

NO. 67113-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

J. C.,

Appellant.

REC'D

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King County Prosecutor  
Appellate Unit

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COURT OF APPEALS DIV I  
STATE OF WASHINGTON

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

The Honorable Jay V. White, Judge

BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

	Page
A. <u>INTRODUCTION</u> .....	1
B. <u>ASSIGNMENTS OF ERROR</u> .....	2
<u>Issues Pertaining to Assignments of Error</u> .....	2
C. <u>STATEMENT OF THE CASE</u> .....	3
D. <u>ARGUMENT</u> .....	16
THE COURT ERRED IN ADMITTING CAMACHO'S STATEMENT TO DETECTIVE JOHNSON AS A RECORDED RECOLLECTION BECAUSE SHE DID NOT HAVE AN INSUFFICIENT RECOLLECTION OF THE EVENT AND DISAVOWED THE STATEMENT'S ACCURACY. ....	16
1. <u>Camacho Did Not Have an Insufficient Recollection of            the Event.</u> .....	18
2. <u>Camacho Disavowed the Statement's Accuracy.</u> .....	19
3. <u>Defense Counsel's Improper Concession Constituted            Ineffective Assistance of Counsel.</u> .....	26
E. <u>CONCLUSION</u> .....	28

**TABLE OF AUTHORITIES**

Page

**WASHINGTON CASES**

City of Kennewick v. Day  
142 Wn.2d 1, 11 P.3d 304 (2000) ..... 17, 24

State v. Alvarado  
89 Wn. App. 543, 949 P.2d 831 (1998) ..... 14, 18, 19, 20, 21, 22, 24

State v. Calegar  
133 Wn.2d 718, 947 P.2d 235 (1997) ..... 25

State v. Castellanos  
132 Wn.2d 94, 935 P.2d 1353 (1997) ..... 16

State v. Chavez  
134 Wn. App. 657, 142 P.3d 1110 (2006) ..... 18

State v. Derouin  
116 Wn. App. 38, 64 P.3d 35 (2003) ..... 14, 17, 19, 24

State v. Halstein  
122 Wn.2d 109, 857 P.2d 220 (1993) ..... 23

State v. Hill  
123 Wn.2d 641, 870 P. 2d 313 (1994) ..... 23

State v. Saunders  
91 Wn. App. 575, 958 P.2d 364 (1998) ..... 27

State v. Studd  
137 Wn.2d 533, 973 P.2d 1049 (1999) ..... 26

**FEDERAL CASES**

Strickland v. Washington  
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) ..... 26

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<b><u>RULES, STATUTES AND OTHER AUTHORITIES</u></b>	
ER 803 .....	8, 13, 16, 17, 20
ER 804 .....	20
U. S. Const. amend. VI.....	26
Wash. Const. art. 1, § 22.....	26

A. INTRODUCTION<sup>1</sup>

Following an adjudicatory hearing in King County Superior Court, juvenile appellant J.C. was convicted of second-degree assault, allegedly committed against Oscar Daza-Flores. CP 22-23, 30. At trial, J.C. testified that he acted in self-defense. 4RP 68-77. Testimony of Daza-Flores' girlfriend, Carolina Camacho, was consistent with J.C.'s defense. 1RP 51-52, 63-74. Over defense objection, however, the court admitted Camacho's prior statement to a detective as a recorded recollection. 2RP 24, 35-40. In contrast to her trial testimony, Camacho's prior statement supported Daza-Flores' testimony that the assault was unprovoked. 3RP 6-8.

Because Camacho's prior statement did not meet the admissibility requirements of the recorded recollection hearsay exception, J.C. assigns error to the court's ruling. Moreover, defense counsel contributed to the error by conceding one of the requirements that clearly was not met, as the court itself initially would have held. 3RP 27-29, 34-36. As a result, J.C. received ineffective assistance of counsel.

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<sup>1</sup> This brief refers to the transcripts as follows: 1RP – 3/21/11; 2RP – 3/22/11; 3RP – 3/28/11; 4RP – 3/29/11; 5RP – 3/30/11; and 6RP – 4/29/11.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting Carolina Camacho's prior oral statement to Detective Christopher Johnson.

2. To the extent defense counsel contributed to the error, J.C. received ineffective assistance of counsel.

3. The court erred in finding that at the time of trial, Camacho had an insufficient recollection of the assault to testify fully and accurately. CP 35-37.

4. The court erred in finding that the statement reflected Camacho's prior knowledge accurately. CP 35-37.

Issues Pertaining to Assignments of Error

1. Whether the trial court erred in admitting Camacho's prior oral statement where she did not have an insufficient recollection of the event to testify fully and accurately, and where she disavowed its accuracy?

2. Whether defense counsel provided ineffective assistance of counsel, where the court would have found Camacho disavowed the accuracy of her prior statement had it not been for counsel's improper concession the record supported a contrary finding, one that weighed in favor of admission?

C. STATEMENT OF THE CASE

On the evening of May 9, 2010, Camacho picked Daza-Flores up from his job at the Lake City Subway restaurant and the two drove to El Rinconsito restaurant in Sea-Tac for dinner. 3RP 50-51. As a perk, Daza-Flores received free beverages from Subway and usually carried one or two drinks with him, an apple juice and/or orange juice. 3RP 117.

In El Rinconsito's parking lot, Daza-Flores noticed C.C., a friend from earlier days, together with C.C.'s younger brother, J.C., whom Daza-Flores did not know, and two other young women. 3RP 55-56, 94, 134. Daza-Flores and C.C. greeted each other, before Daza-Flores went into the restaurant. 3RP 58.

Daza-Flores testified that when he went to order, he realized he left his wallet in Camacho's car. 3RP 60. He and Camacho went outside to retrieve it. 3RP 60-61. Daza-Flores testified Camacho went with him to make sure he did not talk to the other young women in the parking lot. 3RP 60.

According to Daza-Flores, as he approached Camacho's car, J.C. ran up and positioned himself between Daza-Flores and the car. 3RP 60, 63. Daza-Flores testified J.C. whipped out what Daza-Flores thought to be a knife and took a swipe at him. 3RP

63. Daza-Flores jumped back but stood his ground. 3RP 63. Daza-Flores claimed he realized the knife was actually a metal baton when J.C. hit him over the head with it, causing a laceration to Daza-Flores' ear. 3RP 63, 66, 82-83.

When Daza-Flores asked what was the problem, J.C. reportedly said, "you are a snitch" and hit Daza-Flores a second time.<sup>2</sup> 3RP 63. Daza-Flores testified he fended off a third blow with his arm. 3RP 63, 72.

Reportedly, J.C. dropped the baton after Camacho told him to fight like a man. 3RP 72, 74. According to Daza-Flores, J.C. then rushed him, and Daza-Flores defended himself. 3RP 75, 107. Daza-Flores and J.C. exchanged punches until J.C. allegedly picked up Daza-Flores and tried to slam him against a van. 3RP 77, 107. Daza-Flores claimed that when the two thereafter fell onto the ground, security guards from the adjacent casino began approaching with pepper spray. 3RP 78, 108.

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<sup>2</sup> Daza-Flores had various theories as to why J.C. reportedly called him a "snitch," but the court found these theories to be insufficiently proven. 5RP 13-15. Accordingly, J.C. was acquitted of a second charge of intimidating a witness. CP 22-23, 30; 5RP 15.

At that point, J.C. reportedly complained Daza-Flores was bleeding on him and told Daza-Flores to let go. 3RP 78. According to Daza-Flores, someone from the casino directed security not to interfere, reasoning the fight was not on casino property. 3RP 78. Nonetheless, Daza-Flores and J.C. had separated and the fight was over. 3RP 78-81.

In contrast, J.C. testified it was Daza-Flores who approached and picked a fight with him. 4RP 68-74. J.C., his brother C.C. and their friends Kelli Wernecke and a woman named Marlene had gone to eat at El Rinconsito after a full day at a family-oriented Latino festival. 4RP 62-64. They were just wrapping up the evening, talking outside in the parking lot, when Daza-Flores and Camacho arrived. 4RP 65, 84. Daza-Flores greeted C.C. before going into the restaurant. 4RP 67.

J.C. testified that Daza-Flores came out a few minutes later, followed by Camacho, and asked why he was “talking shit.”<sup>3</sup> 4RP 68. It was clear to J.C. Daza-Flores was talking to him. RP 69. Daza-Flores appeared “tensed up” and was squeezing the top of a bottle he was holding, which J.C. believed to be glass.<sup>4</sup> 4RP 69-70.

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<sup>3</sup> J.C. believed the question had to do with some advice J.C. gave a young woman about dating Daza-Flores. 4RP 94-95.

J.C. was concerned for his safety and picked up a large stick he found on the ground near the bushes by where he was standing. 4RP 73. J.C. testified that Daza-Flores said something further, approached, and appeared as if he intended to strike J.C. with the bottle. 4RP 72-73. When J.C. raised his stick to signal he would strike back, Daza-Flores backed off. 4RP 73.

At that point, the security guards from the casino and Camacho were yelling for J.C. and Daza-Flores to drop their weapons, which they did. 4RP 74. Although the two thereafter exchanged punches, the fight was over quickly and each went his respective way. 4RP 74, 76, 78. Before the fight was over, J.C. sustained a cut to his neck; he acknowledged seeing blood on Daza-Flores' shirt. 4RP 77.

Camacho testified that when she and Daza-Flores went outside El Rinconsito to get Daza-Flores' wallet, he and J.C. confronted each other and started to fight. 1RP 62-63. She could not remember who approached whom or who hit whom first. 1RP

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<sup>4</sup> Daza-Flores initially claimed he had nothing in his hands. 3RP 64, 117. On cross-examination, however, he acknowledged he may have had a plastic juice bottle, although he claimed he would have put it down before the fight. 3RP 133. Significantly, Camacho thought Daza-Flores might have held something in his hand before the fight. 2RP 7. Camacho agreed Daza-Flores usually carried apple juice with him; she thought it would have been in a hard plastic bottle and a little less than a foot long in size. 2RP 7-9. The security guard from the adjacent casino testified Daza-Flores was holding a bottle. 5RP 52.

64-65. However, she thought each held something in his hand initially. 1RP 65. According to Camacho, J.C. was holding “some kind of stick,” which he hit Daza-Flores with on the ear. 1RP 66. Beforehand, Camacho heard them “calling each other snitches.” 1RP 68.

When asked what happened next, Camacho testified: “I was just so blurry in my head, it is – I just remember them fighting, and then broke up, then we left.” 1RP 69. In response to further questioning, Camacho testified she recalled “some other guys did come” out, but they just watched. 1RP 70. Once the fight broke up, Camacho took Daza-Flores to the hospital. 1RP 72.

Camacho testified she gave a tape-recorded statement to Detective Johnson a few days later. 1RP 78-79. Before her testimony, Camacho was given the opportunity to read over her statement. 1RP 80-81; Ex 4. Camacho testified, however, that detective Johnson did not give her an opportunity to listen to, or read, the statement after making it. 1RP 80. Camacho did not recall whether Johnson asked her if the statement was correct.<sup>5</sup> 1RP 80. When the prosecutor asked, during Camacho’s testimony,

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<sup>5</sup> At the end of the interview, according to the transcript, Johnson did ask: “Is everything you told me on here true to the best of your knowledge?” 3RP 8. Camacho responded “Yes.” 3RP 8.

if it was an accurate statement, she stated: "I can't remember it." 1RP 80. When asked if she made the statement closer in time to the event, however, Camacho responded affirmatively. 1RP 81. She also agreed her memory would have been fresher a few days after the event than it was at the time of her testimony. 1RP 81.

Based on this testimony, the state offered exhibit 4. 1RP 82. Defense counsel objected Camacho previously testified the statement would not refresh her recollection (see 1RP 79<sup>6</sup>) and that she was testifying from memory. 1RP 82. The prosecutor asserted the statement was admissible under ER 803(a)(5)<sup>7</sup> as a recorded recollection. 1RP 82. Defense counsel countered Camacho did not have an insufficient recollection of the event, as required for the hearsay exception.<sup>8</sup> 1RP 82.

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<sup>6</sup> Camacho testified reviewing the statement would not refresh her recollection as to when she gave the statement to Detective Johnson. 1RP 79.

<sup>7</sup> The exception provides:

*Recorded Recollection.* A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

<sup>8</sup> Admission under ER 803(a)(5) is proper when the following prongs are met:

The court ruled the prosecutor could confront Camacho with certain statements but it was not persuaded the entire interview qualified as a recorded recollection:

[T]o the extent that she has testified differently, or can't recall things, I think she can be confronted with statements that she made and allowed to look at them, and those could then be read into the record in that context. But I'm not persuaded it qualifies as a whole – recorded recollection, and accordingly, would not admit the exhibit or even permit the entire thing be read into the record. But I think she certainly can be confronted with parts of that statement if it would assist in – or I know that either refreshing her memory or giving her an opportunity to deny that that's a statement she made, once it is in front of her, so she can see just what you are talking about.

1RP 84.

Deputy prosecutor Lindsey Grieve thereafter asked a number of questions relating to Camacho's statement. First, Grieve

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(1) the record pertains to a matter about which the witness once had knowledge; (2) the witness has an insufficient recollection of the matter to provide truthful and accurate trial testimony; (3) the record was made or adopted by the witness when the matter was fresh in the witness' memory; and (4) the record reflects the witness' prior knowledge accurately.

State v. Alvarado, 89 Wn. App. 543, 548, 949 P.2d 831 (1998).

Whether the fourth prong is established is determined using a "totality of the circumstances" test, which takes into account:

(1) whether the witness disavows accuracy; (2) whether the witness averred accuracy at the time of making the statement; (3) whether the recording process is reliable; and (4) whether other indicia of reliability establish the trustworthiness of the statement.

Alvarado, 89 Wn. App. at 552.

recounted Camacho's previous testimony she could not remember whether she spoke to anyone before entering El Rinconsito. When Camacho responded that was correct, Grieve directed Camacho to a portion of her statement and asked whether it refreshed her recollection. 1RP 85. Camacho responded:

I don't remember. I remember talking to him, I remember his face, but I don't remember me – this was so long ago, you know, like, reading this is like reading a book. I don't remember me actually saying this or anything.

1RP 81.

Later, Grieve asked about the stick Camacho saw J.C. holding and the following exchange occurred:

Q. And you said earlier that you don't remember what the stick looked like. About how long was it?

A. I think it was – like, I don't remember, it was just –

Q. Would it – and does it indicate on the third paragraph, on page 2 – please take a moment to read that first paragraph and then look up when you've had a chance to read it.

A. Okay.

Q. What did the stick look like?

A. On the statement, it says that it was thick and with a little ball at the end.

Q. Was it metal or wood?

A. I don't remember.

Q. Take a look at the fifth paragraph, please.

A. Okay.

Q. Was the stick made out of metal or wood?

A. On the statement, it says metal, but I did not see the stick. This was kind of – I don't remember the statement a lot, but when I gave this statement, I was, like, I was going –

1RP 90.

The prosecutor also asked about who called whom a snitch and again referred Camacho to the statement:

Q. And who called who a snitch first?

A. I still can't remember who called a snitch first.

Q. What does it say in your statement?

A. "And he just called him a snitch."

Q. And who were you referring to in your statement before that?

A. Before that?

Q. When you said "he" in your statement, who are you referring to?

A. Jonathan. But I'm not sure who called who a snitch first, or how it started, or –

1RP 91.

After addressing the moment when J.C. dropped the stick, Grieve asked Camacho what happened next, again directing her to the statement:

Q. And then what did he do?

A. They were both – they just kept on fighting.

Q. Do you remember who came at who next?

A. I don't know who.

Q. Take a look at the top of page 4, the third paragraph down.

A. Page 4?

Q. Page 4, the third paragraph down. Okay?

A. Okay.

Q. After Jonathan dropped the stick, what did he do?

A. On the paper, it does say that Jonathan charged at Oscar.

Q. Thank you.

A. But I believe that's incorrect.

1RP 94.

On cross-examination, Camacho stated she in fact did not see how the fight started:

Q [defense counsel Steve Adams]. Okay. And the exchange of words between Jonathan and Oscar,

did that last for just a few seconds, or was that, like, a half a minute? Can you describe to the Court how long that happened?

A. A couple seconds.

Q. And then, right after those first few seconds, is that when both Oscar and Jonathan started to fight?

A. I didn't see when it started, I just, like, remember looking and it was, like, already –

Q. So for clarification, you heard something, you looked up, and you saw them fighting?

A. Yeah, and it was already there.

Q. So you don't know exactly how that fight started?

A. Correct.

2RP 6. Camacho described the fight itself as “pretty even.” 2RP 14.

At the end of Camacho's testimony, the court heard the state's renewed motion to admit Camacho's statement as a recorded recollection. 2RP 19-21. The state asserted it met the foundation requirements under ER 803(a)(5). The defense objected that Camacho already testified to what she told the detective and therefore, the statement was cumulative. 2RP 24.

Strangely, defense counsel conceded Camacho had not disavowed the statement's accuracy:

The other part about it, your Honor, is under Alvarado, it talks about the foundation, sufficient indicia of reliability under totality of circumstances. Prong two of that – excuse me, prong one of that is whether the witness disavows accuracy. I think what Ms. Camacho is saying is, today or yesterday, she doesn't recall some of the events as they occurred, but she doesn't disavow the accuracy of the statement she provided to Detective Johnson back in may of 2010. In fact, she said, "That's what I said, I don't remember that, but that's what I said." She's not saying that the recording is inaccurate, in fact, I think she said it was accurate, and there are many times throughout the direct examination that she took a long period of time to review the recording, specific paragraphs that the State wanted her to read, and then either read into the record or answered the direct questions proposed by the State. So we don't think that it is sufficient under either Alvarado or [Derouin].<sup>9</sup>

2RP 24-25.

In contrast, the court appeared to disagree that Camacho had not disavowed the statement:

[S]he was obviously reluctant to deal with this statement to the Court. And there may be – you know, if we look at the entire transcript, there may be variations, but it appeared to the Court she was – some frequency, rather than, you know, she never really – again, maybe there is an exception, but it did not appear that she was looking at the statement and in effect saying, "Yeah, that's what I said," or, "My memory is refreshed, yes." She seems to be saying persistently, "I cannot remember," and the way she wanted to phrase it is, when she was then permitted to read the statement, as a practical matter, or recite the statement having just looked at it, presumably because her memory is refreshed, she just said,

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<sup>9</sup> State v. Derouin, 116 Wn. App. 38, 64 P.3d 35 (2003).

“Well, the statement says,” you know, not that it is anything that she would adopt. I mean, I think what I’m getting to is, it appears that under those circumstances that operated as a disavowal of accuracy or unwillingness to accept the accuracy of the statement.

2RP 30-31; see also 2RP 34 (“the Court, in considering this, can reasonably find that she, in effect, disavowed accuracy.”).

Despite this, the defense reiterated it did not believe Camacho had disavowed the accuracy of the transcript “at all.” 2RP 32; see also 2RP 34. The court accordingly relied on the parties’ agreement:

[C]ertainly, the Court should respect that both counsel are agreeing that she did not disavow the accuracy of the statements at the time that she testified to them; is that correct?

MS. GRIEVE: I agree with you that would not be a fatal point.

THE COURT: That’s a different issue, but we are clear that that’s what both parties agree, the record would reflect.

MS. GRIEVE: I think so.

2RP 35.

The court therefore found Camacho had not disavowed the statement’s accuracy, and that the other foundational requirements were met. 2RP 36-38. Accordingly, the court found the statement

admissible and read a portion of it into the record. 3RP 4. Most significantly, in the statement, Camacho reportedly told the detective that when she and Daza-Flores exited the restaurant, J.C. ran directly in front of Daza-Flores and pulled out something that was black and metal with a ball on the end. 3RP 6. She further stated that J.C. called Daza-Flores a “snitch” and then “just banged him, like, twice in his ear and his ear just automatically started bleeding everywhere.” 3RP 7.

The prosecutor relied on Camacho’s prior statement in closing argument (4RP 106), and the court likewise relied on it in finding J.C. guilty of second degree assault. 5RP 11.

D. ARGUMENT

THE COURT ERRED IN ADMITTING CAMACHO’S STATEMENT TO DETECTIVE JOHNSON AS A RECORDED RECOLLECTION BECAUSE SHE DID NOT HAVE AN INSUFFICIENT RECOLLECTION OF THE EVENT AND DISAVOWED THE STATEMENT’S ACCURACY.

The admission of statements under ER 803(a)(5) is reviewed for an abuse of discretion. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). An evidentiary ruling that is based on an incomplete analysis of the law or one that is based on misapprehension of the legal issues may constitute an abuse of

discretion because it is a decision based on untenable grounds. City of Kennewick v. Day, 142 Wn.2d 1, 5, 11 P.3d 304 (2000). The trial court abused its discretion in admitting Camacho's statement under ER 803(a)(5) because: (1) she did not have an insufficient recollection preventing her from testifying fully and accurately; and (2) she disavowed the statement's accuracy.

Normally, hearsay statements are not admissible at trial. State v. Derouin, 116 Wn. App. 38, 42-43, 64 P.3d 35 (2003). Evidence Rule 803 carves out some exceptions, however. Relevant here, ER 803(a)(5) provides:

*Recorded Recollection.* A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

For admission under ER 803(a)(5), the following criteria must be met:

(1) the record pertains to a matter about which the witness once had knowledge; (2) the witness has an insufficient recollection of the matter to provide truthful and accurate trial testimony; (3) the record was made or adopted by the witness when the matter

was fresh in the witness' memory; and (4) the record reflects the witness' prior knowledge accurately.

Alvarado, 89 Wn. App. at 548.

1. Camacho Did Not Have an Insufficient Recollection of the Event.

The Court erred in admitting the statement because Camacho did not have an insufficient recollection of the event preventing her from testifying fully and accurately. The second foundational requirement is satisfied when the witness can testify generally about the matter, but cannot remember details about critical issues. State v. Chavez, 134 Wn. App. 657, 142 P.3d 1110 (2006).

Camacho initially testified she could not remember who approached whom or who hit whom first. 1RP 64-65. Granted, this is a critical issue. Significantly, however, Camacho clarified on cross-examination she did not actually see how the fight started. Rather, she heard something, looked up, and the fight had already started. 2RP 6. Whether the state could have impeached her with the prior statement, the state did not establish the foundation for its admission as a recorded recollection. The court therefore erred in admitting the statement on this point. Chavez, 152 Wn. App. 657 (admission of the statement was error where the prosecutor failed

to lay a foundation for an insufficient recollection of the facts in question).

2. Camacho Disavowed the Statement's Accuracy.

The Court erred in admitting the statement because Camacho disavowed the statement's accuracy. While the fourth criterion previously had to be satisfied by the same declarant who gave the prior statement, this Court rejected that requirement in Alvarado. Derouin, 116 Wn. App. at 43.

The Alvarado case involved three tape recorded statements by a witness to a murder. The witness, Lopez, initially told police he had neither heard nor seen the murder. In his next two tape recorded statements, however, he told police that he had witnessed Alvarado commit the murder. At trial, Lopez denied any memory of the incident. Lopez remembered the police recorded his statements, but claimed: "I was so confused over the statement. Everybody had been telling me bits and pieces, so I couldn't really say it was true or not." Alvarado, 89 Wn. App. at 547.

On appeal, this Court affirmed the admission of Lopez's statement. As an initial matter, this Court noted that, "[n]ormally the witness testifies that despite lack of memory, he [or she] remembers making the statement and that it was accurate when

made.” Alvarado, 89 Wn. App. at 550. This Court nevertheless acknowledged, “what is ideal in theory may be some distance from what is possible in practice.” Alvarado, 89 Wn. App. at 550.

Moreover, the Court recognized:

The rule applies regardless of the declarant’s availability to testify,<sup>[10]</sup> and thus apparently does not contemplate that the declarant will always testify, let alone affirmatively vouch for the record’s accuracy.

Alvarado, 89 Wn. App. at 550.

Accordingly, this Court adopted a totality of the circumstances test for the fourth criterion and set forth a number of indicia of reliability for courts to consider, including:

(1) whether the witness disavows accuracy; (2) whether the witness averred accuracy at the time of making the statement; (3) whether the recording process is reliable; and (4) whether other indicia of reliability establish the trustworthiness of the statement.

Alvarado, 89 Wn. App. at 552.

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<sup>10</sup> The exceptions to the hearsay rule listed under ER 803 apply regardless of the availability of the declarant, in contrast to those exceptions listed under ER 804, where the declarant’s unavailability is required for admission. Cf. ER 803(a), ER 804(b).

Applying the totality of the circumstances test to Lopez's statements in Alvarado, this Court found indicia of reliability weighed in favor of admission. Foremost, this Court noted Lopez "never recanted or disavowed the accuracy of the second or third statement[.]" Alvarado, at 552. Moreover, Lopez affirmatively asserted their accuracy at the time of he made them and there was no suggestion the tapes did not accurately reflect his statements. Id. Significantly, this Court also noted other indicia of reliability in that the contents of Lopez's later statements were corroborated in varying degrees by the testimony of other witnesses as well as by Alvarado's confession (which he later denied making). Id.

While recognizing Lopez was capable of lying – as evidenced by his first statement denying knowledge of the crime – this Court found that his deception alone did not render the second and third statements inadmissible. In so finding, this Court relied on Lopez's explanation that he denied knowledge because he feared retaliation and that same fear may have prompted his lack of memory at trial. Under the totality of the circumstances, this Court held the trial court was justified in concluding the second and third recordings accurately reflected Lopez's knowledge when made. Alvarado, 89 Wn. App. at 553.

The circumstances of this case stand in sharp contrast to those in Alvarado. First and foremost, unlike Lopez, Camacho did in fact disavow the accuracy of her statement. Initially, Camacho testified that although she remembered the interview, she did not remember making any of the statements attributed to her. 1RP 81. At first blush, this may appear analogous to the circumstances of Alvarado. However, when asked more specific questions, Camacho directly contradicted what was written in her statement. For instance, when asked what she said about J.C.'s stick, Camacho acknowledged the statement indicated she said it was metal. However, she disputed the accuracy of that statement when she testified she did not see the stick. 1RP 90. Similarly, Camacho acknowledged the statement indicated J.C. was the first one to call the other a "snitch." However, she disputed the accuracy of that statement when she testified she was not sure, in reality. 1RP 91. Perhaps most significantly, Camacho acknowledged the statement indicated that after dropping the stick, J.C. charged Daza-Flores. However, she clearly disputed the accuracy of that statement when she testified, "I believe that's incorrect." 1RP 94.

In light of this testimony, the court was correct in finding that Camacho disavowed the accuracy of her prior statement. 2RP 34.

Based on the parties' faulty perception of the testimony, however, the court abandoned its own recollection and found Camacho's testimony was more properly characterized as not remembering the statement, as opposed to disavowing it. 2RP 35-36; 3RP 3. This was error.<sup>11</sup>

Factual findings are erroneous where they are not supported by substantial evidence in the record. State v. Hill, 123 Wn.2d 641, 870 P. 2d 313 (1994). There is substantial evidence only where there is a "sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." Hill, at 644 (citing State v. Halstein, 122 Wn.2d 109, 128, 857 P.2d 220 (1993)). Before altering its recollection at the behest of the parties, the court twice found Camacho had disavowed the accuracy of her statement. 2RP 30-31; 2RP 34. If "the Court, in considering this [testimony], can reasonably find that she, in effect, disavowed accuracy (2RP 34 (emphasis added)),<sup>11</sup>" it necessarily follows there cannot be a "sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth" of the *exact opposite* of this finding. The court's "about face" was clearly

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<sup>11</sup> As argued *infra*, to the extent defense counsel contributed to the error, J.C. received ineffective assistance of counsel.

erroneous. Because it affected the court's application of the totality of the circumstances test, the court abused its discretion in admitting Camacho's statement to Johnson. See e.g. City of Kennewick v. Day, 142 Wn.2d at 5 (an evidentiary ruling that is based on an incomplete analysis of the law or one that is based on misapprehension of the legal issues may constitute an abuse of discretion).

Not only did Camacho disavow the accuracy of her statement, but other indicia of reliability were noticeably absent as well. Although detective Johnson asked Camacho at the end of the interview whether everything she said was true to the best of her knowledge (3RP 8), he did not give her the opportunity to review or listen to her statement immediately afterward. 1RP 80. Nor did Camacho affirm its truth under penalty of perjury. See e.g. Derouin, 116 Wn. App. at 46 (one indicia of reliability is signing statement under penalty of perjury).

And although there was no suggestion the recording process was unreliable, Camacho did have a motive to lie when making the statement, as Daza-Flores was her boyfriend at the time. See e.g. Alvarado, 89 Wn. App. at 552 (that Lopez was capable of lying was an indicia of unreliability).

Finally, unlike Lopez's statement, Camacho's statement was not corroborated by other witnesses or by a confession. Escobar Flores testified he saw J.C. and Daza-Flores put down their weapons and engage in a mutual fight. 4RP 52. The other witness who testified, Kelli Wernecke, testified she saw only some of what transpired, namely a mutual fight between J.C. and Daza-Flores. 17-21. Accordingly, the only witnesses claiming J.C. provoked the incident were the complainant and his girlfriend, both of whom had a motive to downplay Daza-Flores' culpability.

In short, the trial court erred in admitting Camacho's statement. Not only did Camacho disavow its accuracy, but other indicia of reliability were noticeably absent. The state failed to lay a proper foundation for its admission.

The court's erroneous admission of the statement requires reversal. J.C. testified he acted in self-defense. The prosecutor relied on Camacho's prior statement as evidence he did not. 4RP 106. The court relied on Camacho's prior statement to find the absence of self-defense. 5RP 11. There is therefore a reasonable possibility the evidentiary error affected the outcome of trial. State v. Calegar, 133 Wn.2d 718, 727, 947 P.2d 235 (1997) (evidentiary

error requires reversal where there is a reasonable probability the error affected the outcome of the trial).

3. Defense Counsel's Improper Concession Constituted Ineffective Assistance of Counsel.

In response, the state may argue that since defense counsel conceded Camacho did not disavow the statement's accuracy, J.C. somehow waived the court's error or invited it. This argument should be rejected, because counsel's concession was not a legitimate trial tactic and constituted ineffective assistance of counsel. J.C. had the right to effective assistance of counsel at trial. U. S. Const. amend. 6; Const. art. 1, § 22. The invited error doctrine does not bar review of a claim of ineffective assistance of counsel. State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

To prevail on an ineffective assistance claim, trial counsel's conduct must have been deficient in some respect, and that deficiency must have prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A defendant claiming ineffective assistance based on counsel's failure to object to the admission of evidence must show (1) an absence of legitimate tactical reasons for failing to object; (2)

an objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence not been admitted. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Although counsel objected to the admission of Camacho's statement to detective Johnson, counsel improperly conceded what is perhaps the most important criterion for establishing reliability – that the witness has not disavowed accuracy. This is tantamount to no objection at all. There was no legitimate trial tactic for defense counsel's concession; it is clear he did not want the statement admitted (2RP 24), and the record supported a contrary finding.

Moreover, a proper objection likely would have been sustained, as the court itself found – on more than one occasion – that Camacho had disavowed accuracy. 2RP 30-31; 2RP 34. And as recounted above, other indicia of reliability were noticeably absent.

Finally, the result of the trial likely would have been different had the evidence not been admitted. As also recounted above, the court relied on Camacho's statement to find the state proved the absence of self defense. 5RP 11. J.C. was prejudiced by his counsel's deficient performance.

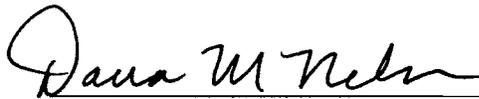
E. CONCLUSION

For the reasons stated above, this Court should reverse J.C.'s second degree assault conviction and remand for a new trial.

Dated this 28<sup>th</sup> day of October, 2011

Respectfully submitted

NIELSEN, BROMAN & KOCH



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Attorneys for Appellant

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

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STATE OF WASHINGTON	)	
Respondent,	)	
vs.	)	COA NO. 67113-8-1
JONATHAN CERVANTES,	)	
Appellant.	)	

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**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 28<sup>TH</sup> DAY OF OCTOBER 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF RESPONDENT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JONATHAN CERVANTES  
GREEN HILL SCHOOL  
375 SW 11<sup>TH</sup> STREET  
CHEHALIS, WA 98532

**SIGNED** IN SEATTLE WASHINGTON, THIS 28<sup>TH</sup> DAY OF OCTOBER 2011.

x *Patrick Mayovsky*