, Inslee testified "[t]he major component of each of the mixtures matched the reference sample that I just referred to that was submitted from the suspect." RP 700; see also 736-37 (reiterating this conclusion on cross-examination). Inslee did not give an

estimated probability of selecting an unrelated individual at random from the U.S. population with the same DNA profile. Nor does her lab report anywhere state a probability estimate for this "match." Ex. 149.

Under Cauthron and its progeny, Inslee's testimony that Kolanowski's DNA "matched" the blood samples taken from his sweatshirt was inadmissible without a probability estimate. Only with a probability estimate may an expert testify particular DNA is unique. Buckner, 133 Wn.2d at 66. Yet defense counsel never moved to exclude this testimony and did not contemporaneously object to it. See CP 86-96; RP 700.

There was no legitimate strategic reason for failing to object. If a probability estimate were astronomical, like one in 10 quadrillion, it is conceivable a defense attorney would purposefully not object to lack of testimony on that fact. But nowhere in Inslee's testimony or lab report did she provide a probability estimate. Defense counsel could not have known whether the probability estimate was exceedingly high or exceedingly low, because there was none. The only known fact was that Inslee's match testimony was inadmissible.[8]

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[8] During cross-examination of Inslee, defense counsel seemed confused about the purpose of the probability estimate and how the federal database is used to calculate probabilities. See RP 742-44. For instance, he asked Inslee, "And if you don't have that one-to-one database, in other words you don't know both sides -- sample and a comparison -- if you don't have both of those, that is when you are using the database to try to come up with a statistic?" RP 744. This

This Court's decision in Bander provides a useful contrast. There, Bander argued expert testimony about inconclusive DNA results was inadmissible because the experts did not provide statistical calculations for specific mixed samples. Bander, 150 Wn. App. at 718. But the experts did not testify Bander's DNA profile *matched* the mixed samples at issue. Id. at 719. Rather, they testified only that the results were inconclusive or that Bander could not be excluded as a possible contributor. Id. This Court accordingly found no error because "[t]he concerns that animated the court's decision in Cauthron" were not present. Id.

Unlike Bander, Inslee actually testified Kolanowski's DNA profile *matched* the blood sample at issue, without stating the probability that the same DNA profile would appear in the population. This is the very problem identified in Cauthron—without the probability estimate, it is impossible to know whether Inslee tested monomorphic or polymorphic alleles. Cauthron, 120 Wn.2d at 900. Inslee's conclusion that Kolanowski's DNA matched the blood sample was both meaningless and misleading without the probability estimate. Id. at 907.

Given clear and controlling case law holding that such testimony is inadmissible, defense counsel's failure to object was unreasonably deficient.

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suggests counsel's failure to object resulted from a misunderstanding of the probability estimate, rather than a strategic decision.

See, e.g., State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) ("Reasonable conduct for an attorney includes carrying out the duty to research the relevant law."); State v. Adamy, 151 Wn. App. 583, 588, 213 P.3d 627 (2009) ("[Defense] counsel was deficient for failing to recognize and cite the appropriate case law.").[9]

c. The inadmissible DNA "match" testimony was highly prejudicial and undermines confidence in the outcome of Kolanowski's trial.

Counsel's deficient performance in failing to object to Inslee's inadmissible testimony prejudiced Kolanowski. The evidence of a DNA match was highly incriminating. S.W.-H. told police the man who attacked her was wearing a hooded, possibly dark-colored, sweatshirt. RP 277, 800, 824. S.W.-H. also testified the man repeatedly punched her in the face. RP 774-75. Blood matching Kolanowski's DNA on the cuff of his sweatshirt corroborated this testimony. Further, Kolanowski was arrested wearing the black sweatshirt, suggesting not only that he was the one who attacked S.W.-H., but also that he was wearing the same clothes.

The evidence was also significant because the black sweatshirt was different than what Kolanowski was wearing earlier in the evening on

[9] In re Pers. Restraint of Tsai, 183 Wn.2d 91, 102, 351 P.3d 138 (2015) ("Indeed, "[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland." (quoting Hinton v. Alabama, 571 U.S.__, 134 S. Ct. 1081, 1089, 188 L. Ed. 2d 1 (2014)).

February 7. Powell said Kolanowski was wearing a green army fatigue jacket and later a blue checkered shirt. RP 196-211. Mills also said Kolanowski was wearing a "greenish" jacket. RP 886. These descriptions conflict with S.W.-H.'s testimony about what the man was wearing. But blood on Kolanowski's sweatshirt that matched his DNA suggested he changed his clothes before going to S.W.-H.'s trailer. This damning evidence corroborated S.W.-H.'s testimony and suggested Kolanowski was in her trailer that night. Indeed, the State argued in closing that Kolanowski was wearing the same black sweatshirt when he was arrested as when he attacked S.W.-H. RP 1418-19. Inslee's impermissible "match" testimony allowed the State to make this inference.

Defense counsel exacerbated the prejudice on cross-examination by asking Inslee, "And when you declare something being a match, that is a subjective standard?" RP 742. Inslee responded:

> I don't believe so.
>
> A match, in terms of how I declare it, is an explicit matching of numbers.
>
> Essentially I have a set of numbers that I have obtained from an evidence item -- the DNA profile. I compare it to the set of numbers that I obtain from the reference sample and if they match exactly, it is a match.

RP 742. This gave the impression that the DNA on Kolanowski's sweatshirt was unique and the "match" was absolute. But such a conclusion cannot be reached or given without a probability estimate.

Finally, Inslee's match testimony was prejudicial because it very likely confused the jury. Inslee properly gave probability estimates for the two samples that matched S.W.-H.'s DNA. RP 697, 709. The State's other DNA expert, Brad Dixon, testified the YSTR profile on S.W.-H.'s gray sweatshirt matched Kolanowski's DNA.[10] RP 1140-42. He properly gave a probability estimate—that the profile was not expected to occur more frequently than one in 8600 males in the U.S. population. RP 1140-42.

By contrast, Inslee's testimony that Kolanowski's DNA "matched" the blood on his sweatshirt conspicuously lacked any probability estimate. RP 700. During deliberations, the jury told the court, "We need a clarification of a DNA match compared to statistics from the two DNA scientists." CP 58. The court responded, "Please refer to your notes and/or memory of the testimony of witnesses [and] other evidence, as well as the court's instructions." CP 59. But this response could not have remedied the jury's confusion, given Inslee's failure to provide a probability estimate.

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[10] YSTR is essentially the same as PCR-STR testing, except it permits analysis of the male Y-chromosome in a mixed-source sample that also contains female DNA. Bander, 150 Wn. App. at 700. The DNA segments that are the focus of YSTR testing are inherited as a block through an individual's paternal lineage, so all men in a paternal line have the same YSTR DNA profile. Id.

Defense counsel's failure to object to inadmissible DNA testimony was unreasonably deficient. Inslee's match testimony would have been excluded had defense counsel objected and cited the controlling case law discussed above. Because the evidence was highly incriminating, there is a reasonable probability that but for counsel's failure to object, the result of Kolanowski's trial would have been different. This Court should reverse and remand for a new trial.

3. APPEAL COSTS SHOULD NOT BE IMPOSED.

If Kolanowski does not substantially prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. RCW 10.73.160(1) provides that appellate courts "may require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). This Court has ample discretion to deny the State's request for appellate costs. State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612, 615-18 (2016) (exercising discretion and denying State's request for appellate costs).

The trial court made no finding of Kolanowski's ability to pay, instead waiving all discretionary legal financial obligations. CP 66; see also State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). The trial court did, however, find Kolanowski to be indigent and unable to pay for appellate review expenses "by reason of poverty." CP 83-85. Kolanowski reported

zero income, assets, or savings. CP 80-82. At the time of the alleged rape, Kolanowski was living with his mother and stepfather in a trailer. RP 1212-13. Though Kolanowski was employed at the time, he lost his job and the court imposed an indeterminate sentence with a 90-month minimum term and a maximum term of life.[11] CP 68; RCW 9.94A.507.

Further, there has been no order finding Kolanowski's financial condition has improved or is likely to improve. RAP 15.2(f) specifies "[t]he appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." This Court must therefore presume Kolanowski remains indigent and give him the benefits of that indigency. RAP 15.2(f). For all these reasons, this Court should not assess appellate costs against Kolanowski in the event he does not substantially prevail on appeal.

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[11] An indeterminate sentence means Kolanowski may be incarcerated for his entire life if the Indeterminate Sentence Review Board determines, despite conditions of community custody, "it is more likely than not that the offender will commit sex offenses if released." RCW 9.95.420(3)(a).

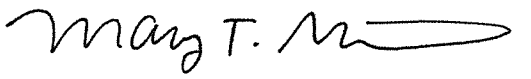
D. CONCLUSION

This Court should reverse Kolanowski's convictions and remand for a new trial because Kolanowski was denied effective assistance of counsel.

DATED this 21st day of April, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Attorneys for Appellant

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 73703-1-I
	)	
DERRICK KOLANOWSKI,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

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

THAT ON THE 21ST DAY OF APRIL 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DERRICK KOLANOWSKI
DOC NO. 383092
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 21ST DAY OF APRIL 2016.

x Patrick Mayovsky