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Court of Appeals
Division III
State of Washington

NO. 319652

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

STATE OF WASHINGTON,
Plaintiff/Appellee,

v.

ANAUM GUZMAN,
Defendant/Appellant.

OPENING BRIEF

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KEY TO CITATIONS

Trans.2012- refers to transcript of the first trial in 2012

Trans.2103- refers to transcript of the second trial in 2013

CR- refers to the court record or clerks papers

I. INTRODUCTION

Mr. Guzman, Appellant/Defendant, was originally tried on these charges in February of 2012. That trial also involved an additional charge alleging an assault with a sexual motivation against the older sister of the alleged victim in the second trial. That trial resulted in an acquittal on the charge concerning the older sister, and a hung jury on the charges that Mr. Guzman was eventually retried for.

In this appeal Mr. Guzman asserts that he did not receive a fair trial upon the remaining charges.

There was error in the jury instructions that allowed for a non unanimous verdict. Testimony that should have been excluded concerning the older sister, who did not testify in the second trial, was admitted into evidence. This occurred both as a result of error of the court and/or ineffective assistance of counsel. Further, Mr. Guzman's counsel was deficient in his

cross examination of the victim. Finally, the cumulative errors that occurred in this case warrant a reversal of the convictions and remand for new trial.

II. ASSIGNMENTS OF ERROR

A. Jury Instruction

Error occurred in this case as a result of the jury unanimity instruction that was given by the court. This instruction informed the jury that in order to convict the defendant, that “at least one particular act of sexual intercourse must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved.” Unfortunately this language was repeated verbatim for each count, leaving the jury in a position to convict the defendant on both counts, despite having only agreed on one act of sexual intercourse unanimously. In other words, the unanimity instruction did not make it clear that two acts of sexual intercourse were required to be proved beyond a

reasonable doubt, one in the time frame of each respective count.

The remaining issues in this case are related to Mr. Guzman's claim that his trial counsel provided ineffective assistance.

B. Testimony concerning Deepa Thiry

The admission of testimony concerning Deepa Thiry, the older sister of the alleged victim Renuka Thiry was improper and counsel failed to act by objection or motion for mistrial. Deepa Thiry had testified in the first trial, but did not testify in the second trial. As explained below, the admission of what basically amounted to her statements through other witnesses was hearsay. If this evidence was being offered for a purpose other than the truth of the matter asserted, then it should not have been admitted because the circumstances of how it was offered make its relevance questionable. If this

evidence had minimal relevance is was outweighed by its prejudicial effect, and the obvious danger that it would confuse the jury.

C. Violation of Motion in Limine

During the testimony of Janice Thiry, the State elicited testimony which violated the court's motion in limine that Deepa Thiry's allegations, of which Mr. Guzman was found not guilty in the first trial, should not be mentioned in the second trial. Trial counsel failed to act on this either by objection, or motion for mistrial.

D. Failure to properly cross examine/ impeach victim

This type of case almost by necessity involves the credibility of the accused and the accuser. In the first trial counsel had called law enforcement witnesses to impeach Renuka Thiry's testimony with prior inconsistent statements. In the second trial, counsel failed to call these witnesses,

although one had been subpoenaed. This resulted in a failure of the adversarial process of discerning the truth through the process of cross examination.

E. Cumulative Error

Finally, if each of the above issues are insufficient to warrant reversal and remand, Mr. Guzman asserts that taken together they resulted in cumulative error justifying reversal.

III. STATEMENT OF THE CASE

In this case, the State alleged that between July 26, 2001 and July 25, 2007, that Mr. Guzman engaged in acts constituting sexual intercourse with the victim. The victim's 12th birthday formed the demarcation between count 1 and count 2. At trial the victim testified that acts constituting sexual intercourse occurred on several occasions. At trial Mr. Guzman testified that these events never occurred.

Mr. Guzman was married to the alleged victims oldest sister Lorenda Guzman. Renuka Thiry and her older sister Deepa Thiry had been adopted from India. The adoptive parents are Nick and Janice Thiry.

During the testimony in the case reference is made to the little red house and the house in Ephrata. These were both residences of Lorenda and Anaum Guzman. They lived in the little red house when they were first married and later moved to a house in Ephrata, which was closer to Nick and Janice Thiry's residence.

IV. LAW AND ARGUMENT

A. The jury unanimity instruction given by the court was inadequate to ensure that the jury was unanimous on each count.

As Division II has recently outlined,

Criminal defendants in Washington have a right to a unanimous jury verdict. *Wash. Const. art. 1, § 21*. This right includes the right to an expressly unanimous verdict. *Wash. Const. art. 1, § 21* states: "The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases...." Allowing juries of less than 12 in courts not of record creates a right to 12-member juries in courts of record. *Seattle v. Filson*, 98 Wash.2d 66, 70, 653 P.2d 608 (1982), overruled on other grounds by *In the Matter of Eng*, 113 Wash.2d 178, 776 P.2d 1336 (1989). Additionally, by allowing verdicts of nine or more only in civil cases, the final clause implicitly recognizes a unanimous verdict requirement in criminal cases. *State v. Stephens*, 93 Wash.2d 186, 190, 607 P.2d 304 (1980); see also *State v. Kitchen*, 110 Wash.2d 403, 409, 756 P.2d 105 (1988); *State v. Workman*, 66 Wash. 292, 294-95, 119 P. 751 (1911). In certain situations, the right to a unanimous jury trial also includes the right to express jury unanimity on the means by which the defendant is found to have committed the crime. *State v. Green*, 94 Wash.2d 216, 230-35, 616 P.2d 628 (1980); accord *State v. Whitney*, 108 Wash.2d 506, 511, 739 P.2d 1150 (1987); *State v. Franco*, 96 Wash.2d 816, 823, 639 P.2d 1320 (1982); *State v. Simon*, 64 Wash. App. 948, 961, 831 P.2d 139 (1991).

State v. Lobe, 140 Wn.App. 897, 903, (Div. 2 2007).

As indicated by the above authority, a right to a unanimous jury verdict is a constitutionally guaranteed right, and therefore may be raised for the first time on appeal. See *State v. O'Hara*, 167 Wn.2d 91, 100 (2009) (indicating that failure to require a unanimous verdict satisfied RAP 2.5(a))

The problem with the unanimity instruction in this case is that it allowed for the jury in this case, after reaching a unanimous agreement that “at least one act of sexual intercourse” had occurred, to use that determination as a basis for finding the defendant guilty of both counts. That instruction, Number 7, reads as follows:

The State alleges that, on more than one occasion, the defendant committed acts which could be found by the jury an element of a crime charged.

To convict the defendant of rape of a child in the first degree, as charged in Count 1, at least one particular act of sexual intercourse must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been

proved. You need not unanimously agree that all the alleged acts have been proved.

To convict the defendant of rape of a child in the second degree, as charged in Count 2, at least one particular act of sexual intercourse must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that all the alleged acts have been proved.

CR at 152.

This jury instruction explicitly allowed the jury to return a verdict of guilty on both counts on a unanimous finding of “at least one particular act.” In other words although the constitutional right involved here would require that the jury unanimously find a particular act within the time frame of *each* of the counts, this instruction would allow the jury to use a unanimous finding on any one of the alleged acts to support a finding of guilt on both counts. The language at the end of the instruction, indicating that unanimous agreement is not required for all alleged acts aggravates this issue.

Instruction number 8 does nothing to correct this error, only instructing the jury that it must be unanimous on each count, and not a particular act supporting *EACH* count.

CR 153.

Because there is no way of determining that there was a unanimous finding of an act supporting each count, both must be reversed.

B. The testimony regarding Deepa Thiry's statements were inadmissible hearsay. The relevance of those statements was never established, and even if the statements had some relevance, they should have been excluded under ER 403. To the extent that these statements were elicited over objection, the trial court erred, to the extent that the statements were elicited without objection, counsel was ineffective.

In the first trial in this case, that occurred in February of 2012, there were two alleged victims, Renuka and Deepa

Thiry. The jury found Mr. Guzman not guilty on the charge concerning Deepa Thiry, and was deadlocked on the counts concerning Renuka Thiry. CR75. A mistrial was declared, and The State proceeded to retry Mr. Guzman on the charges concerning Renuka Thiry.

A central part of the State's case involved how the subject of molestation had initially been brought to the attention of Janice and Nick Thiry, the Girls' parents. In the first trial Deepa Thiry had testified, and had related that she had a conversation with her Sister shortly after Christmas 2010 in which both girls disclosed for the first time that they had been abused by Mr. Guzman. Transcript of 2012 trial at 319-321. Deepa Thiry then testified that she had shortly thereafter had a conversation with her father where the topic of the conversation was molestation, but there was no mention that either of the girls had been abused, or by whom. Trans. 2012, 322-25. Janice Thiry, the Girls' mother also testified

about that conversation. Trans. 2012, 372-73. Nick Thiry did as well. Trans. 2012, 393-95. All of the testimony concerning this conversation was that there were no specific allegations concerning any abuse. To summarize, the narrative was that after the daughters had disclosed abuse to each other, that the older sister Deepa had a conversation with her parents concerning the general topic of abuse, but not any specific allegations concerning either the girls, or Mr. Guzman.

At the second trial, Deepa did not testify, but other witnesses did testify concerning the conversation described above, and it was also featured in the State's opening statement. The problem with how this information was presented in the second trial is evident from the State's opening statement.

You're going to hear that eventually, in 2010, the Thirys were over at the house of the defendant and Lorenda, they were enjoying Christmas together. You're going to hear that wither that night or the next day, Deepa approached her

parents and said, what if you knew someone was being molested? What do you do? And the parents said, well, you would tell somebody, you would tell somebody, you would notify the authorities.

You're going to hear that a day or two later, Mr. Thiry and the defendant, who worked together, who were good friends, worked together, worked together doing construction, had been working on some kitchen cabinets for the defendant's home. And it had been a good day, they had gotten some work done, and Mr. Thiry suggested, let's go to Golden Corral, a restaurant that used to be in Moses Lake, that was kind of an all-you-can-eat buffet restaurant. And that's where they liked to eat, it wasn't very expensive, they could get lots of food, it was good food.

So they were on their way to Golden Corral when Mr. Thiry says to the defendant, you know it's hard being a parent, it's really hard being a parent. Deepa came to us last night, she wanted to talk about, you know, what if you knew somebody was being molested, what would you do. And he said It's hard, you know, you get these subjects come up. Mr. Thiry will tell you that when he relayed this conversation to the defendant, the defendant got very quiet, got to the restaurant, the defendant was very quiet, which was out of character for him, insisted that he pay for lunch, and that when Mr. Thiry was going back for a second or third plate of food, he realized that the defendant wasn't eating and thought, well maybe I shouldn't have let him pay for lunch, maybe he just can't afford it. And he

really didn't think more of it. The defendant was moody for the rest of the afternoon. And Mr. Thiry just thought he was depressed. And toward the end of the afternoon, he kind of snapped out of it. It was a few days later that Renuka came to her parents about the sexual abuse at the hands of the defendant.

Trans.2013 62-64.

Whether done in good faith or not, this narrative, which comprises three of the six pages of the transcript of the State's opening, is problematic. The defense had moved in Limine to exclude mention of Deepa Thiry's allegations against the defendant. CR 82-84. This leaves Deepa Thiry's true role in the story that the State set forth in opening completely out of context.

At the very least, the implication of this narrative out of context is that the younger sister confided in the older sister that she had been abused, and the older sister went to her parents. Then when Nick Thiry mentioned this conversation to Mr. Guzman, his actions demonstrated consciousness of guilt

concerning his abuse of Renuka. Unfortunately, even if Mr. Guzman's actions demonstrated a consciousness of guilt, there was no showing that it was guilt concerning his abuse of Renuka Thiry. Of course, without Deepa's testimony, the jury was never going to hear what her Deepa's sister had told her, or whether her conversation about abuse was about her sister or herself. In other words, what Deepa said in that conversation may have been about her own allegations of abuse and may have had nothing whatsoever to do with her sister.

This makes the State's use of the interaction between Mr. Guzman and Nick Thiry improper. The part of the narrative concerning the workday and lunch at the Golden Corral was clearly used to demonstrate consciousness of guilt.

People's interpretations of other persons emotional states can be extremely subjective, and so should probably be treated carefully in general. But in this case, at this trial, this

evidence which was a central piece of the State's case, was not only inherently subjective, it was misleading to the jury.

This narrative was reinforced by the testimony that was offered during the trial. During direct examination of Janice Thiry, trial counsel objected on hearsay to Janice Thiry's testimony concerning what Deepa had told her during the conversation, but was overruled by the court. Trans. 2013 at 82. During Nick Thiry's testimony, the State elicited testimony concerning his interaction with Mr. Guzman when he mentioned that Deepa had asked him about molestation and Mr. Guzman's reaction to that information, Trans. 2013, 114-118. Finally, the State used these events in closing argument. Trans.2013, 321-22.

The testimony supporting this narrative is not relevant under ER 401. In context, its relevance is speculative at best. However, if this testimony had some probative value, it certainly should have been excluded under ER 403. Its

tendency to mislead the jury is apparent. As it was offered primarily to demonstrate consciousness of guilt of the abuse of Renuka Thiry, its prejudicial effect is also apparent.

Trial counsel in this case had realized that Deepa Thiry's allegations about the defendant should not be mentioned at trial by filing a motion in limine. CR 82-84. However, when he failed to object to the misleading narrative offered by the State, the effectiveness of that motion in limine was reduced significantly. Because, as the result of the first trial shows, this case could be tipped in any direction as a result of minimal changes in evidence, it was ineffective assistance of counsel to fail to object, or to fail to move for a mistrial after the State made its intention to use this narrative in this case.

C. Counsel was also ineffective when he failed to object, or move for a mistrial when the testimony of Janice

Thiry violated the motion in limine concerning allegations made by Deepa Thiry.

After Janice Thiry had testified concerning the conversation regarding molestation she had with Deepa Thiry, she was asked about the next time she spoke to Renuka, which was the first time that both girls revealed their allegations concerning Mr. Guzman to their parents. As has been mentioned, Deepa Thiry was also making allegations concerning Mr. Guzman, and the defense had moved the court to prevent mention of Deepa's allegations. Here is the relevant portion of Janice Thiry's testimony that violated that motion in limine. The Questions are being asked by the State.

Q: Before lunch, Ms. Thiry, we had talked about when Renuka had come to talk to you to tell you about these allegations. When she came to you, could you relate to us, not what she said, but what you did in response to what she said?

A: This is when Renuka came and said that she had something to tell us?

Q: Yes

A: Yes. So later that evening, when we were home, we went to Deepa's bedroom, and there the girls were sitting on the floor, and they said that -

Q: Just -

A: **It was apparent that they had something - go ahead.**

Q: Okay. Go ahead.

A: **It was apparent that they had something very important to say to us. And so it was revealed that -**

Mr. White: I'll object to the narrative.

The Court: Right. You're not permitted to relate what you were told.

The Witness: Okay.

The Court: That's why Miss Highland asked you not what you were told, but what you did in response to what you were told.

A: **I asked them questions to determine the extent of the molestation, and -**

By Ms. Highland:

Q: Okay. How long did you talk - how long did this talk go on for?

A: Two or three hours.

Q: when you were speaking to the girls,
what was Renuka's demeanor like

A: She was scared and shaky, quiet,
determined.

Q: and as a result of what you had learned,
what did you do?

A: **I started reassuring them that they –
that there was hope, that we – that they
weren't bad girls, that – that they were worth
– that they were worthy.**

Q: Did you do anything after that evening
in relation to what you had been told?

A: We reported it to the Ephrata police the
next day.

Trans.2013, 85-86. *emphasis mine.*

Janice Thiry's testimony concerning the girls is stated in
terms of what "they" did. It was clear that *they* had something
important to tell us; I asked *them* questions to determine the
extent of the molestation; and I started reassuring *them* that
they – that there was hope, that we – that *they weren't bad*
girls, that – that *they* were worth – that *they* were worthy.

This testimony strongly implies that Deepa Thiry had made some kind of allegation concerning Mr. Guzman. At that point in the trial, Counsel should have moved for a mistrial. The jury had heard these two pieces of information concerning Deepa Thiry despite defense's desire to keep that information out of the trial.

It was ineffective assistance of counsel to take no action in response to this testimony.

D. Trial counsel was ineffective by failing to effectively cross examine Renuka Thiry, primarily because he failed to impeach her with her prior inconsistent statements.

At the second trial, Renuka Thiry related the following incidents.

She testified that the abuse began at age 8 when Mr. Guzman touched her hand. Trans.2013, 164.

She testified that at some later date when she was between 8 and 10 years old, she went fishing at Lake Lenore with her family and Mr. Guzman rubbed her bottom and hugged her. Trans.2013, 165-66.

She described another incident at Lake Lenore when she was fishing in a small boat with Mr. Guzman and her brother where Mr. Guzman started rubbing her legs, and then put his hand underneath her underwear and digitally penetrated her. She related that Mr. Guzman was saying "I love you" while he was doing this, and that her brother did not see anything. Trans.2013, 167-168.

She then related that later, basically the same thing occurred during an incident fishing at Blue Lake with Mr. Guzman and her brother. Trans.2013, 169-70. She said that no other abuse occurred while she was fishing with Mr. Guzman. Id.

She indicated that nothing else happened at the “Red House”. Trans.2013, 171, but that when Mr. Guzman moved to the “house in town,” when she was 12 or 13, that Mr. Guzman began kissing her and telling her that he loved her. Trans.2013, 173.

She related an incident around that same time where she was staying the night at Mr. Guzman’s house to help with a yard sale the next day. Mr. Guzman entered the bedroom she was sleeping in and removed her clothing and fondled her, but left when he heard his wife coming. Trans.2013, 174-76.

She related another incident at the same home where she went to the basement to get a clean diaper for her nephew, and Mr. Guzman was down there, that he was “kissing me down in my private spots,” and that he removed his pants and put his penis in her mouth. This incident was interrupted when Mr. Guzman heard his wife coming. Trans.2013, 176-77.

She related an incident which she thought occurred when she was 15, again in the basement of Mr. Guzman's home similar to the other incident but that Mr. Guzman had also attempted vaginal-penile penetration. Trans.2013, 179-80.

This was in essence Renuka Thiry's testimony on direct examination in the second trial.

It goes without saying that the jury's judgment regarding the credibility of the victim in this type of case is crucial. This makes trial counsel's failure to adequately impeach Renuka Thiry's testimony a crucial error.

In the first trial, different trial counsel had asked Renuka Thiry many questions regarding statements that she had made during the course of the investigation in order to set up impeachment by Law enforcement witnesses. Trans.2012, 256-99.

After the State rested, trial counsel called three witnesses to impeach Renuka's testimony with prior inconsistent statements. Officer Joshua Buescher, Retired officer Dan Bohnet, and defense investigator Lawrence Kuciemba. Trans.2012, 388, 421-450.

The following information was adduced.

Officer Buescher testified that he had interviewed Renuka Thiry on December 30th 2010. Trans.2012, 423. He indicated that on that occasion that Renuka Thiry had told him that Mr. Guzman had touched her over her clothes between the ages of 8 and 14, and that Renuka Thiry had told him that Mr. Guzman had attempted to put his penis into her vagina, and that had occurred in March of 2010, 423-24.

Sergeant Dan Bohnet testified that he had interviewed Renuka Thiry as well, and that when he had asked her if Mr. Guzman made threats to her, and that she replied "no he

doesn't." Trans.2012, 429. He testified that he had asked her if Mr. Guzman had ever touched her with his penis, and that she had said yes. Bohnet had followed up by asking if there was any pain and that she had replied "No because he never had the chance to go in." Trans.2012, 430. Bohnet testified that he had asked her again later in the interview if Mr. Guzman had ever threatened her and that she replied "No he hasn't threatened me at all," and that he had again asked her if Mr. Guzman's penis had ever penetrated her and that she responded "no." Trans.2012, 431.

In the second trial, Counsel for Mr. Guzman had subpoenaed Officer Beuscher but he was never called as a witness. CR 89. There was also an amended witness list filed by the defense indicating an intention to call investigator Jeff Wade, but he was not called as a witness. CR 87.

At that point Renuka Thiry had been interviewed several times and as demonstrated by just the above statements from

witnesses Buescher and Bohnet, her statements regarding past events were not consistent in many respects.

Trial counsel in the first trial had demonstrated the importance of these witnesses. Certainly their testimony regarding penile penetration and Buescher's statement that Renuka Thiry had initially said that Mr. Guzman did not touch her under her clothes until she was 14 were crucial statements.

Trial counsel in the second trial did attempt to use some of the prior statements, but with mixed results. He asked Renuka Thiry on cross if she had ever told officers that she had not been touched under her clothes until she was 14, and Renuka responded that "I don't remember that." Trans.2013, 204.

Trial counsel did use a transcript of the interview with Sergeant Bohnet to refresh Renuka's recollection of that interview. Counsel was able to establish that Renuka Thiry

had responded to Bohnet's question if Mr. Guzman had ever threatened her and she recalled after viewing the transcript that she had said "no not really." Trans.2013, 215. Also that she had responded to a question about "any kind of threats" by saying "no." Id at 216. On recross, counsel was able to elicit that Renuka Thiry had told Sergeant Bohnet that Mr. Guzman had never had intercourse with her, Trans.2013, 240-41, but the prosecution was able to rehabilitate somewhat by pointing out that she later had told sergeant Bohnet that Mr. Guzman had tried to stick his penis in her. Trans.2013, 233-34.

However, it should be noted that later in that interview Renuka Thiry was asked specifically if Mr. Guzman had touched her with his penis, and she replied yes. Bohnet followed up asking if there had been any pain, and she replied "no, because he never actually had the chance to go in." Finally at the end of the interview Renuka stated that Mr. Guzman had not actually touched her with his penis, and that

his hearing footsteps had stopped the incident before he could do so. Trans. 2012, 429-430.

These examples are illustrative and not exhaustive. The State will certainly respond that some of the prior inconsistent statements that the defense used in the first trial were contradicted elsewhere by Renuka Thiry, but point is not well taken. The issue at trial is her credibility. Ultimately that credibility is damaged by her contradictory statements. Unfortunately, In the second trial, Some of her most striking contradictions were not presented to the jury.

Failing to impeach Renuka Thiry's testimony with prior inconsistent statements, particularly the statements that Buescher testified to (not being touched beneath clothes until after 14) was ineffective assistance of counsel. No possible strategic purpose could justify this omission.

E. Legal Standards for ineffective assistance of counsel.

Three of the above issues fall under the umbrella claim of ineffective assistance of counsel. Counsel's failure to object or move for mistrial regarding Mr. Thiry's revelation of what Deepa Thiry had told him; Counsel's failure to act or address the violation of the court's ruling that Deepa Thiry's allegations should not be mentioned; and Counsel's failure to properly cross examine and impeach Renuka Thiry's testimony.

The Washington Supreme Court recently revisited the legal standards and issues regarding claims of ineffective assistance of counsel in *In re Personal Restraint of Cross*, 327 P.3d 660, 180 Wn.2d 664 (2014). There the court sets forth the basic principles regarding claims of ineffective assistance.

To prevail on an ineffective assistance of counsel claim, a criminal defendant must demonstrate (1) deficient performance by counsel and (2) resulting prejudice. *Strickland v.*

Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). If the court finds either prong has not been met, it need not address the other prong. *Id.* at 700; accord *State v. Garcia*, 57 Wn.App. 927, 932, 791 P.2d 244 (1990).

Cross, 180 Wn.2d at 693.

To establish deficient performance, the defendant must show that trial counsel's performance fell " below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688; see also *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978) (discussing development of a more objective standard akin to that used in legal malpractice cases). We evaluate the reasonableness of a particular action by examining the circumstances at the time of the act. " A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

Cross at 693-94.

Courts presume counsel's representation was effective. *Strickland*, 466 U.S. at 689; *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251

(1995). The presumption is rebutted if there is no possible tactical explanation for counsel's action. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Legitimate trial tactics or strategy cannot form the basis for an ineffective assistance of counsel claim. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

Cross at 694.

Applying these principles in this case, it is clear that counsel's performance was deficient. First, let us examine the admission of Deepa Thiry's general molestation conversation and the use that the State put it to.

Mr. Guzman asserts that this testimony was not relevant, and if it had minimal relevance it should have been excluded under ER 403. Clearly, the mere fact that Deepa Thiry had a conversation with her parents concerning molestation might be relevant if it could be connected to the alleged abuse suffered by Renuka. However, in this case the State was using this as a proxy for what should have been required to establish the link. That is, if Deepa had testified

she could have testified that Renuka had told her Mr. Guzman had abused her (subject to a possible hearsay objection). That is the inference that the State was attempting to draw by eliciting testimony concerning the molestation conversation. Without Deepa's testimony there was nothing other than speculation to establish that Deepa's conversation with her parents had anything to do with Renuka Thiry.

The next part is even more troubling. As presented by the State in opening, the clear implication of the narrative is that Renuka told Deepa that she had been molested, and that Deepa went to her parents. Then when Nick Thiry mentioned this to Mr. Guzman, his response indicated a consciousness of guilt for having abused Renuka. While the State was offering this narrative, it knew or should have known that it was false and misleading. Because the jury was correctly prevented from learning of Deepa's allegations, this narrative did not have a proper context. In context, it might be relevant to show

consciousness of guilt concerning abuse of Deepa, but without more its relevance to any abuse of Renuka is strained. Additionally the danger of unfair prejudice and misleading the jury is apparent.

So was there a valid reason of for trial counsel to fail to object or move for a mistrial? (as this narrative did start in the State's opening). The exclusion of this evidence would have resulted in no harm whatsoever to Mr. Guzman's case and could only have benefitted him. The result of exclusion would have been to eliminate the State's argument that what happened with Nick Thiry showed that Mr. Guzman was feeling guilty. There is no tactical or strategic reason for counsel to have failed to either object, or act by moving for a mistrial. If this information should have been excluded per ER 403 then counsel's performance was clearly deficient.

The second issue that Mr. Guzman asserts shows that counsel was ineffective was counsel's failure to address or

deal with Janice Thiry's testimony of her conversation with Deepa and Renuka in which they first told her that they had been abused. Janice Thiry's testimony all but stated directly that Deepa had made some kind of claim that Mr. Guzman had abused her. Unfortunately, what the members of the jury might have imagined concerning this abuse was likely worse than the actual claims that Deepa had made. At that point, with the defenses motion in limine violated, a mistrial should have been requested.

It should also be noted that these issues are cumulative in supporting a motion for a mistrial. After the admission of Deepa's molestation conversation and Janice Thiry all but stating that Deepa had made an abuse claim, the argument for a mistrial was stronger than if only one had happened.

As far as any tactical reason to continue with the trial, it is hard to see how counsel should not have taken the

opportunity to retry the case unless he had not realized that these errors had occurred.

The third issue relating to ineffective assistance of counsel concerns cross examination and impeachment of Renuka Thiry. Clearly, in a case like this counsel should be aware that one of his or her primary functions is to create as many cracks in the credibility of the testimony of the victim as is possible. Trial counsel certainly seemed to be partially aware of this as he had subpoenaed Officer Buescher, but his failure to actually call him, or to subpoena and call Sergeant Bohnet is mind boggling. I suppose that one could argue that hoping for the best by asking the victim to refresh her recollection could be a strategy, but it certainly wouldn't seem to be a legitimate strategy. Hoping for the best with refreshed recollection and relying on the victim to be forthcoming does not seem a sound or legitimate strategy when the alternative was to have law enforcement witnesses take the stand and

present statements from the victim's own mouth that damaged her credibility.

The above fairly establishes that counsel's performance was deficient, and so the remaining issue is whether Mr. Guzman was prejudiced by this deficient performance. The standard that must be met is that Mr. Guzman must show " that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *In re Personal Restraint of Gomez*, 180 Wn.2d 337, 348 (Wash. 2014) citing *Strickland*, supra at 694.

Although the second trial was not the same trial as the first, the fact that the jury could not reach a unanimous verdict in that trial certainly makes showing a reasonable probability more likely. The evidence concerning consciousness of guilt and Deepa's claim of abuse were both present in the first trial.

The second trial should have proceeded free of this evidence, that could only make the likelihood of an outcome different from a finding of guilt on both counts seem reasonably likely.

Looking at the first trial, it seems facially evident that the testimony of Officer Buescher and Sergeant Bohnet, was very powerful for the defense. They were called as witnesses for the defense and then testified that Renuka had made statements at the beginning of the case that were different than what she was saying at the time of trial. If trial counsel for the second trial had simply followed the lead of counsel in the first, Mr. Guzman's case would have been much stronger.

Had this case progressed without trial counsel's errors that Mr. Guzman has set forth, there seems a very reasonable probability that without these errors the result would have been different. Mr. Guzman has demonstrated prejudice.

V. CONCLUSION

If for some reason the court should find that any one of the above issues does not warrant reversal, Mr. Guzman would ask the court to consider cumulative error and find that all indentified errors prevented a fair trial.

For the reasons stated above, Mr. Guzman requests that this court reverse his conviction and remand the case for a new trial.

RESPECTFULLY SUBMITTED this 17th day of February,
2015.


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