

No. 35102-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

ALFREDO FLORES,

Appellant.

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION TWO
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BY DEPT

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable James Orlando,
The Honorable Frederick W. Fleming,
The Honorable Lisa Worswick, and
The Honorable Susan K. Serko, Judges

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

Appellant's Sixth Amendment and Article I, § 22 rights to effective assistance of counsel were violated by counsel's repeated, unprofessional and prejudicial mistakes.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Evidence that a witness has agreed with the prosecution to provide "truthful testimony" in exchange for a "deal" is improper because it bolsters and vouches for the witness' credibility. Counsel was aware that the prosecution would attempt to introduce such evidence regarding the prosecution's main witness against his client at the second trial. Was counsel ineffective in failing to move to exclude or object to the admission of such improper evidence when the prosecution's case depended on the jury finding that witness' testimony credible?

2. The prosecution's crucial witness admitted that he and another man threw the "Molotov cocktails" which started the victim's car and house on fire, but claimed that appellant had paid them to do so. The crucial issue at trial was the credibility of that witness' testimony, which was virtually the only evidence against appellant. Was counsel ineffective in failing to move to exclude or object to the repeated admission of evidence designed to incite the jury to feel sympathy for the witness when the prosecutor exploited that evidence in closing argument?

3. "Prior consistent statements" of a prosecution witness are inadmissible unless and until the defense makes a claim that the testimony of the witness was the result of "recent fabrication." Once such a claim is made, evidence of a prior consistent statement is admissible only if that

statement was made prior to when the motive to fabricate arose. The prior consistent statement is then relevant to rebut the claim of recent fabrication by showing that the witness had said the same thing even before there was a motive to do so.

In this case, there was no evidence that the testimony of the prosecution's crucial witness was any different than any other statement he made. The defense claim was not one of "recent fabrication" but rather that the witness had a motive to make up all of his statements to police because they were made after the witness was himself arrested for the crime, when he knew he could likely get a better deal if he incriminated himself. Counsel nevertheless failed to argue that the "prior consistent statement" rule did not permit admission of the witness' declarations to police, incriminating his client.

Was counsel prejudicially ineffective in handling this issue where the evidence was inadmissible as "prior consistent statements," the witness' credibility was crucial and the prosecutor repeatedly relied on the inadmissible evidence as proving the critical issue of the witness' credibility in closing argument?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Alfredo Flores was charged in Pierce County with first-degree arson and conspiracy to commit first-degree arson. CP 1-4; RCW 9A.28.040; RCW 9A.48.020(1)(b).

Motion hearings were held before the Honorable Judges James Orlando and Lisa Worswick on August 24, 2005, January 18, February 13

and 22, 2006, and trial was held before the Honorable Susan Serko on February 27-28, March 1-2, 2006.¹

The jury was unable to reach a verdict and a mistrial was declared. See CP 63-64. Retrial occurred before the Honorable Frederick W. Fleming on March 13-17, 2006, after which Mr. Flores was found guilty as charged. CP 176-77. After a continuance on June 2, 2006, Judge Fleming ordered Mr. Flores to serve a standard range sentence on June 16, 2006. CP 189-200. Mr. Flores appealed and this pleading follows. See CP 205.

2. Overview of facts relating to incident

On the night of March 8, 2005, Tracy Morgan was outside with her mom when her dog started barking at two black men in a pasture next to her house. 3RP 115-17. When the men did not leave after awhile, Ms. Morgan's mom called the absent manager of the property next door, to tell him people were over there. 3RP 128. There were concerns about possible theft of the tools on the property, where the house was being remodeled. 3RP 128. Ms. Morgan's mom also called police. 3RP 117.

While her mom was on the phone, Ms. Morgan saw a "bright ball of fire" come onto their property and land next to a car. 3RP 117. Ms.

¹The 13 volumes of the verbatim report of proceedings includes a volume with four separate dates, separately paginated. The volumes will be referred to as follows:
continuance of August 24, 2005, as "CRP1";
continuance of January 18, 2006, as "CRP2;"
continuance of February 13, 2006, *contained in the January 18, 2006, volume*, as "CRP3;"
continuance of February 22, 2006, *contained in the January 18, 2006, volume*, as "CRP4;"
continuance of March 7, 2006, *contained in the January 18, 2006, volume*, as "CRP5;"
the chronologically paginated proceedings of February 27-28, 2006, as "1RP;"
the chronologically paginated proceedings of March 1-2, 2006, as "2RP;"
the 7 volumes of chronologically paginated proceedings of March 13-17, June 2 and 16, 2006, as "3RP."

Morgan went outside and used a hose to put the fire out and then saw some people, including Alfredo Flores, a neighbor, standing next to the fence at the bottom of the Morgan property. 3RP 117-19. Mr. Flores yelled to Ms. Morgan that the roof of her house was on fire, and asked if she needed any help. 3RP 119. When she said yes, Mr. Flores and the others with him jumped the fence and came onto the property. 3RP 121.

Mr. Flores asked if Ms. Morgan had a fire extinguisher and if he could go through the house to get to the backyard. 3RP 122. She gave him the extinguisher and told him to go around the side. 3RP 122. Another fire was at the back door, and Mr. Flores put it out with the extinguisher. 3RP 122-23. The police and fire department eventually arrived. 3RP 123.

Officers arrested KeShane Dillingham for starting the fires. 3RP 45. A "Crime Stoppers" program on television had featured the crime and a reward was offered, with the result that Mr. Dillingham was identified as the arsonist. 3RP 52, 55.

Mr. Dillingham was brought to the Lakewood Police precinct for interrogation. 3RP 45. When confronted with the accusations against him, he confessed. 3RP 47, 57. He claimed, however, that he had committed the arson at the behest of a man named "Mexican Freddy." 3RP 47, 57. According to Mr. Dillingham, "Mexican Freddy" had offered Mr. Dillingham and another man, "Black Chuckie," money to set fire to the house. 3RP 47. Mr. Dillingham said the goal was not to hurt anyone but to give "Mexican Freddy" a chance to help put out the fire so he could "look better in the community." 3RP 47. Mr. Dillingham claimed

“Mexican Freddy” was tired of “extra” police attention at his house and thought this would help. 3RP 48.

Mr. Dillingham was homeless and drug addicted. 3RP 48. He needed some cash, so a few days after the offer was allegedly made by “Mexican Freddy,” he and “Chuckie” decided to agree. 3RP 48.

According to Mr. Dillingham, if they could get the money before starting the fire, they would take the money and not live up to their end of the deal. 3RP 48. This plot was unsuccessful, however, because “Mexican Freddy” said they had to do the job before they would get paid. 3RP 49.

Mr. Dillingham and Chuckie rigged up some bottles by pouring gasoline in them and putting in rags, “like a Molotov cocktail.” 3RP 49. They went to the property next to the home, lit the bottles, and threw them. 3RP 49-50, 57, 69.

At trial, Mr. Dillingham testified that Mr. Flores was “Mexican Freddy.” 3RP 64-67. Mr. Dillingham claimed that Mr. Flores had said the neighbors were always calling police on Mr. Flores, because of the “drug activity” at his house. 3RP 67-68. Mr. Dillingham claimed to have purchased from and used drugs with Mr. Flores. 3RP 67-68. According to Mr. Dillingham, Mr. Flores wanted to be seen helping put out the fire because then he would be seen as a good person and the neighbors would stop calling police on him so much. 3RP 70.

Mr. Dillingham testified he had initially hesitated to start the fires because he was “not a violent person” and did not wish “harm upon nobody.” 3RP 68. On cross-examination, however, he admitted he had two prior assault convictions. 3RP 74.

“Chuckie,” the other man who threw the Molotov cocktails, was Charles McKeever. 3RP 70. Mr. Dillingham testified that, after they started the fire, he and Mr. McKeever went to Mr. McKeever’s house and asked his roommate, Jeffrey Laverdure, if he would go pick up the money they were promised. 3RP 71. The roommate agreed, left, and came back with \$300. 3RP 59, 71. Mr. Dillingham admitted that he did not see who gave Mr. Laverdure the money. 3RP 76.

Mr. Laverdure knew Mr. Flores well. 3RP 146-51. He disputed Mr. Dillingham’s claim and testified unequivocally that he never got any money from Mr. Flores for Mr. Dillingham and Mr. McKeever, and never gave either Mr. Dillingham or Mr. McKeever money as Mr. Dillingham claimed. 3RP 146-51.

An officer testified that he called some “special ops” police officers who were in the “narcotics unit” in that area and they had heard the name “Mexican Freddy” and knew who that was. 3RP 57-58.

Ms. Morgan said she had seen “activity” of some unspecified kind at the Flores home in the day and the night sometimes but nothing that caused her to ever call police. 3RP 123-24.

Mr. Flores told police that he was in his house, heard a commotion or yelling outside, ran outside to see what was going on and saw the fire, so he went to help. 3RP 95. Mr. Flores lived only one or two houses down from the Morgan house. 3RP 100. Ms. Morgan testified that she did not yell to her mother until after she saw the defendant and the others standing at the fence and she did not recall anyone else in the vicinity shouting, although at some point she shouted to her mother. 3RP 118-19.

She had, however, been outside and putting out the fire on or next to her car with the hose for a time. 3RP 139.

D. ARGUMENT

APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL WERE VIOLATED

Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); Sixth Amend.; Art. I, § 22. To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Although there is a "strong presumption" that counsel's representation was effective, that presumption is overcome where counsel's conduct fell below an objective standard of reasonableness competence, and that performance prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

In this case, this Court should reverse, because counsel was ineffective in many ways and that ineffectiveness was highly prejudicial to Mr. Flores.

a. Ineffectiveness regarding improper vouching

First, counsel was prejudicially ineffective in his failure to move to exclude the improper, vouching testimony that Mr. Dillingham had an agreement with the prosecution which required him to provide "truthful testimony."

i. Relevant facts

At the first trial, the prosecutor established that Mr. Dillingham had made an agreement with the prosecution which provided that “in return for . . . truthful testimony” he would get to plead to a reduced charge. RP 87-88. Counsel did not object. 1RP 89-90.

At the second trial, when Mr. Dillingham testified, the prosecutor asked if everything he told the officers was “the truth” and if he was telling the jury the truth. 3RP 72. Once that testimony was elicited, the prosecutor asked: “[h]as the prosecution or the State and your attorney reached an agreement for you providing truthful testimony?” 3RP 72. Mr. Dillingham said, “[y]es, ma’am.” 3RP 72. The prosecutor then asked what Mr. Dillingham understood the agreement to be and Mr. Dillingham stated he was going to be allowed to plead to “[c]onspiracy to commit arson in the second degree.” 3RP 72.

In closing argument, the prosecutor began by saying that it would be “nice” if criminal cases were like “CSI or Law & Order or a Tom Clancy novel” where “everything fell into place and everything is neat,” and if the prosecution did not have to rely on “snitches” to prove a case. 3RP 161. The prosecutor then said that “reality” was that “in order to enforce the laws, sometimes the State must make deals” and had to rest its case on such evidence, but that such evidence can still be “the foundation of a guilty verdict.” 3RP 162. The prosecutor then said the “real dispute” in the case was whether the jury would believe Mr. Dillingham was telling the truth. 3RP 162.

ii. Counsel was ineffective

Counsel was prejudicially ineffective in failing to move to prevent introduction of this improper evidence. Evidence that a witness has entered into a plea agreement to provide “truthful testimony” is improper because it vouches for the witness’ credibility. State v. Green, 119 Wn. App. 15, 24, 79 P.3d 460 (2003), review denied, 151 Wn.2d 1035, cert. denied, 543 U.S. 1023 (2004). Such evidence is not admissible even if the defendant challenges the witness’ credibility, because it implies that the prosecutor has some knowledge of or ability to ensure that the witness is testifying truthfully. Id. The evidence is therefore “prejudicial and improperly vouch[es]” for the witness. Green, 119 Wn. App. at 24.

Thus, in Green, a state’s witness entered into plea agreements including one in which he agreed to “testify truthfully” and another which stated the intent of the agreements was “to secure the true and accurate testimony” of the witness. 119 Wn. App. at 22. The defendant objected that this language “impermissibly vouched for” the witness’ credibility and “improperly bolstered his testimony.” 119 Wn. App. at 22. The prosecution responded that it was not going to focus on that language or argue that the witness was credible based upon the agreement, and the trial court admitted the evidence. Id.

On appeal, Division One held that, while evidence of agreements between the state and a witness could be admitted on cross-examination to show bias, or on redirect as “evidence of explanation,” when such an agreement is admitted the irrelevant and prejudicial portion should be redacted. 119 Wn. App. at 23. Indeed, if a request for such redaction is

made, it would be error to deny it. 119 Wn. App. at 24. The Green Court did not reverse, however, finding the error harmless under the fact of that particular case. 119 Wn. App. at 25.

Here, in contrast, the admission of the evidence was not harmless. The evidence against Mr. Flores was far from strong and depended entirely upon the jury believing Mr. Dillingham.

Indeed, the weakness of the prosecution's case is made clear by the fact that the initial jury was unable to unanimously conclude that the prosecution had proven its case against Mr. Flores beyond a reasonable doubt at the first trial. As the prosecutor herself admitted, the question of whether Mr. Dillingham was believed was the crucial issue at trial. 3RP 162. It was, in fact, one upon which the convictions would rise or fall.

Even if counsel could not have anticipated that the prosecution would introduce the improper evidence in the first trial, he certainly knew about it before the second. Yet he made no effort to prevent this improper evidence from being presented to the jury, despite the fact that it went directly to the crucial issue in his client's case - whether the jury would believe Mr. Dillingham or not.

Counsel's performance is deficient if there is no legitimate strategic or tactical reason for counsel's conduct. See State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856 (1992). There could be no tactical reason for counsel to fail to object to introduction of this evidence, so prejudicial to his client's interests in this case. Counsel was prejudicially ineffective in failing to move to exclude the improper vouching and bolstering evidence of the plea agreement,

prior to the second trial.

b. Ineffectiveness regarding bolstering with irrelevant “demeanor” evidence

Counsel was also ineffective in failing to object at the second trial to repeated, improper “demeanor” evidence designed solely to bolster the prosecution’s case and sway the jurors’ emotions towards finding Mr. Dillingham credible.

i. Relevant facts

At the first trial, when describing Mr. Dillingham as he gave his statement, Detective Zano testified that Mr. Dillingham was very cooperative, that he appeared “kind of sad and downtrodden” and that he seemed to have simply gotten “caught up in” the crime due to his drug problem. 2RP 61-62.

At the second trial, without defense objection, several officers were permitted to opine as to Mr. Dillingham’s “demeanor” when he gave the statement, as well as his apparent remorse for his involvement in the crimes. Detective Lawler gave his opinion that Mr. Dillingham was “extremely cooperative,” “upset about what he had done,” “felt remorseful that what he had done was wrong,” “knew what he had done was wrong,” and “felt bad about it.” 3RP 49. From Detective Zano, the prosecutor elicited the opinion that Mr. Dillingham’s demeanor was “[j]ust remorseful and kind of just sad about it,” that Mr. Dillingham had “attributed his actions to crack addiction,” that he “regretted what happened,” and that he had said “it wasn’t really his true nature” and had just done it because of his addiction. 3RP 58.

In rebuttal closing argument, the prosecutor emphasized as a “final thing” that the jury should consider how Mr. Dillingham appeared to them and “how he appeared to the police,” that “[h]e was remorseful and he was sad.” 3RP 178. The prosecutor also pointed out that it appeared Mr. Dillingham “knows he didn’t do the right thing and he will serve some time for that.” 3RP 178. The prosecutor then declared that Mr. Dillingham did not lie. 3RP 178.

ii. Counsel was again ineffective

Counsel was ineffective in failing to either 1) move to exclude this improper evidence at the second trial, 2) object to its admission or 3) taking steps to ensure that it was not exploited by the prosecution, once it was admitted.

No witness may state an opinion about the credibility of a witness, because such testimony “invades the province of the jury to weigh the evidence and decide the credibility” of the witnesses for itself. State v. Jones, 71 Wn. App. 798, 812, 863 P.2d 85 (1993), review denied, 124 Wn.2d 1018 (1994); see also State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). In addition, such testimony also violates the defendant’s right to trial by an impartial jury. Demery, 144 Wn.2d at 759.

Here, the officers’ comments were clearly indirect comments on Mr. Dillingham’s credibility. There was no relevance to his demeanor, or the officers’ opinions of it, for any of the charged crimes. Instead, the only relevance was to bolstering Mr. Dillingham’s credibility, making it clear that officers believed his claims about the limits of his involvement, as well as that he was remorseful and had only gotten involved because of his

drug addiction.

Counsel was ineffective in relation to this testimony. It is true that the “demeanor” evidence elicited at the first trial was far less egregious, and not exploited by the prosecutor in the second trial than in the first. Even so, counsel was certainly aware of the prosecution’s intent to introduce the improper evidence at the second trial, as it had in the first. Further, after the first officer had testified as to his opinion about Mr. Dillingham’s “demeanor” in the second trial, it was clear what the prosecution was doing. Yet counsel neither objected nor moved to prevent further testimony from being elicited from the second officer. More egregious, counsel failed to even address the issue and argue outside the jury’s presence that the evidence should have been excluded and should not be referred to by the prosecution in closing.

There could be no tactical reason for counsel’s unprofessional failures. Even if the failure to object at the first trial could be seen as tactical, once the improper evidence had been elicited at that trial there could be no reason not to move to preclude the evidence from the second trial. And even if the failure to object to the testimony of the first officer at the second trial might be seen as tactical, there could be no tactical reason not to address the issue outside the presence of the jury once that testimony had been elicited, to ensure that no further objectionable evidence was elicited and that evidence was not exploited by the prosecution in closing argument. Counsel’s unprofessional failures in relation to this evidence amounted to ineffective assistance, and this Court should so hold.

c. Ineffectiveness regarding admission of improper “bolstering” evidence and in misstating evidence

Finally, counsel was prejudicially ineffective at the second trial regarding the admission of improper bolstering evidence that Mr. Dillingham’s statements to police were consistent with his accusations against Mr. Flores at trial. Further, counsel misstated the evidence on this point in closing, thus exacerbating the serious prejudice his client had already suffered.

i. Relevant facts

At the first trial, after it was established that Mr. Dillingham was being permitted to plead to a significantly lesser offense as a result of his testimony, the prosecutor asked if Mr. Dillingham had told police “essentially the same story at the time you were arrested, before you had any deal in place.” 1RP 93. Mr. Dillingham said, “[o]h yeah. Oh yeah.” 1RP 93. Counsel did not object.

In closing argument, defense counsel argued that Mr. Dillingham had a motive for incriminating Mr. Flores to police because “[a]nybody that watches TV knows that defendants, the people who commit crimes, know what the heck they’re doing and, more often than not, know that if they point to somebody else, they can get a deal.” 2RP 141. Counsel then noted the deal Mr. Dillingham had gotten was that he would be getting something like 16 months instead of 60 months in custody, and “[t]here’s your motive for pointing to somebody else. Right there.” 2RP 141-42. Counsel pointed out that the only person who linked Mr. Flores with the crime was Mr. Dillingham, whose testimony had to be examined with

caution, as he was an accomplice. 2RP 142-44. Finally, counsel argued that Mr. Dillingham was “sophisticated” in the criminal justice system because he got himself “a really good deal” by “pointing to somebody else.” 2RP 142-44.

In rebuttal, the prosecutor noted that Mr. Dillingham had implicated Mr. McKeever already and thus did not need to implicate Mr. Flores as well to get any “deal.” 2RP 146. The prosecutor also argued that Mr. Dillingham had “told police the same version of events” initially, “before any deal was on the table.” 2RP 146.

After the jury hung, the second trial began before a different judge. In opening argument at the second trial, the prosecutor told the jury that it would hear from the officers that “the story that KeShane Dillingham tells you this afternoon was the same one that he told immediately upon being arrested, before any type of deal or any type of incentive was offered to him.” 3RP 23. Counsel did not object. 3RP 23.

Later, before the officers testified, the prosecution moved to admit testimony about the substance of Mr. Dillingham’s confession to police and the statements he made implicating Mr. Flores right after his arrest. 3RP 36. The prosecutor argued that the evidence should be admitted in her case in chief as “a prior consistent statement offered to rebut the inference that the defense has had that KeShane is making this up as part of a plea agreement, a plea bargain.” 3RP 36.

Counsel objected that the prosecution was trying to “buttress” the statements of Mr. Dillingham before he had even testified. 3RP 37. Counsel argued that it would be sufficient to have the officers say that Mr.

Dillingham “implicated” Mr. Flores in his confession in order to indicate the chronology of events without improper evidence being admitted. 3RP 38. Counsel also argued about whether Mr. Dillingham might make a different statement at the second trial than what the officers were saying he had said in his statement. 3RP 39. Finally, counsel noted it was improper for the officers “to rehabilitate a witness who hasn’t even been on the stand.” 3RP 39.

At that point, the court said it understood that the defense was saying “Mr. Dillingham is not being truthful and he didn’t say what the State says he said through their witnesses, the police officers.” 3RP 39-40. Counsel did not correct the court’s impression that the defense was claiming that Mr. Dillingham had changed his story at trial from what he had said when he spoke to police. 3RP 40. Instead, counsel stated it would still be sufficient for the prosecutor to “do what she is trying to do simply by asking the officer at what point in time” Mr. Dillingham had implicated Mr. Flores. 3RP 40.

In response, the prosecutor argued that the “heart of the defense case is that KeShane Dillingham is doing this because he’s getting a plea bargain.” 3RP 42. The prosecutor also admitted that “KeShane’s the only thing that links the defendant.” 3RP 42.

The court granted the prosecution’s motion to permit admission of the testimony in direct examination. 3RP 42. At trial, both Detective Lawler and Detective Zano recited what Mr. Dillingham had said in his confession after his arrest, including the statements incriminating Mr. Flores. 3RP 45-48, 55-58. Detective Zano also testified that Mr.

Dillingham had not been offered “any type of plea agreement or any type of benefit for his testimony,” although Mr. Dillingham was told he should admit involvement “because it will be better for you in the future.” 3RP 55-60.

In his testimony, Mr. Dillingham admitted the officers told him that making a statement would help him out. 3RP 75. He claimed, however, that the idea that implicating others was not in his mind at the time. 3RP 75. He conceded that he was testifying because he was “getting a whole lot better deal than” he would if he went to trial, facing something like 16 months instead of 60-70. 3RP 75-78. He also said he was testifying:

To let the courts know what really happened that day. Just like I told the detectives, you know, they didn't come to me saying, well, if you tell on somebody or testify in court, that you will get a deal. They didn't say anything like that to me. They just said that somebody called Crime Stoppers on me, we know - - we came to book you on Arson 1, you know, to help yourself you should just tell the truth instead of giving us the runaround, and that's what I did.

3RP 78.

In closing argument, the prosecutor began by saying that it would be “nice” if criminal cases were like “CSI or Law & Order or a Tom Clancy novel” where “everything fell into place and everything is neat.” 3RP 161. The prosecutor also said it would be nice if the prosecution did not have to rely on “snitches” to prove a case. 3RP 161. The prosecutor then said that “reality” was “in order to enforce the laws, sometimes the State must make deals,” and that sometimes the state had to rest its case on such evidence, which could be “the foundation of a guilty verdict.” 3RP

162.

The prosecutor also declared that “[t]he real dispute in this case” was over whether the jury should “believe KeShane Dillingham.” 3RP 162. The prosecutor then relied on the fact that Mr. Dillingham told the same “story” to police when he was first arrested as he told in his testimony, and that he had thus “been consistent in the story that he tells.” 3RP 163.

On behalf of Mr. Flores, counsel argued about the motives Mr. Dillingham had to lie, including his drug use and to get a “better deal” for himself. 3RP 172. Counsel also declared the officers had said “[t]he more people you give us, the better deal you’re going to get.” 3RP 172.

In rebuttal closing argument, the prosecutor pointed out that there was no testimony about incriminating more people to get a better deal. 3RP 176. Instead, the prosecutor said, the testimony was that the officers told Mr. Dillingham it would be better for him if he told the truth. 3RP 176. The prosecutor again relied on the fact that Mr. Dillingham’s testimony was consistent with “what he first told police” in arguing that Mr. Dillingham should be believed and Mr. Flores found credible. 3RP 178.

- ii. The evidence was not admissible as a “prior consistent statement,” its admission improperly bolstered the prosecution’s crucial witness and counsel was utterly ineffective

Once again, counsel was ineffective in his representation of his client. In general, “the testimony of a witness cannot be bolstered by showing that the witness has made prior, out-of-court statements similar to

and in harmony with his or her present testimony on the stand.” Thomas v. French, 99 Wn.2d 95, 103, 659 P.2d 1097 (1983), overruled in part on other grounds by, Gaglidari v. Denny’s Rests., 117 Wn.2d 426, 445, 815 P.2d 1362 (1991). There is a limited exception contained in ER 801(d)(1)(ii). Under that rule, the prior consistent statements of a witness may be admitted in response to claims that the witness recently fabricated his or her story. See State v. Pendleton, 8 Wn. App. 573, 574-75, 508 P.2d 179, review denied, 82 Wn.2d 1007 (1973).

The rule, however, is limited. It does not apply - and prior consistent statements are not admissible - if a defendant has simply attacked a witness’ credibility. See State v. Harper, 35 Wn. App. 855, 858, 670 P.2d 296 (1983), review denied, 100 Wn.2d 1035 (1984). This is because a general attack on credibility is not the same as a claim of “recent fabrication.” Harper, 35 Wn. App. at 858.

Further, without a claim of “recent fabrication,” prior consistent statements are inadmissible, because such statements are irrelevant and improper “bolstering” of a witness’ testimony. See State v. Smith, 82 Wn. App. 327, 332, 917 P.2d 1108 (1996), review denied, 130 Wn.2d 1023 (1997); State v. Bargas, 52 Wn. App. 700, 702-703, 763 P.2d 470 (1988), review denied, 112 Wn.2d 1005 (1989). “[M]ere repetition does not imply veracity,” so the fact that the witness has maintained a consistent story does not prove anything except consistency, generally legally irrelevant to any issue at trial, but still likely to hold sway in a jury’s mind. See State v. Purdom, 106 Wn. 2d 745, 749-50, 725 P.2d 622 (1986); Harper, 35 Wn. App. at 858-59.

Indeed, prior consistent statements only become admissible and relevant because the prior consistent statement, made before any motive to fabricate, rebuts the claim that testimony was false. Put another way, the prior consistent statement becomes evidence “which counteracts a suggestion that a witness changed his story” in response to some external pressure by showing his story was the same prior to the external pressure. Harper, 35 Wn. App. at 858. As a result, evidence that the witness’ stories have been consistent under those circumstances “is highly relevant to shedding light on the witness’ credibility.” Harper, 35 Wn. App. at 858, quoting, 4 J. Weinstein & M. Berger, *Evidence*, para. 801(d)(1)(B)[01], at 801-117 to -118 (1981). In contrast, evidence “which merely shows that the witness said the same thing on other occasions when his motive was the same does not have much probative force.” Id.

Thus, unless there is a claim of recent fabrication, “a witness’ testimony cannot be corroborated or bolstered by presenting to the fact finder evidence that the witness made the same or similar statements out of court.” Harper, 35 Wn. App. at 857; see, e.g., State v. Dictado, 102 Wn.2d 277, 687 P.2d 174 (1984), disapproved in part on other grounds by State v. Harris, 106 Wn.2d 784, 789, 725 P.2d 975 (1986) (where cross-examination focused on inconsistencies between the witness’ statements and a meeting in July where pressure was suggested to have been asserted, admission of prior consistent statements made in June was proper).

In addition, a prior consistent statement is not admissible unless it was made before the motive to fabricate arose. See Tome v. United States, 513 U.S. 150, 156, 115 S. Ct. 696, 130 L. Ed. 2d 574 (1995); State v.

Stubsjoen, 48 Wn. App. 139, 146, 738 P.2d 306, review denied, 108 Wn.2d 1033 (1987). If the statements were made *after* that motive arose then they are irrelevant, because the motive to lie already existed and the statements thus prove nothing about whether the testimony was a fabrication resulting from that motive. See Stubsjoen, 48 Wn. App. at 146.

In Stubsjoen, statements the defendant made after a crime indicated her intent at the time of the crime and would have proved she lacked the required intent for criminal liability. 48 Wn. App. at 146. Those statements, however, were inadmissible as “prior consistent statements,” because at the time they were made the defendant was aware of the possibility the police were looking for her. Id. Because she already “had a motive to fabricate an explanation for her conduct” when she made the statements, they were not admissible as “prior consistent statements.” Id.

Similarly, prior consistent statements are inadmissible unless they were “made under circumstances indicating that the witness was unlikely to have foreseen the legal consequences of his or her statements.” State v. Makela, 66 Wn. App. 164, 169, 831 P.2d 1109, review denied, 120 Wn.2d 1014 (1992). This is yet another limit relating to the motive to lie, because a person aware of the potential legal consequences of statements has a possible motive to fabricate, if those consequences may be in their favor.

Finally, because prior consistent statements are only relevant to rehabilitate a witness whose testimony has been impeached by claims of recent fabrication, the Supreme Court has held that such statements are not

admissible in direct examination. French, 99 Wn.2d at 103.²

All of this caselaw makes it clear that Mr. Dillingham's confession incriminating Mr. Flores was not admissible as a "prior consistent statement" at trial. The confession was *not* made under circumstances where Mr. Dillingham was unlikely to have foreseen the legal consequences of his statement. He had been arrested. He was in police custody. He was being interrogated. And he was being confronted about the fact that he had been identified as the arsonist. Clearly, he was aware that the statements he made incriminating Mr. Flores as the "mastermind" behind the crimes would have negative legal implications for Mr. Flores. And he was certainly aware of the corresponding positive legal implications of reducing his own perceived culpability, not to mention the increased possibility of a "deal" based upon his "cooperation."

Nor was the confession made before the motive to fabricate arose. That motive existed the moment Mr. Dillingham was arrested for the crimes, because it was then that he had the motive to implicate someone else as more culpable than himself.

Further, and most important, there was no "recent fabrication" that the confession was relevant to rebut. To the contrary, the confession was entirely consistent with Mr. Dillingham's testimony at trial. In both, he claimed that, although he had thrown Molotov cocktails at the house and started the fires, he only did it because he was a drug addict who needed money but was not truly a violent or bad guy. And in both he claimed that

²The trial court's apparent conclusion that French has effectively been overruled by the court of appeals decision in Makela, supra, is discussed in more detail, *infra*.

Mr. Flores had hired him to commit the arson in order to gain a good reputation with the neighbors for putting it out.

Thus, the substance of the confession was *not* admissible as a prior consistent statement. Yet it was admitted and indeed used to bolster Mr. Dillingham on the crucial issue of credibility, multiple times. And it was specifically exploited by the prosecution on that vital issue in closing argument.

Notably, although the court permitted the evidence to be admitted in direct examination, that admission was wrong. The court apparently relied on Makela, cited by the prosecution, as supporting admission of the evidence in the prosecution's case in chief. 3RP 36-42. Makela, however, did not control.

In Makela, the charges were that the defendant had inappropriate sexual contact with a girl while he was dating her mother. 66 Wn. App. at 166-67. Four years later, the girl revealed the alleged abuse to her mother in a letter and it was subsequently reported to police. 66 Wn. App. at 167. The defense theory was *either* that the allegations were fabricated by the mother and girl because of animosity for the breakup with the mother four years before, *or* that the allegations were fabricated by the girl just before they were revealed to the mother, based upon the girl's desire for more freedom and her wish to get back at her mother for not allowing it. 66 Wn. App. at 167.

Before trial, the prosecution said it would be calling three of the girl's childhood friends to testify that she had disclosed the abuse to them four years earlier. Id. The defendant argued the statements were not

admissible as prior consistent statements because she had a motive to lie to her childhood friends, as well. Id. The trial court made a factual finding that there was insufficient evidence of such a motive to lie to the friends. Id. The trial court then held that the testimony of the friends was admissible to rebut the defense theory of recent fabrication. 66 Wn. App. at 167-68.

On appeal, the defendant argued, *inter alia*, that the trial court “prematurely” ruled the testimony of one of the childhood friends admissible before trial. 66 Wn. App. at 168. In rejecting this claim, Division One noted that, while the trial court had initially granted the motion to exclude the prior consistent statements, it had ruled the statements admissible only after a pretrial interview, a “thorough offer of proof” on what would be said, and argument in which the defense specifically declared that the defense intended to impeach the victim’s testimony with allegations of a motive to fabricate at the time the statements were made to the friends *and* a motive to fabricate arising four years later, when the allegations were made. 66 Wn. App. at 169. In addition, the defense had filed briefing on the issue, as well. Id. As a result, the Court concluded, “[b]y the time of the court’s ruling, it was abundantly clear both from Makela’s trial brief and from extensive defense arguments during the pretrial motions” that the defense would be making such allegations. Id. The Court concluded that the pretrial ruling and admission of the testimony in direct examination “did not alter Makela’s planned trial strategy” and that the court’s ruling was made “in the light of Makela’s pronouncements of what that strategy would be.” 66 Wn. App.

at 170. The Court did not feel “bound to reverse the court’s pretrial evidentiary ruling” when it was clear that the evidence would have been admissible after the defense cross-examination once the claim of recent fabrication had been made. 66 Wn. App. at 170. In addition, the Court noted, the childhood friend was not called to testify until after the cross-examination of the victim had already been done - and the claims of recent fabrication effectively raised. 66 Wn. App. at 171.

Further, the Court rejected the idea that the trial court could not rely on the specific pretrial representations of the defendant in making an evidentiary ruling. 66 Wn. App. at 172. Indeed, the Court held, if it adopted that theory, it would “radically change accepted trial practice,” and render trial courts “unable to rely upon offers of proof and arguments of counsel in order to make rulings outside the presence of the jury.” 66 Wn. App. at 172.

The defense also argued that the trial court erred in admitting, in direct examination of the victim, testimony that she had reported the abuse to her childhood friends. 66 Wn. App. at 174-75. The defense argued that, because cross-examination had not yet occurred, the defense had not yet attacked the victim’s credibility at the time the testimony was admitted. 66 Wn. App. at 174-75.

On appeal, Division One noted that the testimony had only been elicited twice and that, each time, the objections had been insufficient to preserve the issue for appeal. 66 Wn. App. at 174-75. The issue of ineffective assistance was not raised and, the Court noted, “[e]ven in the absence of an attack on the credibility of the complaining witness, in

criminal trials for sex offenses the State is permitted to show in its case in chief when the complainant first made a complaint consistent with the charge[.]” 66 Wn. App. at 175 (emphasis omitted).

Thus, Makela does not hold that it is always proper to admit evidence of “prior consistent statements” in direct examination. It simply held that, given the unique circumstances of the case and the detailed offers of proof, arguments, motions and written materials provided before trial, it would not reverse a trial court’s decision to allow such evidence when the evidence clearly would have been admissible later. And it held that, in the specific situation of a sex crime case, the “fact of the complaint” supported the admission of the evidence in direct examination, where there was no proper objection sufficient to preserve the issue.

Here, in contrast, this was not a sex case, Mr. Dillingham was not the victim, and the “fact of the complaint” doctrine did not apply. Nor were there detailed offers of proof and written motions making it abundantly clear that the defense was going to be arguing “recent fabrication.” There was no change in Mr. Dillingham’s claims from his very first statement to his testimony, and all of his statements were made *after* the motive to lie occurred.

From the record, it appears counsel had never read Makela. 3RP 36-42. He certainly failed to discuss anything about that case, or explain why the facts and record of that case were completely different and that case inapposite. Instead of asking for time to look at that case, however, counsel simply argued about how improper it was to “buttress” the witness’ testimony in advance, without any explanation of why the “prior

consistent statement” rule did not apply in this case.

Indeed, it appears that counsel did not understand that rule. He certainly did not appear to be aware that there had to be a claim of “recent fabrication” before prior consistent statements could be admitted. Nor did he appear to know that prior consistent statements had to be made before the motive to fabricate arose, or that such statements had to be made without awareness of their potential legal implications. And he did not appear aware that a general attack on credibility, like the one he was bringing on behalf of his client, did *not* support admission of prior consistent statements.

If counsel had known any of these crucial requirements for admission of prior consistent statements, he could have pointed them out and prevented the admission of the statements which were *not* admissible under the rule in this case. Other than not knowing the relevant law, the only possibility is that counsel was unaware of the actual facts of his client’s case and did not, in fact, *know* that there was no issue of “recent fabrication.”

Under either scenario, however, counsel’s performance was deficient. It is not reasonable for an attorney not to be aware of the relevant facts and the law applicable to his client’s case. State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302, review denied, 90 Wn.2d 1008 (1978). Instead, an attorney is required to make reasonable investigation into those matters in order to be able to adequately represent his client at trial. State v. Thomas, 109 W.2d 222, 225-26, 743 P.2d 816 (1987). Failure to “conduct appropriate investigations, either factual or legal, to determine

what matters of defense were available” or to fail to allow time for reflection and preparation for trial amounts to deficient performance. Jury 19 Wn. App. at 263-64.

Counsel’s deficiencies were especially egregious here, given what happened at the first trial. After the prosecutor elicited the very same bolstering testimony at the first trial, she specifically *used it* in closing argument, as evidence that Mr. Dillingham had consistently told the same story even “before any deal was on the table.” 2RP 146. Any reasonably competent counsel would have then been aware that the prosecution would seek to introduce the same evidence and use the same argument at the second trial. And any reasonably competent counsel would have researched the issue to see if such evidence and argument was proper, given how crucial Mr. Dillingham’s credibility was in this case.

Yet counsel failed to move to exclude the evidence as improper prior to the second trial, even though it was elicited at the first trial. And next, counsel failed to raise the issue outside the presence of the jury after the prosecutor relied on the statement in opening argument at the second trial. Then, when the issue was discussed prior to the officers’ testimony, counsel failed to correct the court’s misimpression that there was some claim that Mr. Dillingham’s statements had somehow changed - a failure which was directly responsible for the court’s decision to admit the evidence as “prior consistent statements.” 3RP 39-40.

Indeed, counsel’s deficiencies were not even limited to admission of the improper bolstering evidence and exploitation of it at trial. They went further, as counsel affirmatively *misstated* the evidence in closing

argument regarding what the officers said to elicit the confession in the first place. There was never any testimony that the officers told Mr. Dillingham that he would get a better deal if he “gave” the officers “more people.” And that misstatement allowed the prosecutor to specifically discredit the defense in a damning way, and remind the jury that the officers not only had *not* made such a statement but had actually said Mr. Dillingham should tell the truth.

There can be no tactical reason for counsel’s repeated failures to act in his client’s interests on this evidence. No reasonably competent counsel would have so utterly failed to understand the fact of counsel’s case and the relevant law, or to so misstate the facts to his client’s great detriment. Counsel’s performance was clearly deficient on this point.

d. Reversal is required

Reversal is required for counsel’s deficient performance when, within reasonable probabilities, counsel’s deficiencies prejudiced his client. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reasonable probability is a “probability sufficient to undermine confidence in the outcome” of the case. Strickland, 466 U.S. at 694.

There is more than such a probability here. Counsel’s unprofessional errors went to the heart of the prosecution’s case - and Mr. Flores’ defense. All of them directly impacted the jury’s ability to fairly and impartially evaluate the evidence against Mr. Flores. Had counsel acted with professional competence, the jury would not have heard the improper bolstering evidence of Mr. Dillingham’s agreement with the prosecution to provide “truthful testimony,” or the officers’ opinions about

Mr. Dillingham's remorse, or that Mr. Dillingham had repeatedly made the same statements. The court would have excluded the improper evidence from consideration at trial. Given the weakness of the prosecution's case, there is more than a reasonable probability that the outcome of the case would have been different if counsel had been effective. Even if each of counsel's errors would not individually undermine confidence in the outcome of the case, taken together they more than meet that standard. Reversal is required.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 5th day of March, 2007.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office,
946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;
to Mr. Flores, DOC 767164, Washington State Penitentiary, 1313
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DATED this 5th day of March, 2007.


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